



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Docket No. 15-0935

Petitioner Below, **Petitioner**

vs.

CSX TRANSPORTATION, INC.,

Respondent, Below, **Respondent.**

BRIEF OF RESPONDENT CSX TRANSPORTATION, INC.

James W. McBride
Admitted *pro hac vice* below

Michael P. Markins
West Virginia State Bar #8825

BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC
901 K St. NW, Suite 900
Washington, D.C. 20001
Telephone: (202) 508-3400
Fax: (202) 508-3402
jmcbride@bakerdonelson.com

CIPRIANI & WERNER PC
400 Tracy Way, Suite 110
Charleston, WV 25311
Telephone: (304) 341-0500
Fax: (304) 513-4243
mmarkins@c-wlaw.com

Attorneys for CSX Transportation, Inc.

TABLE OF CONTENTS

I. STATEMENT OF THE CASE..... 1

II. SUMMARY OF ARGUMENT 5

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION 6

IV. STANDARD OF REVIEW 6

V. ARGUMENT & RESPONSE TO EACH ASSIGNMENT OF ERROR..... 7

 A. The Circuit Court Correctly Held that the Commissioner’s Failure to Allow a Use Tax Credit for Local Sales Taxes Paid in Other Jurisdictions Was Not Constitutionally Apportioned in Violation of the Dormant Commerce Clause. 7

 B. The Circuit Court Correctly Applied the Supreme Court’s Internal Consistency Test and Found that Not Allowing a Credit For Local Sales Taxes Paid To Other Jurisdictions Runs Afoul of the Dormant Commerce Clause. 15

 C. The Circuit Court Correctly Applied the Supreme Court’s *Wynne* Decision When It Assumed All States Calculating a Use Tax Credit in the Same Manner as West Virginia Would Impermissibly Result in Double Taxation. 20

 D. The Circuit Court’s Order is Consistent with Supreme Court Precedent and Persuasive Court Decisions that are Analogous and Correctly Decided. 24

VI. CONCLUSION..... 26

VII. CERTIFICATE OF SERVICE 28

TABLE OF AUTHORITIES

CASES

<i>Ariz. Dept. of Revenue v. Ariz. Public Service Co.</i> , 934 P.2d 796, 799 (Ariz. Ct. App., 1997)	8, 10, 24
<i>Armco, Inc. v. Hardesty</i> , 467 U.S. 638 (1984).....	12
<i>Associated Indus. of Missouri v. Lohman</i> , 511 U.S. 641, 646 (1994)	8
<i>Complete Auto Transit, Inc. v. Brady</i> , 430 U.S. 274 (1977).....	4, 8, 15
<i>General Motors Corp. v. City and Cnty. of Denver</i> , 990 P.2d 59, 69 (Colo. 1999)	passim
<i>Goldberg v. Sweet</i> , 488 U.S. 252, 261 (1989)	8, 9
<i>Griffith v. ConAgra Brands, Inc.</i> , 728 S.E.2d 74, 80 (W.Va. 2012).....	7, 8
<i>Hartley Marine Corp. v. Mierke</i> , 474 S.E. 2d 599, 607-08 (W. Va. 1996)	7, 8
<i>J.C. Penney Co., Inc. v. Hardesty</i> , 264 S.E. 2d 604, 612 (W. Va. 1979)	15
<i>Japan Line, Ltd. v. County of Los Angeles</i> , 441 U.S. 434, 446-47 (1979)	9
<i>Maryland State Comptroller of the Treasury v. Wynne</i> , 64 A.3d 453 (Md. 2013).....	2, 20, 22
<i>Md. State Comptroller of the Treasury v. Wynne</i> , 135 S. Ct. 1787 (2015).....	passim
<i>Moorman Mfg. Co. v. Bair</i> , 437 U.S. 267 (1978).....	19
<i>Oklahoma Tax Commission v. Jefferson Lines, Inc.</i> 514 U.S. 175 (1995)	9, 10, 15
<i>South Carolina State Highway Dept. v. Barnwell Bros., Inc.</i> , 303 U.S. 177 (1938).....	8
<i>Tax Com’r of State v. MBNA America Bank, N.A.</i> , 640 S.E.2d 226, 229 (W.Va. 2006).....	8
<i>The First Marblehead Corp. v. Mass. Comm’r of Rev.</i> , 136 S. Ct. 317 (2015).....	23

STATUTES

W. Va. Code § 11-10A-19(f)	8
W. Va. Code § 29A-5-4	9
W.Va. Code § 11-15A-13a	15
W.Va. Code § 11-15A-13a(c)(1)	12

OTHER AUTHORITIES

1 Hellerstein & Hellerstein, *State Taxation*, ¶ 18.09[2], 2015 WL 1646564, pp. *1-*2 (3d ed. 2000-15)..... 17, 19

1 Hellerstein & Hellerstein, *State Taxation*, ¶ 18.09[3][a], 2015 WL 1646564, p. *6 (3d ed. 2000-15)..... 27

Iowa Dept. of Rev., *The Wynne Decision* (2015), available at <https://tax.iowa.gov/wynne-decision> 25

Walter Hellerstein, *Is "Internal Consistency" Foolish?: Reflections On an Emerging Commerce Clause Restraint on State Taxation*, 87 Mich. L. Rev. 138, 160 (1988) 12, 27

I. STATEMENT OF THE CASE

Respondent, CSX Transportation, Inc. (“CSXT”), is a Virginia corporation with its principal place of business in Jacksonville, Florida. (App. 2.) CSXT’s business is interstate rail transportation. (*Id.*) In October 2010, an auditor with the West Virginia State Tax Department (“Tax Department”) met with a representative of CSXT at one of its rail yards in West Virginia and characterized this meeting as a “field audit.” (*Id.*) One of the results of this field audit was to set up CSXT as a fuel importer and to ensure that it began to pay West Virginia Motor Fuel Use Tax under Section 11-15A-13a of the West Virginia Code (“WV Use Tax”) on the fuel it was using in West Virginia. (*Id.*)

Thereafter, CSXT filed amended West Virginia Motor Fuel Use Tax Returns wherein the CSXT sought a credit for sales taxes paid for locomotive fuel to cities, counties, and other localities in states other than West Virginia under West Virginia Code Section 11-15A-10a. (*Id.*) The Tax Commissioner determined that CSXT was not entitled to a credit for these taxes and issued a Refund Denial. (*Id.*) During the process of reviewing the amended returns, the auditor and other Tax Department employees considered what they determined to be a different problem, namely, the way CSXT was calculating the credit it was seeking for fuel taxes paid to other states. (*Id.*) This led the auditor to conduct another field audit which led to a Notice of Assessment against CSXT for WV Use Tax on June 5, 2013. (App. 3.) For three quarters in 2012, an auditor in the Tax Department utilized a “new” methodology to determine gallons of motor fuel deemed used in West Virginia, and how many of those gallons were purchased in other states and taxed. (*Id.*)

On December 14, 2012, CSXT timely filed with the Office of Tax Appeals (“OTA”) a petition for refund. (*Id.*) Additionally, as a result of the Notice of Assessment, CSXT also filed

a timely petition for reassessment. (*Id.*) The two petitions were consolidated before the OTA and an evidentiary hearing was held on April 30, 2014. (*Id.*) At the conclusion of the hearing, the parties filed legal briefs. (*Id.*)

On January 23, 2015, the OTA rendered its Final Decision which granted Respondent's refund request and vacated the Assessment issued by the Tax Department. (App. 1619.) The OTA determined that CSXT was entitled to a credit under Section 11-15A-10a of the West Virginia Code for sales taxes paid to cities, counties, and other localities. The OTA based this determination primarily on its review and analysis of the dormant Commerce Clause jurisprudence. (App. 1631.) As a result, the OTA held that "the Tax Commissioner has applied West Virginia's use tax to [CSXT] here in a manner that violates the dormant Commerce Clause because its application is not fairly apportioned and discriminates against interstate commerce." (*Id.*) The OTA observed that "[t]he constitutional questions addressed by the parties are well settled." (App. 1627.)

The OTA followed this sound precedent and found a case from the highest court in Maryland, *Md. State Comptroller of the Treasury v. Wynne*, 64 A.3d 453 (Md. 2013), to be determinative because it was a recent, clear and cogent analysis of the internal consistency test under dormant Commerce Clause jurisprudence. The OTA determined that the Maryland Court of Appeals engaged in a "simple math" analysis where it assumed all states had the same offending tax provision and found that a discriminatory effect resulted where a resident with multi-state income was not able to get the same credits as a resident with wholly intrastate income. (App. 1630.) The OTA acknowledged, however, that the United States Supreme Court had granted *certiorari*, but nonetheless found the Maryland decision persuasive. (App. 1631.)

On March 27, 2015, the Tax Commissioner filed a Petition for Appeal before the Circuit Court of Kanawha County (“Circuit Court”), citing eight assignments of error. (App. 16.) CSXT filed a Response to the Petition for Appeal, stating that the true issue before the Circuit Court is the strictly legal question of whether CSXT is entitled to claim a use tax credit for local taxes paid to cities, counties, and other localities in other states. (App. 60.) The Tax Commissioner filed its Memorandum of Law, agreeing that “[t]he only issue on appeal is whether CSXT is entitled to claim a credit for local taxes paid in other states in order to reduce the assessment and obtain a refund.” (App. 76.)

The Circuit Court held a hearing on August 6, 2015. (App. 141.) Following the hearing, the Circuit Court rendered a Final Order in CSXT’s favor, holding that “West Virginia’s determination of a use tax credit without accounting for local taxes paid results in an internally inconsistent and constitutionally suspect state tax structure.” (App. 11.) The Circuit Court’s holding was based on reviewing “well-established dormant Commerce Clause jurisprudence and the analysis of the internal consistency test by other jurisdictions, including the United States Supreme Court.” (App. 10.) Since the OTA’s Final Decision, the United States Supreme Court has now affirmed the Maryland Court of Appeals in *Md. State Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787 (2015), holding that a state’s tax scheme which did not provide a full tax credit for income taxes paid to another state against Maryland’s county income tax was an unconstitutional violation of the dormant Commerce Clause. Thus, utilizing the simple math analysis of the *Wynne* decision, as well as decisions by courts in other jurisdictions faced with the same specific issue, the Circuit Court’s simple math analysis resulted in the finding that the “present case reveals a similar internal inconsistency in the application of the WV Use Tax without credit for local sales taxes paid” as the cited cases in the Final Order. (App. 10.)

The Circuit Court also addressed the same argument brought forth by the Tax Commissioner in this present appeal, namely that because West Virginia does not have local taxes on fuel, it passes the internal consistency test. However, the Circuit Court explicitly held “[t]he fact that West Virginia does not have a county use tax has no relevance to the analysis of internal consistency under the *Complete Auto* test [*Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the United States Supreme Court’s test for internal consistency] because the use tax provision itself is not the offending provision; rather, it is the calculation of the use tax credit without a credit for local sales taxes paid that produces the resulting discriminatory effect on interstate commerce.” (App. 12.) The Circuit Court concluded that, “applying the internal consistency test to the case *sub judice* and assuming all states that do not impose local taxes also deny tax credit for local taxes paid in other states, the Court is of the opinion that such a scheme inherently discriminates against interstate commerce without regard to the tax policies of other states.” (App. 13.) The Circuit Court held that CSXT was entitled to a use tax credit for sales taxes paid to cities, counties, or other localities of another state. (*Id.*)

The Tax Commissioner brought this present appeal before this Court due to his continued misunderstanding and disagreement with well-established jurisprudence on the dormant Commerce Clause, the well-reasoned opinion of the OTA, and the well-reasoned opinion of the Circuit Court. CSXT agrees with the Tax Commissioner that the only issue on this appeal is whether CSXT is entitled to claim a credit for local sales taxes paid in other states in order to reduce the assessment and obtain a refund. (Brief of Petitioner, p. 2.) However, CSXT asserts that this issue was correctly decided by the OTA and the Circuit Court which both independently found that West Virginia must give a tax credit for local taxes paid to other jurisdictions so as to not run afoul of the dormant Commerce Clause of the United States Constitution.

II. SUMMARY OF ARGUMENT

Both the OTA and the Circuit Court correctly found that the Tax Commissioner's calculation of the WV Use Tax credit which fails to allow a taxpayer to take a credit for local sales taxes paid in other States up to the use tax rate imposed in West Virginia results in double taxation on an interstate taxpayer in violation of the dormant Commerce Clause. Both the OTA and the Circuit Court were unconvinced by the Tax Commissioner's attempt to alter the well-established internal consistency test by asking the Court to assume that all states had no local taxes on fuel and ending the inquiry there. Essentially, the Tax Commissioner is asking this Court to assume that the problem does not exist in the first place; if no other jurisdictions imposed local taxes on fuel, then there would be no crediting issue.

Rather, the correct application of the internal consistency test involves assuming all states have the same potentially offending tax scheme to isolate the effect of that state's tax scheme. *Md. State Comptroller of Treasury v. Wynne*, 135 S. Ct. 1787, 1803 (2015); *General Motors Corp. v. City and Cnty. of Denver*, 990 P.2d 59, 69 (Colo. 1999); *Ariz. Dept. of Revenue v. Ariz. Public Service Co.*, 934 P.2d 796, 799 (Ariz. Ct. App. 1997).¹ In other words, the Court must assume that all states (without its own local taxes on fuel) uses the same crediting provision as West Virginia and fails to credit taxpayers for sales taxes paid to localities in other states. Both the OTA and the Circuit Court found that a discriminatory effect results when using a simple math hypothetical, just as other courts determining whether a state tax scheme violates the dormant Commerce Clause consistently do. That is, a taxpayer pays more in taxes when purchasing fuel from an out of state vendor and using the fuel in West Virginia as opposed to a

¹ In all of these cases, state and local taxes were treated as "state taxes" regardless of the label.

taxpayer who purchases and uses fuel from an in-state vendor. A taxpayer purchasing fuel in West Virginia receives full credit for any sales taxes paid in West Virginia up to the full amount of use tax imposed on that same article of fuel so that the value is only taxed once. On the other hand, an taxpayer who purchases fuel outside of West Virginia in a state with a lower state sales tax rate but which imposes local sales taxes finds itself paying state and local sales tax *and* the difference in WV Use Tax; the value is subject to double taxation.

For the foregoing reasons, this Court should affirm the Circuit Court's Final Decision and find that West Virginia must offer a full credit for sales taxes paid to another state, both local and state sales taxes, against its Use Tax on fuel in order to have a constitutionally sound use tax scheme.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

CSXT asserts that oral argument is unnecessary, pursuant to West Virginia Rule of Appellate Procedure 18(a). CSXT states that the dispositive issue of whether failure to properly credit CSXT for local sales taxes paid to other states is a violation of the dormant Commerce Clause has been authoritatively answered by the United States Supreme Court in the recent decision of *Md. State Comptroller of the Treasury v. Wynne*, 135 S. Ct. 1787 (2015). CSXT further states that the facts and legal arguments will be adequately presented in the parties' briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

IV. STANDARD OF REVIEW

The procedures applicable to judicial review by the highest appellate court in West Virginia of a Circuit Court's review of decisions of the Office of Tax Appeals are the same and are those governed by Section 29A-5-4, *et seq.* of the West Virginia Code, otherwise known as

the State Administrative Procedures Act. W. Va. Code § 11-10A-19(f); see *Griffith v. ConAgra Brands, Inc.*, 728 S.E. 2d 74, 79 (W. Va. 2012). This Court may only reverse, vacate, or modify the Final Decision of the Circuit Court if substantial rights of the Tax Commissioner have been prejudiced because the decision is (1) in violation of constitutional or statutory provisions, (2) in excess of the statutory authority or jurisdiction of the agency, (3) made upon unlawful procedures, (4) affected by other error of law, (5) clearly wrong in view of the reliable, probative and substantial evidence on the whole record, or (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. W. Va. Code § 29A-5-4. Conclusions of law by the lower courts are reviewed *de novo*. *Hartley Marine Corp. v. Mierke*, 474 S.E. 2d 599, 607 (W. Va. 1996). As will be outlined below, the Tax Commissioner has not established that any of the six bases in Section 29A-5-4 exist to warrant reversing, vacating, or modifying the Final Decision of the Circuit Court.

V. ARGUMENT & RESPONSE TO EACH ASSIGNMENT OF ERROR

A. **The Circuit Court Correctly Held that the Commissioner's Failure to Allow a Use Tax Credit for Local Sales Taxes Paid in Other Jurisdictions Was Not Constitutionally Apportioned in Violation of the Dormant Commerce Clause.**

The questions decided by the Circuit Court were whether the Tax Commissioner's application of the WV Use Tax—without a credit for local sales taxes paid in other jurisdictions—is fairly apportioned and whether such application discriminates against interstate taxpayers. The Circuit Court was correct in holding that the Tax Commissioner's denial of the use tax credit for local taxes paid to other jurisdictions results in a state use tax that is not fairly apportioned and is discriminatory against interstate taxpayers. Such a holding is consistent with all existing Dormant Commerce Clause jurisprudence.

Article 1, § 8 of the United States Constitution states that Congress has the authority to “regulate Commerce with foreign Nations, and among the several States.” The Supreme Court has determined that, in addition to granting express authority to regulate interstate commerce, the Commerce Clause also prevents state regulations that *interfere* with interstate commerce by way of the doctrine otherwise known as the “dormant” Commerce Clause. See *Tax Com’r of State v. MBNA America Bank, N.A.*, 640 S.E. 2d 226, 229 (W.Va. 2006), citing *South Carolina State Highway Dept. v. Barnwell Bros., Inc.*, 303 U.S. 177 (1938).

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. See *Associated Indus. of Missouri v. Lohman*, 511 U.S. 641, 646 (1994); see also *Ariz. Dept. of Rev. v. Ariz. Pub. Service Co.*, 934 P.2d at 799. West Virginia courts must utilize the same test as the United States Supreme Court when considering whether a state tax scheme runs afoul of the dormant Commerce Clause. “A state tax on interstate commerce will not be sustained unless it: 1) has a substantial nexus with the State; 2) is fairly apportioned; 3) does not discriminate; and 4) is fairly related to the services provided by the State.” *Griffith v. ConAgra Brands, Inc.*, 728 S.E. 2d at 80 (W.Va. 2012), citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977); see also *Hartley Marine Corp. v. Mierke*, 474 S.E. 2d at 607-08. Otherwise known as the “Complete Auto” test, the Supreme Court and this Court has recognized that the *Complete Auto* Court “adopted instead a ‘consistent and rational method of inquiry [that focused on] the *practical effect* of [the] challenged tax.’” *Hartley Marine Corp.*, 474 S.E. 2d at 608, quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 304-05 (1992) (emphasis supplied).

The “apportionment” requirement ensures that each state taxes only its fair share of an interstate transaction. See *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989). Accordingly, “[i]t is a

commonplace of constitutional jurisprudence that multiple taxation may well be offensive to the Commerce Clause. In order to prevent multiple taxation of interstate commerce, the Court has required that taxes be apportioned among taxing jurisdictions, so that no instrumentality of commerce is subjected to more than one tax on its full value.” *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 446-47 (1979) (internal citations omitted). Thus, “a tax upon interstate commerce must either be apportioned to relate the tax to the activity taking place within the taxing state or it must allow a credit for other *similar taxes* paid by the taxpayer in other jurisdictions.” *General Motors Corp. v. Cty. and Cnty. of Denver*, 990 P.2d at 69, citing *Goldberg*, 488 U.S. at 264. (emphasis added). The central purpose of assessing whether a tax is properly apportioned, the second prong of the *Complete Auto* test, is to prohibit against multiple taxation, “which is threatened whenever one State’s act of overreaching combines with the possibility that another State will claim its fair share of the valued taxed: the portion of value by which one State exceeded its fair share would be taxed again by a State properly laying claim to it.” *Oklahoma Tax Com’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995).

To analyze whether a state tax is fairly apportioned, interpreting bodies look to whether “a tax is ‘internally consistent’ and, if so, whether it is ‘externally consistent’ as well.” *Oklahoma Tax Comm’n v. Jefferson Lines*, 514 U.S. at 185. A state’s failure to establish the internal consistency of its tax scheme is fatal because: “A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax.” *Id.*

Internal consistency “looks to the structure of the tax at issue to see whether its identical application by every state in the Union would place interstate commerce at a disadvantage as

compared with commerce intrastate.” *Id.* With respect to the tax at issue, use taxes are inherently discriminatory against interstate commerce because use taxes are typically only applied to the use of goods purchased outside the taxing state and brought into it. *See Ariz. Dept. of Revenue v. Ariz. Public Service Co.*, 934 P.2d at 799. Use taxes are valid, however, if the burdens of the tax imposed on intrastate and interstate commerce are equal. *Id.*

Thus, in the context of a use tax, state tax schemes meet this internal consistency test by providing a credit for sales or use taxes paid to other jurisdictions. *General Motors Corp. v. City and Cnty. of Denver*, 990 P.2d at 69, citing Walter Hellerstein, *Is “Internal Consistency” Foolish?: Reflections On an Emerging Commerce Clause Restraint on State Taxation*, 87 Mich. L. Rev. 138, 160 (1988). Importantly, though, this crediting structure must be designed properly; “[i]nternal consistency requires that states impose identical taxes when viewed in the aggregate-- as a collection of state and sub-state taxing jurisdictions.” 990 P.2d at 69.

This present case reveals the same internal inconsistency in the application of West Virginia’s use tax without credit for local sales taxes paid. Taxpayers who use diesel fuel in West Virginia are subject to use tax, regardless of where purchased. *See* W.Va. Code § 11-15A-13a(c)(1). Section 11-15A-10a provides for a credit for sales taxes paid to another jurisdiction for that same service or property up to the use tax rate. However, in states where the state sales tax rate is lower than the WV Use Tax rate, but which also exact a municipal or county sales tax in addition to a state sales tax, a taxpayer who purchases the fuel outside West Virginia always pays more than a similar in-state taxpayer who purchases all of its fuel in West Virginia under the Tax Commissioner’s interpretation of the credit statute. For example, in a state where there is 4% state sales tax and 2% county sales taxes, a taxpayer pays a total of 6% sales tax on the purchase of diesel fuel in that state. If taxpayers are not given credit for local sales taxes paid,

then the taxpayer purchasing diesel fuel in that state and importing it into West Virginia will pay an aggregate 6% sales tax but will only get a West Virginia credit for the 4% state sales tax paid in the other jurisdiction. Thus, diesel fuel purchased outside but used inside West Virginia bears an additional 2% on diesel fuel comprised as follows: the 4% out of state sales tax plus the 2% local sales tax imposed in that other state, plus 2% WV Use Tax (which is the 6% West Virginia rate less the 4% out of state sales tax). Thus, the taxpayer who purchased out of state would pay a total of 8% to consume that fuel in West Virginia. Meanwhile, fuel purchased and consumed in West Virginia bears only the 6% WV Use Tax. In total, the taxpayer purchasing diesel fuel out of state and using it in West Virginia will be penalized by paying more than a similar taxpayer purchasing in-state, when both consumers should only be paying a total 6% on fuel used in West Virginia. Thus, West Virginia's determination of a use tax credit without credit for local taxes paid results in an internally inconsistent and a constitutionally suspect state tax structure. And this is precisely what OTA and the Circuit Court found.

The Tax Commissioner's application of the internal consistency test as well as its interpretation of *Wynne* is inapposite to the clear dictates of that case. The Tax Commissioner misunderstands the internal consistency test: The test 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. *Wynne*, 135 S. Ct. at 1802. Thus, in *Wynne*, the fact that there was a county income tax in Maryland in addition to its state income tax was not the reason that the Maryland tax scheme was unconstitutional. It is the fact that Maryland limited its credit provisions to the state income tax which produced the discriminatory effect on interstate taxpayers that was the lynchpin of the analysis. Contrary to the Tax Commissioner's argument, just because West Virginia does not have a local sales tax on fuel and provides *some* credit for sales taxes paid does

not mean the taxing scheme survives constitutional scrutiny under any proper application of the internal consistency test. The Tax Commissioner turns the internal consistency test on its head by ignoring the offending provision of the tax scheme, which is the *limitation* of the credit. By focusing on the potentially offending tax provision, *i.e.*, not providing a use tax credit for sales taxes paid to localities in other states, it is clear that there is a greater tax burden on taxpayers purchasing fuel out of state, as demonstrated above.

The Tax Commissioner's citation to *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984) does not advance his argument. As recognized by both the OTA and the Circuit Court, the Tax Commissioner misinterprets *Armco*. In *Armco*, the taxing authority tried to argue that in order to prove internal inconsistency, the taxpayer had to actually point to a specific tax from another state that resulted in double taxation in order to prevail under a dormant Commerce Clause argument. *Id.* at 644. The *Armco* Court held that this was not a requirement, because to do so would make the application of the internal consistency test depend on not only other state taxes, but also in which states the taxpayer operated. *Id.* The Court refused to demand such a requirement and left the test to be whether any other state might adopt the offending state's tax scheme. *Id.* Thus, the *Armco* Court did not hold that West Virginia need not worry about the taxing schemes in other states in determining whether a tax is internally consistent; instead, *Armco* actually applied the simple math hypothetical as other courts have done to compare the tax bills of identically situated taxpayers. *Id.*

After holding that the West Virginia manufacturer's tax on intrastate businesses and the wholesale excise tax imposed on out-of-state companies were not "compensating taxes," the Supreme Court went on to apply the internal consistency test, just as CSXT suggests it should be applied here. *Id.* at 644. The Supreme Court performed the following analysis:

Moreover, when the two taxes are considered together, discrimination against interstate commerce persists. If Ohio or any of the other 48 States imposes a like tax on its manufacturers—which they have every right to do—then Armco and others from out of State will pay both a manufacturing tax and a wholesale tax while sellers resident in West Virginia will pay only the manufacturing tax. For example, if Ohio were to adopt the precise scheme here, then an interstate seller would pay the manufacturing tax of 0.88% and the gross receipts tax of 0.27%; a purely intrastate seller would pay only the manufacturing tax of 0.88% and would be exempt from the gross receipts tax.

Id. In doing so, the Court found that the West Virginia tax did discriminate unconstitutionally against interstate commerce. *Id.* at 641. The Supreme Court engaged in a similar analysis as CSXT encourages and as the OTA and Circuit Court performed below: It assumed that every state had the same offending tax provision as the state tax scheme at issue.

The Tax Commissioner also appears to argue that because the West Virginia use tax relies on a formula to calculate the amount of fuel the railroad uses in West Virginia, that “apportionment” somehow satisfies the “fairly apportioned” component of the *Complete Auto* test. Again, the Commissioner fails to understand what is happening with respect to this fuel use tax. The formula used for purposes of calculating how much fuel is *deemed* used in West Virginia by the railroad is not the same standard used to determine whether a state tax scheme is fairly apportioned to pass constitutional muster. Normally, a taxpayer who purchases an item, a computer, for example, outside West Virginia and uses it in West Virginia knows both where the computer is purchased and specifically where the computer is being used. It is a relatively simple matter for that taxpayer to calculate its tax liability and credit due for sales tax paid in the other jurisdiction. Because this WV Use Tax is levied on the use of diesel fuel in West Virginia, and because fuel is fungible, it is impossible to know exactly which fuel is used in West Virginia, or where that fuel was purchased. Thus, the WV Use Tax statute provides an apportionment formula to determine both what fuel is deemed used in West Virginia, and

importantly, where that fuel was deemed purchased. *See* W.Va. Code § 11-15A-13a. How to calculate the credit was the other issue decided in CSXT's favor by OTA and not appealed by the Tax Commissioner. (App. 124-25.) The OTA found that the formula which determined the amount of fuel used in West Virginia had to be the same formula that determined the amount of the credit. (App. 1627.) The statutory formula assumes that a portion of the total fuel purchased by CSX everywhere is deemed used in West Virginia, and it also assumes that a portion of the fuel deemed used in West Virginia was deemed purchased in other jurisdictions. Thus, certain gallons of diesel fuel subject to the WV Use Tax are deemed to have already been subject to a sales tax in other jurisdictions. That is why a full credit for sales taxes paid in other jurisdictions is required to pass constitutional muster. Otherwise, the taxpayer paying the tax on fuel purchased out of state has the possibility of being taxed twice.

The statutory apportionment formula used in West Virginia for purposes of calculating the use tax base is not the kind of "fair apportionment" referred to in the *Complete Auto* test. Fair apportionment under *Complete Auto* is designed to see that the same item or transaction is not taxed in more than one state. The Commissioner's arguments about fair apportionment make no sense in the context of this case. Because West Virginia fails to allow credit for local sales taxes in the calculation of the use tax credit, West Virginia is claiming more than its fair share of an interstate transaction in violation of the dormant Commerce Clause. The Circuit Court was correct in holding that West Virginia's failure to allow local sales taxes paid in other states to offset use tax assessment in West Virginia is a violation of the fairly apportionment component of the *Complete Auto* test.

B. The Circuit Court Correctly Applied the Supreme Court’s Internal Consistency Test and Found that Not Allowing a Credit For Local Sales Taxes Paid To Other Jurisdictions Runs Afoul of the Dormant Commerce Clause.

Contrary to the Tax Commissioner’s argument starting on page 19 of his Brief, the Circuit Court did not change the Supreme Court’s internal consistency test by erroneously adding a crediting requirement for sustaining a state’s use tax credit. Instead, the Circuit Court correctly utilized the *Complete Auto* test for considering whether a state tax scheme runs afoul of the dormant Commerce Clause, 430 U.S. 274 (1977), and correctly concluded that the Tax Commissioner’s practice of not allowing a credit for local sales taxes paid to other jurisdictions violates the dormant Commerce Clause. In reaching this conclusion, the Circuit Court cited to a leading treatise on the issue of taxation, Hellerstein & Hellerstein’s *State Taxation*. This treatise is well-regarded as a leading authority on legal tax issues, with the Supreme Court often quoting passages from this secondary source.² See, e.g., *Oklahoma Tax Com’n v. Jefferson Lines, Inc.*, 514 U.S. at 180; *Md. State Comptroller of Treasury v. Wynne*, 135 S. Ct. at 1801.

Professor Walter Hellerstein noted that, 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. See 1 Hellerstein & Hellerstein, *State Taxation*, ¶ 18.09[2], 2015 WL 1646564, pp. *1-*2 (3d ed. 2000-15). (App. 108).³

² This Court has found other publications by Professor Walter Hellerstein, one of the main contributors to the Hellerstein & Hellerstein treatise, instructive and helpful as a general summary of the legal tax landscape as well. See *J.C. Penney Co., Inc. v. Hardesty*, 264 S.E. 2d 604, 612 (W. Va. 1979).

³ Excerpts from the cited sections of the *State Taxation* treatise were attached to CSXT’s briefing in the lower court. Thus, CSXT will also direct this Court to the pages in the Appendix where excerpts of this treatise appear.

The Tax Commissioner selectively cites to portions of the Hellerstein & Hellerstein section relied upon by the Circuit Court to discredit the long-standing understanding and the Circuit Court's conclusion that since the Supreme Court's decision in *Jefferson Lines*, "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. 7.) To aid this Court in understanding the complete analysis made by Professor Hellerstein, the following is the entirety of Section 18.09[2] of Hellerstein & Hellerstein's *State Taxation* on the state of the law on credits for sales or use taxes paid to other jurisdictions:

For many years, the U.S. Supreme Court danced around the question of whether a state is obligated under the Commerce Clause to provide a credit against its own use tax for sales or use taxes paid to other states. Although the Court had noted that such a requirement "has been endorsed by at least one state court," was advocated by the Willis Committee in 1965, was adopted by the Multistate Tax Compact, and had "significant support in the commentary," it nevertheless had found it unnecessary to rule on the issue.

The 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.*, make 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. For a tax to be "internally consistent," its hypothetical replication by every state must result in no greater burden on interstate commerce than on intrastate commerce. "This test... 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 to intrastate commerce." Use taxes typically are levied on the "storage, use or other consumption" of tangible personal property (and, in some instances, of services) in the state and are measured by the price of the property or services. If replicated by every state, these levies would put the enterprise doing business across state lines at a competitive disadvantage to its wholly intrastate competitor.

If one views use taxes in conjunction with sales taxes for which they compensate, the sales-use tax scheme would subject the purchase of goods or services in one state for use in another to two exactions—a sales tax in the state of purchase and a use tax in the state of use. The purchase of goods or services for local use, however, would be subject to only a sales tax. If one views use taxes in isolation from sales taxes, use taxes still would subject the interstate business to the risk of multiple taxation not borne by its intrastate competitor. The interstate business

using property or services in two or more states would pay a tax in each state in which the property or services were used, whereas the intrastate business using the property or services in an identical fashion, except not across state lines, would pay but a single tax. Under either view of the use tax, the competitive “disadvantage” to interstate commerce is self-evident.

The states avoid any “internal consistency” objection to their use taxes by providing a credit for sales or use taxes paid to other states. They thus assure that the sale or use of property or services is in principle taxed just once whether or not the property or services cross state lines. Although there may once have been some room for debate over the question of whether the states were constitutionally compelled to adopt such crediting schemes, the Court’s articulation and reaffirmation of the “internal consistency” doctrine should put an end to that debate. As Justice Scalia observed, if the Court “had applied an internal consistency rule” in *Williams v. Vermont*, where the Court found it unnecessary to reach the question of whether a state must credit a sales tax paid to another state against its own use tax, “the need for such a credit would have followed as a matter of mathematical necessity.”

Moreover, the Court’s opinion in *Jefferson Lines* reinforces the conclusion that states have a constitutional obligation to provide a credit against their own use taxes for sales or use taxes paid to other states. The Court’s strong statements tying its approval of state taxing schemes to the provision of such a credit, and expressing its disapproval of state taxing schemes that fail to provide for such a credit, should lay to rest any doubt that credits for use taxes are constitutionally required.

1 Hellerstein & Hellerstein, *State Taxation*, ¶ 18.09[2], 2015 WL 1646564, pp. *1-*3 (3d ed. 2000-15) (internal citations omitted) (App. 107-08.) Thus, it is evident from a complete reading of this section that this leading treatise written by a well-recognized expert on the subject concludes that there is no doubt states must provide a credit against their own use taxes for sales taxes paid in other jurisdictions in order to have a valid and constitutional tax structure.

The Circuit Court’s conclusion that a state must provide credit against its imposition of use tax for sales taxes paid in other jurisdictions is consistent with the Supreme Court’s findings in *Jefferson Lines*. 514 U.S. at 193. In *Jefferson Lines*, the Supreme Court analyzed whether an Oklahoma sales tax imposed on the full price of a ticket for interstate bus travel originating in Oklahoma, as opposed to a pro-rata share for that portion of travel just within the state of

Oklahoma, was consistent with the Commerce Clause. *Id.* at 177. In the face of an argument by appellant that the sales tax scheme would carry the threat of multiple taxation because another state through which the bus travels while providing interstate services sold in Oklahoma could impose taxes on their own upon the interstate taxpayer, the Supreme Court took the occasion to analyze whether the sales tax on an item known to be carried across state lines would carry the possibility of successive taxation so closely related to the transaction as to indicate potential unfairness of Oklahoma's tax on the full amount of sale. *Id.* at 192. The Court found that the taxpayer had not raised any specter of successive taxes, so it was not required to reconsider whether the tax was fairly apportioned. *Id.*

However, in so holding, the Supreme Court made several comments on the relationship of sales and use taxes, its inherent threat of unconstitutional multiple taxation on interstate taxpayers, and imposition of crediting provisions to decrease the threat which are instructive to this present case. *Id.* First, the Supreme Court commented that a use tax is generally levied to compensate a taxing state for its incapacity to reach the corresponding sale of that item, so it is commonly paired with a sales tax. *Id.* However, the Supreme Court noted that the use tax was applicable "only when no sales tax has been paid or subject to a credit for any such tax paid." In other words, to be free of the threat of multiple taxation that is constitutionally suspect and in order to comply with the Commerce Clause requirements, the use tax must operate the same on goods and services purchased out of state and domestically and should "not apply when another State's sales tax had previously been paid, or would apply subject to credit for such payment." *Id.*

The Supreme Court further noted that it did not matter that Oklahoma, as the sales taxing state, was not the taxing entity offering a credit for related taxes paid elsewhere, but that

Oklahoma could rely on other use-taxing states to do so in order to have a constitutionally sound sales tax scheme. *Id.* at 193. The Supreme Court commented that “[t]his is merely a practical consequence of the structure of use taxes as generally based upon the primacy of taxes on sales, in that use of goods is taxed only to the extent that their prior sale has escaped taxation.” *Id.* Citing to Hellerstein & Hellerstein, the Supreme Court further noted that nearly every state imposing sales and use taxes permit crediting or exemption for similar taxes paid in other jurisdictions. *Id.* Thus, as Hellerstein observed, following the Supreme Court’s decision in *Jefferson Lines*, there is no doubt that a state is constitutionally obligated to offer credits against its use tax for sales taxes paid in other jurisdictions in order to avoid successive, multiple taxation on an item for which sales taxes has already been paid.

As demonstrated using the “simple math” logic of numerous decisions applying the internal consistency test, West Virginia’s failure to credit sales taxes paid to localities against the WV Use Tax imposed results in the danger of multiple taxation on the same unit of fuel used in West Virginia to which taxpayers purchasing wholly in-state are not subject. Consistent with a long-standing understanding of the sales-use tax regime, West Virginia cannot fail to allow credits against its use tax imposed for local sales taxes paid in jurisdictions where the state sales tax rate is less than West Virginia’s use tax rate on the same item without violating the dormant Commerce Clause. The threat of multiple taxation is present when West Virginia fails to properly credit local sales taxes paid against its use tax up to the use tax rate.

The Tax Commissioner cites to *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978) and a 1988 article by Professor Hellerstein as an attempt to undermine Professor Hellerstein’s more recent observation in an updated section of the *State Taxation* treatise that *Jefferson Lines*, a decision which came out in 1995, left little doubt that states must provide a credit against their

use taxes for sales taxes imposed on the same article being taxed. (Brief of Pet., pp. 20, 23.) The attempt is illogical. Even the Tax Commissioner's citation to *Wynne* as not dictating the Circuit Court's finding is unavailing. (Brief of Pet., p. 20.) The *Wynne* Court did determine that Maryland tax scheme violated the requirements of the dormant Commerce Clause. 135 S. Ct. at 1805. The Tax Commissioner is correct that the Supreme Court did not mandate any certain remedial measures to correct the offending tax scheme; instead it left it to the state to correct the otherwise unconstitutional tax scheme. Nevertheless, the Supreme Court found that the taxing scheme was unconstitutional and Maryland could not apply its income tax structure in the manner that violated the dormant Commerce Clause. *Id.* at 1795. Here, the OTA and the Circuit Court correctly held that the only proper application of Section 11-15A-10a is to allow a use tax credit for local sales taxes paid to other states. Otherwise, there is a violation of the dormant Commerce Clause which impermissibly burdens interstate commerce.

C. The Circuit Court Correctly Applied the Supreme Court's *Wynne* Decision When It Assumed All States Calculating a Use Tax Credit in the Same Manner as West Virginia Would Impermissibly Result in Double Taxation.

In the *Wynne* case, Maryland residents complained about the fact that they received a credit against the Maryland state income tax for state income taxes paid in other states, but did not get a credit for those state taxes paid against Maryland's county taxes on the same income. 135 S. Ct. at 1793. The Court of Appeals of Maryland undertook almost precisely the same analysis undertaken by the Arizona Supreme Court in *Arizona Public Service*, discussed below. *Md. State Comptroller of Treasury v. Wynne*, 64 A.3d at 464-65. Using the "simple math" of the internal consistency test, the Maryland Court of Appeals determined that a multi-state taxpayer who was unable to obtain a full credit for the taxes paid in other jurisdictions had a net higher tax bill than a comparable resident with only Maryland income. *Id.*

The Supreme Court affirmed the Maryland Court of Appeals, holding that Maryland's failure to allow a credit for state income tax paid in other jurisdictions against Maryland's county income tax on the same income violated the dormant Commerce Clause because it failed the internal consistency test. 135 S. Ct. at 1794. The Supreme Court stated, echoing the sentiment of the OTA and the Circuit Court in this case, that the "existing dormant Commerce Clause cases all but dictate the result reached in this case by Maryland's highest court." *Id.* Using the "simple math" of the internal consistency test and assuming that every State imposed taxes similar to Maryland's with a credit being limited to *state* taxes paid in other jurisdictions, the Supreme Court found that the interstate taxpayer would be subject to double taxation- having to pay an "extra" income tax to his resident state as well as the state in which he earned the income. *Id.* at 1803. The Supreme Court found:

A simple example illustrates the point. 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. Specifically, April will have to pay a 1.25% tax only once, to State A. But Bob will have to pay a 1.25% tax twice: once to State A, where he resides, and once to State B, where he earns the income.

Critically—and this dispels a central argument made by petitioner and the principal dissent—the Maryland scheme's discriminatory treatment of interstate commerce is not simply the result of its interaction with the taxing schemes of other States. Instead, the internal consistency test reveals what the undisputed economic analysis shows: Maryland's tax scheme is inherently discriminatory and operates as a tariff.

(*Id.*) Thus, the Court found, was a violation of the dormant Commerce Clause.

The Supreme Court in *Wynne*, as well as both the OTA and the Circuit Court, hypothetically assumed that every State applies its taxing scheme in the same potentially

offending manner to isolate the effect of that state's tax scheme. *Wynne*, 135 S. Ct. at 1802. Thus, again, in *Wynne*, the fact that there was a county income tax in Maryland in addition to its state income tax was not the reason that the Maryland tax scheme was unconstitutional. It is the fact that Maryland limited its credit provisions to the state income tax which produced the discriminatory effect on interstate taxpayers that was the lynchpin of the analysis. Contrary to the Tax Commissioner's argument, just because West Virginia does not have a local sales tax on fuel and provides some credit for sales taxes paid does not mean the taxing scheme survives constitutional scrutiny under any proper application of the internal consistency test.

Instead, the Supreme Court focused on the impact of the offending tax scheme between comparable taxpayers, intrastate and interstate. In *Wynne*, the Court found that Maryland residents were discouraged from gaining income from other states because Maryland did not offer credits against its county taxes for income taxes paid in other states. 64 A. 3d at 465. Similarly, here, the Circuit Court found that out of state businesses who use fuel in West Virginia are discouraged from purchasing fuel from states that collect local taxes. (App. 11.) Because of the nature of CSXT's business as a railroad, rather than be discouraged from avoiding those states that collect local taxes to continue its business through West Virginia, CSXT is forced to bear the burden of the unfairly apportioned and discriminatory effect of West Virginia's use tax credit by having a larger total tax burden than an intrastate purchaser and user of the same fuel in West Virginia.

The Tax Commissioner is correct that the Supreme Court did not mandate any certain remedial measures to correct the offending tax scheme; instead it left it to the state to correct the otherwise unconstitutional tax scheme. Nevertheless, the Supreme Court in *Wynne* found that the taxing scheme was unconstitutional and Maryland could not apply its income tax structure in

the manner that violated the dormant Commerce Clause. 135 S. Ct. at 1795. Since *Wynne*, other states have begun to revisit their tax schemes to ensure compliance with the Supreme Court's ruling that their credit mechanisms must properly avoid the threat of double taxation. For example, in Iowa, the Iowa Department of Revenue has issued a notice that taxpayers in Iowa may claim an out-of-state tax credit against its local tax, consistent with the *Wynne* decision. See Iowa Dept. of Rev., *The Wynne Decision* (2015), available at <https://tax.iowa.gov/wynne-decision>. The Iowa Department's position is that *Wynne* concluded that a taxing scheme is unconstitutional because it discriminated in favor of intrastate over interstate economic activity in violation of the dormant Commerce Clause. *Id.* The *Wynne* decision has resulted in state departments concluding that if there is an additional tax burden on an interstate taxpayer that is not imposed on a comparable intrastate tax burden, it should not be operating that tax scheme because it inherently discriminates. *Id.* And just to dispel any notion that the *Wynne* decision and its internal consistency jurisprudence only applies to personal income tax cases, the Supreme Court recently granted a writ of *certiorari* on a petition from a case involving Massachusetts excise tax, vacated the judgment of the Supreme Judicial Court of Massachusetts, and remanded the case for further consideration in light of its *Wynne* decision. See *The First Marblehead Corp. v. Mass. Comm'r of Rev.*, 136 S. Ct. 317 (2015).

Here, the OTA and the Circuit Court correctly held that the only proper application of Section 11-15A-10a is to allow a use tax credit for local sales taxes paid to other states. Otherwise, there is a violation of the dormant Commerce Clause which impermissibly burdens interstate commerce.

D. The Circuit Court's Order is Consistent with Supreme Court Precedent and Persuasive Court Decisions that are Analogous and Correctly Decided.

Admittedly, there are no West Virginia state cases directly on point for this particular issue, but both the OTA and the Circuit Court found cases from Arizona and Colorado persuasive and convincing. It is no surprise, due to the specific circumstances of these cases, and the well-reasoned decision-making of these courts, based on their understanding of long-standing dormant Commerce Clause and tax jurisprudence.

In *Ariz. Dept. of Rev. v. Ariz. Pub. Service Co.*, the Arizona Department of Revenue attempted to deny the taxpayer a credit for gross receipts taxes paid in a New Mexico county against the Arizona state use tax on the same property. In discussing the credit provision, the Arizona Court of Appeals found:

Furthermore . . . [even] if we agreed with DOR that the term “under” refers only to a state tax, the outcome would raise a constitutional problem. The Commerce Clause of the United States Constitution forbids discrimination against interstate commerce. A state may not subject a transaction to a greater tax when it crosses state lines than when it occurs entirely intrastate. . . .

The tax schemes at issue here consist of Arizona's compensating use tax of 5% and its sales tax of 5%. When APS purchased coal in McKinley County, it paid the New Mexico gross receipts taxes of 3.75% during part of the audit period and 4.75% during the remaining period. It also paid the McKinley County gross receipts taxes of 0.375%, which later increased to 0.5%.

If the latest New Mexico state and county rates are combined, APS paid a total tax rate of 5.25%, a sum 0.25% higher than the corresponding Arizona sales tax rate. If APS does not receive an exemption for the McKinley County gross receipts taxes, Arizona would be requiring it to pay more taxes than a similar in-state purchaser. Thus if we interpret the statute as DOR encourages us to do, the Arizona use tax would pose serious constitutional problems in the facts presented here.

Arizona Public Service, 934 P.2d at 798-99. Thus, the Arizona Court of Appeals correctly found that the position of the Arizona Department of Revenue in refusing to allow a credit for local

taxes paid in other jurisdictions would make the Arizona tax scheme unconstitutional because it would result in a greater tax liability for an interstate taxpayer.

The same leading treatise on state and local taxation discussed earlier provides further guidance on the internal consistency requirements of the credit provisions in *Arizona Public Service*:

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

1 Hellerstein & Hellerstein, *State Taxation*, ¶ 18.09[3][a], 2015 WL 1646564, p. *6 (3d ed. 2000-15) (App. 110-11.)

Thus, courts have held, in the context of a use tax, state tax schemes meet this internal consistency test by providing a credit for sales or use taxes paid to other jurisdictions. *General Motors Corp. v. City and Cnty. of Denver*, 990 P.2d at 69, citing Walter Hellerstein, *Is “Internal Consistency” Foolish?: Reflections On an Emerging Commerce Clause Restraint on State Taxation*, 87 Mich. L. Rev. 138, 160 (1988). Importantly, though, this crediting structure must be designed properly; “[i]nternal consistency requires that states impose identical taxes when viewed in the aggregate-- as a collection of state and sub-state taxing jurisdictions.” 990 P.2d at 69.

In *General Motors Corp.*, the highest court in Colorado found that the Denver city and county municipal code section, section 53-92(c), which only credits sales and use taxes paid to

other municipalities, was an internally inconsistent tax scheme. *Id.* In holding that the credit mechanism had the potential to cause multiple taxation, the Court found:

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

Id. at 70. Thus, the credit mechanism, which does not allow for complete crediting had the potential to cause multiple taxation in violation of the dormant Commerce Clause.

The Tax Commissioner has not cited to any cases which directly support his position; on the contrary, CSXT relied upon, and the OTA and the Circuit Court agreed, two persuasive and analogous cases from other jurisdictions, finding the opinions well-reasoned and aligned with dormant Commerce Clause jurisprudence. The Tax Commissioner is only left with the unconvincing argument that these courts got it wrong without more, which does not rise to the level of showing that the Circuit Court erred on the law.

VI. CONCLUSION

The Circuit Court and the OTA correctly analyzed the *Complete Auto* test and found that the application of the use tax credit under Section 11-15A-10a of the West Virginia Code was an unconstitutional violation of the dormant Commerce Clause. Both the Circuit Court and the OTA's identical conclusion was well-founded, well-reasoned, and well-supported by persuasive and applicable case law, particularly the most recent Supreme Court decision on the application of the internal consistency test. Both the OTA and the Circuit Court performed the correct analysis of the internal consistency test and found the calculation of use tax credit in failing to

credit local sales taxes paid to other states was not fairly apportioned and discriminated impermissibly against interstate taxpayers. Both the OTA and the Circuit Court were rightly unpersuaded by the Tax Commissioner's creative argument that if every state did not have local sales taxes on motor fuel like West Virginia, then the internal consistency requirement is met and CSXT would have no problem because it would not have to pay any local taxes in addition to the state sales tax and WV Use Tax on the same fuel.

For the foregoing reasons, the final decisions of the OTA and the Circuit Court should be affirmed by this Court.

Respectfully submitted,

James W. McBride
jmcbride@bakerdonelson.com
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, PC
901 K St. NW, Suite 900
Washington, D.C. 20001
Telephone: (202) 508-3400
Fax: (202) 508-3402

Michael P. Markins
mmarkins@c-wlaw.com
CIPRIANI & WERNER PC
400 Tracy Way, Suite 110
Charleston, WV 25311
Telephone: (304) 341-0500

By: 
Attorneys for CSX Transportation, Inc.

VII. CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **Brief of Respondent CSX Transportation, Inc.** was forwarded to Katherine A. Schultz, Senior Deputy Attorney General, State Capitol Complex, Building 1, Room W-435, Charleston, West Virginia 25305, via U.S. Mail on this date, March 4, 2016


