IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1993 Term

No. 21573

STATE OF WEST VIRGINIA EX REL. JAMES H. PAIGE,
SECRETARY, DEPARTMENT OF TAX AND REVENUE,
Petitioner

v.

HONORABLE HERMAN CANADY, JR., JUDGE
OF THE CIRCUIT COURT OF KANAWHA COUNTY,
AND EXXON CORPORATION,
Respondents

WRIT OF PROHIBITION

WRIT GRANTED

Submitted: March 2, 1993
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JUSTICE NEELY delivered the Opinion of the Court.
MILLER, J., concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. If the State places a taxpayer under duress promptly to pay a tax when due and relegates him to a post-payment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

2. The State must provide a full dollar-for-dollar refund, by credits or payments, of a tax levied in violation of the Commerce Clause, unless the State can show by clear and convincing evidence that the tax paid by a taxpayer seeking a refund was passed on to consumers in such a way that the taxpayer suffered no direct or indirect injury. On this issue, the burden of proof rests with the State.

3. The Legislature has great flexibility in determining tax refund procedures as long as constitutional due process requirements are met.

4. The Legislature has expressed a clear intent in W.Va. Code 11-10-14(i) [1978] and W.Va. Code 11-10-14b [1992] that the exclusive method for obtaining a tax refund is application for a ruling from the Tax Department Office of Hearings and Appeals, followed, if necessary, by judicial review.

Neely, J.:

The State seeks a writ of prohibition to prevent the Circuit Court of Kanawha County from entertaining a declaratory judgment action to settle a dispute between Exxon and the Tax Department. Exxon asks the circuit court to declare Administrative Notice 91-15, which describes the procedure that Exxon must follow to obtain a tax refund, unconstitutional. However, the statutory tax refund process set forth in W.Va. Code 11-10-14 [1978] and W.Va. Code 11-10-14b [1992] provides judicial review of tax refund matters only after the Tax Department has made its ruling on the refund; W.Va. Code 11-10-14(i) [1978] explicitly prohibits declaratory judgments in the refund cases. Accordingly, we grant the writ.

Until 1984, the State of West Virginia imposed a wholesale gross receipts tax on all sales of tangible property in West Virginia, but exempted in-state manufacturers from the tax. In that year, the U.S. Supreme Court held the tax unconstitutional in Armco, Inc. v. Hardesty, 467 U.S. 638 (1984), because it discriminated against out-of-state producers. Among the goods covered by the tax was gasoline. Exxon paid $4,033,657.48 in wholesale gross receipts taxes between 1978 and 1984.

The State, not wanting to pay refunds, initially interpreted the Armco ruling as requiring the State to only stop collecting the

unconstitutional tax. On 17 June 1985, the Tax Department informed Exxon that it would apply Armco only prospectively; the State refused to refund any money to Exxon. Ashland Oil, engaged in litigation over its tax liability at the time of the Armco decision, appealed to the U.S. Supreme Court our ruling upholding the Tax Department's position that Armco only applied prospectively. Ashland Oil, Inc. v. Rose, 177 W.Va. 20, 350 S.E.2d 531 (1986). The U.S. Supreme Court reversed our decision and held that the Armco decision invalidating the wholesale gross receipts tax must be applied retroactively. Ashland Oil v. Caryl, 497 U.S. 916, 110 S.Ct. 3202, 111 L.Ed.2d 734 (1990) (per curiam); accord National Mines Corp. v. Caryl, 497 U.S. 922, 110 S.Ct. 3205, 111 L.Ed.2d 740 (1990) (per curiam).

The State, running out of options to avoid repayment of taxes, issued Administrative Notice 91-15, entitled "Payment of Claims for Refund or Credit by Manufacturers as a Result of Partial Invalidity of the Wholesale Classification of the Business and Occupation Tax." In that notice, the Tax Commissioner advised all taxpayers with pending claims of its procedure to determine the amount of refunds that it would make:

> West Virginia will compensate taxpayers only for the amount of tax they absorbed and did not pass through to consumers and for any loss of market share attributable to the unconstitutional tax. . . . Claimants should be prepared to furnish this kind of information in order to show the amount of the unconstitutional tax they absorbed and the market share they lost as a result of the unconstitutional tax. The amount of tax absorbed is determined by a Tax Incidence Analysis. The focus of this analysis is the

> relationship between the elasticity of demand and the elasticity of supply as well as the relationship among input costs, revenues, taxes and product prices.

The Tax Department scheduled a hearing on Exxon's refund claim for 16 June 1992. The Tax Commissioner notified Exxon that the Office of Hearings and Appeals would perform a "tax incidence analysis" to determine the amount of the refund. Administrative Notice 91-15 described the calculations that go into a tax incidence analysis, and the type of evidence that would be useful to the Tax Department in deciding the amount of the refund.

Instead of proceeding with the Tax Department hearing, Exxon sought a writ of mandamus from the Circuit Court of Kanawha County. Exxon petitioned the court to declare Administrative Notice 91-15 invalid and to order the Tax Commissioner to comply with the "nondiscretionary" duties set out in the tax refund provisions of the West Virginia Code. In order to avoid violating the State's constitutional immunity from suit, the Circuit Court converted the action from a mandamus action to a declaratory judgment action on the issue of whether Administrative Notice 91-15 is enforceable. West Virginia Constitution Art. VI, § 35. The State now seeks a writ of prohibition because the declaratory judgment action would be improper.

West Virginia is not unique in having imposed a tax that discriminated against interstate commerce. Nor is West Virginia

unique in hoping that when a court invalidates an unconstitutional tax the effect will be prospective only. However, the U. S. Supreme Court disabused the states of that expectation in McKesson v. Division of Alcoholic Beverages, 496 U.S. 18, 31, 110 S.Ct. 2238, ___, 110 L.Ed.2d 17, 32 (1990), where that court held:

> If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

The U.S. Supreme Court has already found the wholesale gross receipts tax unconstitutional, and held that the State must provide retroactive relief. Ashland Oil v. Caryl, 497 U.S. 916, 110 S.Ct. 3202, 111 L.Ed.2d 734 (1990). Therefore, the State must provide meaningful backward-looking relief to rectify its collection of an unconstitutional tax. This does not necessarily mean that the State must give refunds; the State could simply collect equivalent taxes on previously exempted in-state corporations. See McKesson, 496 U.S. at 40, 110 S.Ct. at ___, 110 L.Ed.2d at 38, n. 23 and accompanying text. However, the State has made it clear that it has chosen to repay wrongfully levied taxes rather than impose new ones. Indeed, the Legislature, although granting the Tax Commissioner broad discretion in W.Va. Code 11-10-14b [1992], expressed a preference for granting credits or refunds over collecting additional taxes.

Moreover, the Tax Commissioner has made it clear by his actions that he has no intention of collecting additional taxes.

In United States v. Jefferson Electric Mfg. Co., 291 U.S. 386, 54 S.Ct. 443, 78 L.Ed 859, the U.S. Supreme Court held that the federal government has the power to keep the part of a wrongfully taken tax that the taxpayer had passed on to its customers. However, in Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 492-493, 88 S.Ct. 2224, ___, 20 L.Ed.2d 1231, 1241 (1968), the U.S. Supreme Court expressed its concern about the extreme difficulty of making a pass-on showing:

> We are not impressed with the argument that sound laws of economics require recognizing [the pass-on] defense. A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove to be insurmountable. [Footnote omitted; emphasis added]

The State, then, must provide a full dollar-for-dollar refund, by credits or payments, of a tax levied in violation of the Commerce Clause, unless the State can show by clear and convincing evidence that the tax paid by a taxpayer seeking refund was passed on to consumers in such a way that it did not affect the marketplace performance of the taxpayer; due process demands that the burden of proof rest on the State to make this showing. As the U.S. Supreme Court held in McKesson, 496 U.S. at 48-49, 110 S.Ct. at ___, 110 L.Ed.2d at 43:

> The tax injured petitioner not only because it left petitioner poorer in an absolute sense than before (a problem that might be rectified to the extent petitioner passed on the economic incidence of the tax to others), but also because it placed petitioner at a relative disadvantage in the marketplace vis-a-vis competitors distributing preferred local products. . . . To whatever extent petitioner succeeded in passing on the economic incidence of the tax through higher prices to its customers, it most likely lost sales to the favored distributors or else incurred other costs (e.g., for advertising) in an effort to maintain its market share. The State cannot persuasively claim that "equity" entitles it to retain tax moneys taken unlawfully from petitioner due to its pass-on of the tax where the pass-on itself furthers the very competitive advantage constituting the Commerce Clause violation that rendered the deprivation unlawful in the first place. [Footnote omitted; emphasis added]

However, the U.S. Supreme Court has also recognized that the State has wide latitude in providing for remedies after a tax has been declared unconstitutional:

> [W]ithin our due process jurisprudence, state interests traditionally have played, and may play, some role in shaping the contours of the relief that the State must provide to illegally or erroneously deprived taxpayers, just as such interests play a role in shaping the procedural safeguards that the State must provide in order to ensure the accuracy of the initial determination of illegality or error. . . . States may avail themselves of a variety of procedural protections against any disruptive effects of a tax scheme's invalidation, such as providing by statute that refunds will be available to only those taxpayers paying under protest, or enforcing relatively short statutes of limitation applicable to refund actions.

McKesson, 496 U.S. at 50, 110 S.Ct. at ___, 110 L.Ed.2d at 44 (citing Mathews v. Eldridge, 424 U.S. 319, 348, 96 S.Ct. 893, ___, 47 L.Ed.2d 18, ___ (1976)("[T]he Government's interest . . . in conserving scarce fiscal and administrative resources is a factor that must be weighed" when determining the precise amount of process due). Although due process requires a meaningful remedy, the State has great flexibility in determining its relief mechanisms.

The Legislature has established a relief mechanism in W.Va. Code 11-10-14 [1978].[1] The Legislature designated this procedure as requiring the Tax Department first to rule on the amount of the refund, and then providing judicial review. The Legislature has made this

[1]In 1992, the Legislature enacted W.Va. Code 11-10-14b [1992], entitled "Monetary remedies for overpayments due to unconstitutionality." This section generally affirms the procedures of W.Va. Code 11-10-14 [1978], but grants the Tax Commissioner additional flexibility to deal with repayment of tax refunds owed. In W.Va. Code 11-10-14b(b)(2)(A) [1992], the Legislature reiterates its intention that the procedures of W.Va. Code 11-10-14 [1978] are exclusive.

the exclusive remedy for procuring a tax refund. W.Va. Code 11-10-14(i) [1978] provides, in part:

> Remedy Exclusive.-- The procedure provided by this section shall constitute the sole method of obtaining any refund or credit, it being the intent hereof that the procedures set forth in this article shall be in lieu of any other remedy, including the Uniform Declaratory Judgments Act embodied in article 13, chapter 55 of this code. [Emphasis added.]

Therefore a declaratory judgment action is inappropriate, as such an action would be intervention in the tax refund case not allowed by the statute.

There is really nothing that a declaratory judgment could accomplish at this point anyway. An Administrative Notice put out by the Tax Department is not a regulation within the contemplation of the Administrative Procedure Act, Chapter 29A of W.Va. Code. An Administrative Notice can either be an "interpretive rule" or a "procedural rule" depending on its content. An interpretive rule is a rule "which is intended by the agency to provide information or guidance to the public regarding the agency's interpretations, policy or opinions upon the law enforced by it." W.Va. Code 29A-1-2(c) [1982]. Such a rule may not be relied on to impose legal sanction (either civil or criminal), nor is it "admissible in any administrative or judicial proceeding" to either sanction conduct or confer a privilege. Similarly, a "'procedural rule' . . . fixes rules of procedure, practice or evidence for dealings with or proceedings before an agency." W.Va. Code 29A-1-2(g) [1982]. Some

Administrative Notices express pure interpretive opinion, and others describe procedures to be followed before the Tax Department.

All that Administrative Notice 91-15 does is show the opinion of the Tax Commissioner and describe the procedures to be followed. Administrative Notice 91-15 does not bind the hearing examiner to any result; nor does it alter the rights of the parties. Moreover, Administrative Notice 91-15 does not require Exxon to do anything, it merely describes the evidence that Exxon may want to present at its hearing. The burden of proof, as we discussed above, must rest on the State to show by clear and convincing evidence the amount of tax passed on to consumers that did not affect Exxon's market performance if the State intends to reduce the refund by some amount based on the "pass-on" theory.

For the foregoing reasons, the writ of prohibition prayed for is awarded.

Writ awarded.