No. 31377 – *Bluestone Paving, Inc., a corporation, v. Tax Commissioner of the State of West Virginia*

FILED
December 4, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, Justice, dissenting:

I dissent from the majority opinion because it fails to fully explore the ramifications of the conclusion that it adopts. In essence, the majority concludes (1) that a taxpayer who has paid the State of Virginia a sales tax (2) may claim a credit for that tax under the use tax provisions found in Article 15A of Chapter 11 of the West Virginia Code (3) against a sales tax imposed under Article 15, Chapter 11 of the West Virginia Code, (4) but only if the item upon which the sales tax was paid to Virginia remains identical in every respect throughout its existence in West Virginia. In reaching this conclusion, the majority adopts the position urged upon it by the State Tax Commissioner.

I believe that under the facts presented, this Court had two reasonable choices, but rejected those far preferable options for a completely illogical third option. The first choice was to reject the availability of a credit granted under Article 15A against a tax imposed by Article 15. The second choice was to recognize the availability of the credit and reject the limitation proposed by the State Tax Commissioner. The third alternative, which the Court adopts at the behest of the State Tax Commissioner, is to craft a limitation on the credit which is supported neither by statute nor by reason. To fully analyze this complex

situation, it is helpful to first review the structure and intent of the two statutes, that is, Article 15, Chapter 11, the sales tax, and Article 15A, Chapter 11, the use tax, together with their interrelation.

West Virginia enacted a sales tax for the support of its schools in 1937. As originally enacted, the tax was imposed on the sale of goods and services. Its burden rested on the purchaser, the vendee, although from the beginning the responsibility for its collection was with the vendor at the point of sale.

In the case of a sale contracted in state for ultimate delivery to a consumer out of state, the tax did not apply. Therefore, for a purchase initially contracted in West Virginia but delivered to an ultimate consumer out of state, such as Virginia, no sales tax was imposed. Conversely, in the case of a purchase out of state for ultimate delivery to a consumer in West Virginia, neither the state of domicile of the vendor (Virginia) nor the state of domicile of the vendee (West Virginia) collected sales tax. Alternatively, when, as in this case, a resident of one state purchased and took delivery of an item in another state that state customarily required the vendor to collect its sales tax from the purchaser (vendee) at the time of sale, even though the purchaser immediately brought the item which it bought into the purchaser's state of domicile.

To address these situations, most states, including West Virginia, adopted a use tax, undertaking to tax the *use* of property in this state of items purchased out of state as contrasted with attempting to tax the *sale* of such items. Under its use tax, West Virginia levied a tax on the use of property in this state, equal to the West Virginia sales tax, on items purchased elsewhere on which West Virginia was unable to collect a sales tax. To reduce the chances for double taxation – taxation by West Virginia and by the state where the sale was completed – West Virginia law currently provides for a credit:

> against the [use] tax on the use of a particular item of tangible personal property equal to the amount, if any, of sales tax lawfully paid to another state for the acquisition of that property...not [to] exceed the amount of the use tax imposed [by] this state.

West Virginia Code § 11- 15A-10a (1986) (Repl. Vol. 2002).

This credit operates to effectively remove from the scope of the use tax a substantial number and dollar amount of purchases made daily by consumers throughout the state. Technically those consumers are liable for the filing of a use tax return on such purchases and are then entitled to claim the credit provided by this section against any tax due the state pursuant to the return. In daily practice, relatively few use tax returns are filed, except for businesses routinely filing other types of tax returns. In practical terms, the credit

provided under this section absolves most consumers of most or all liability for use tax on those out-of-state purchases.[1]

In the case before us, the Appellee filed some form of a West Virginia tax return and claimed a credit under West Virginia Code § 11-15A-10a for the amount of sales tax it previously paid the State of Virginia for gravel purchased there and imported into West Virginia for use in the manufacture of asphalt to be used in fulfilling a contract with the state to pave certain roadways. According to the Appellant State Tax Commissioner – and the majority opinion – the Appellee is not entitled to the benefit of the credit because by using the gravel to make asphalt the gravel was no longer the "identical" item of property it was at the time of purchase and importation into West Virginia. The Tax Commissioner argued that the credit would only apply if the gravel had retained its character solely as gravel; the majority of this Court has now agreed and ensconced that limitation upon the *use tax* credit granted by West Virginia Code § 11- 15A-10a (1986) in syllabus point five of the majority opinion.

[1]Also, in recent years West Virginia has, by statute or by agreement with neighboring states, extended its collection efforts of either sales or use taxes to cover many interstate transactions. Nevertheless, enforcement of the use tax is, and always has been, uneven, arising from several factors, including (1) administrative inability or reluctance to pursue West Virginia residents, (2) individual legislators urging administrators not to enforce the tax in some areas, and (3) the current congressional directive forbidding states to tax certain internet transactions. The historical record of uneven enforcement presents an interesting contrast to the Tax Commissioner's zeal in this case.

Analysis of the limitation advocated by the Tax Commissioner requires a recital of a further development in the law of sales and use taxes that is pertinent because the taxpayer in this case is seeking to apply the *use tax credit* established by West Virginia Code § 11- 15A-10a to reduce liability for *sales taxes* imposed by West Virginia Code § 11-15-7 on the sale or value of a manufactured product.

In 1989, the Legislature added to the *sales* tax – not the *use* tax – a series of amendments laying the *sales* tax obligation upon the *vendor*–not the vendee–for certain goods and services utilized in certain specific activities. Among those changes was an amendment to West Virginia Code § 11-15-7 (1989), which imposed on the *vendors* of certain manufactured products (not otherwise exempted from the tax) a *sales* tax on the proceeds of the sale of such manufactured products, or if not so sold, upon "*the gross value of the natural resource, product or manufactured product, so used or consumed by him,"* and further requiring that the manufacturer "pay the tax imposed by this article," again, the *sales* tax, not the *use* tax. Here, contrary to the historic structure of sales and use taxes, the tax was levied on the seller or manufacturer, not the purchaser, the vendee. As noted, it was against this *sales* tax, imposed by West Virginia Code § 11-15-7, that the Tax Commissioner argues, and the majority of this Court holds, that the Appellee may claim the credit allowed under the *use* tax by West Virginia Code § 11-15A-10a, *but only if the particular item of personal property remains "identical" throughout its existence in West Virginia.*

The majority argues that it is merely applying the plain meaning of the exemption. That is transparently wrong. Under the plain meaning of West Virginia Code § 11-15A-10a, the credit there allowed applies only to "a credit against the tax imposed by *this* article," the article imposing the *use* tax. The credit the majority approves (had gravel remained gravel) is against the *sales* tax. Thus, it is clear that the majority is not simply applying the plain meaning of the statute. The majority is interpreting the statute, albeit in the limited manner suggested by the Tax Commissioner. That interpretation extends the application of the *use tax* credit so that it may also operate as a credit against the *sales* tax imposed on vendors of manufactured goods.

I have no real quarrel with this extension of the credit to the sales tax in this situation. However, it must be admitted that the Court had a valid reason not to extend that credit had it so chosen. As I said at the beginning of this dissent, the Court had a clear and defensible option: To reject the application of the *use* tax credit to reduce any *sales* tax liability.

On the other hand, there is also sound reason in law to permit the application of the *use tax* credit to *sales tax* liability in the situation before us. The use tax statute contains a particular statement of legislative intent that arguably justifies the extension of the use tax credit to sales tax liability in these circumstances:

> The legislature hereby finds and declares that it is the intent of the legislature that the use tax imposed by the provisions of article fifteen-A [§§ 11-15A-1 et seq.] and the consumers sales tax imposed by the provisions of article fifteen [§§ 11-15-1 et seq.], chapter eleven of the Code of West Virginia, one thousand nine hundred thirty-one, as amended, be *complementary laws* and wherever possible be construed and applied to accomplish such intent as to the imposition, administration and collection of such taxes.

W.Va. Code § 11-15A-1a (1969) (Repl. Vol. 2002) (emphasis supplied).

In light of that very clear legislative directive, it is not only appropriate but highly desirable that the Tax Commissioner and the courts look with favor on constructions and applications of the two statutes, the sales tax and the use tax, that treat these taxes in a correlative fashion so as to achieve that legislative intent of complementary imposition, administration and collection.

Given that expression of legislative intent, it is similarly apparent that this Court had a second reasonable choice: To adopt the position enunciated by the circuit court and grant the Appellee the benefit of the use tax credit against its sales tax liability.

Why then did the majority make a third choice and deny the Appellee the benefit of the credit while approving its application to a sales tax liability consistent with the Tax Commissioner's preferred limitation? In short, because the majority misconstrued and misapplied the statutory grant of the credit for "the use of a particular item of tangible

personal property." The majority wrote into the statute a further limitation that the property must remain *identical* in the manufacturing process to entitle payment of the foreign sales tax on the property to be used as a credit against the sales tax imposed on manufacturing by West Virginia Code § 11-15-7. The question that remains is whether that judicially crafted limitation, urged on the majority by the Tax Commissioner, is fair to the taxpayers and justified by law. The answer to that query is an emphatic and undeniable "no!"

First, it defies reason to say that any product, after manufacture, is the identical tangible property it was before manufacture. It is the essence of the process of manufacturing to take a collection of ingredients and by a combination of those ingredients and perhaps the introduction of chemical or other processes create something intrinsically different. Literally applied, the limitation adopted by the majority defeats the credit against any manufactured product.

Second, in that manufacturing process, it would be ludicrous to require a search of each final product for portions that remain "identical" and thus qualify for the credit, e.g., driven nails that nonetheless remain identical, and a search for other final parts or portions whose identical nature have been altered by the manufacturing process.

Third, the statutory language imposing a *sales* tax on manufactured products and the statutory language granting the credit under discussion expressly recite that certain materials incorporated into the manufactured product will be *used or consumed* in the manufacturing process. In this connection, the majority mistakenly construes the "used and consumed" language in West Virginia Code § 11-15-7 to mean that the tax at issue is a *use* tax, not a *sales* tax. That mistaken understanding exposes a fundamental lack of appreciation of the nature of the issues at stake and leads to the majority's erroneous requirement that the property remain "identical."

Fourth, there is no basis on the face of the exemption statute, under its plain meaning, to limit the exemption in the manner adopted by the majority.

Fifth, the statutory requirement granting the credit only to "the use of a particular item of tangible personal property," far from intimating a requirement that the property remain "identical" throughout a manufacturing process, simply limits the application of the credit to the sales tax due on the manufactured product into which the "particular item of tangible personal property" was incorporated. In my view, the requirement simply prevents a taxpayer from claiming the credit against sales or products used that do not include the "particular item of tangible personal property."

Sixth, a fundamental goal of manufacturing a product is to add value to the materials used by combining and/or processing them, thereby creating a new "item." Allowing a credit for the Virginia tax paid on the gravel against the sales tax imposed on the selling price or value of the asphalt manufactured by the Appellee likely leaves that state with a substantial tax collection.

All of this leads to the conclusion that the circuit court judge who first heard this administrative appeal, Judge Frazier, had it right and the majority has missed the boat. Appellee paid Virginia a *sales* tax for gravel that Appellee then transported to West Virginia and *used and consumed* here to manufacture asphalt. In the process of manufacturing that asphalt, it used or consumed the particular item of personal property, the gravel, upon which Appellee paid a sales tax to Virginia. Construing the use tax and sales tax statutes in a complementary way to achieve their intent, the use tax credit should have been applied against the sales tax imposed on the Appellee for the manufacture of the asphalt.

Under the majority's third choice, limiting the credit to "identical" items after a manufacturing process, some manufacturing processes will be subjected to double taxation – for both foreign sales taxes and West Virginia sales taxes. Others will have the benefit of the credit. Complementary construction of the sales and use tax statutes will be hit and miss and the credit difficult to obtain and administer. The unanswered question is why the

majority chose to deny this West Virginia firm, situate as it is on the border of the state near stiff competition, the credit it seeks. The result is to further burden Appellee's West Virginia manufacturing processes and all West Virginia manufacturers with unintended double taxation.

It is said in royal lore that courts should "protect the King's purse." It is also said that "the King's prerogative is to sheer his sheep, not skin them." In this case the majority has allowed the King to "skin the taxpayer." The judgment of the Circuit Court of Mercer County should have been affirmed.

I am authorized to state that Justice McGraw joins in this dissent.