IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2005 Term

FILED
December 2, 2005
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 32528

U. S. STEEL MINING COMPANY, LLC,
CONSOLIDATED COAL COMPANY,
LAUREL RUN MINING COMPANY,
McELROY COAL COMPANY,
ARCH COAL, INC., MID-VOL LEASING, INC.,
COASTAL COAL-WEST VIRGINIA, LLC,
ELK RUN COAL COMPANY, INC.,
PAYNTER BRANCH MINING, INC.,
KINGSTON RESOURCES, INC.
PIONEER FUEL CORPORATION,
Petitioners Below, Appellants

v.

THE HONORABLE VIRGIL HELTON,
WEST VIRGINIA STATE TAX COMMISSIONER,
Appellee

Appeal from the Circuit Court of Kanawha County
Hon. Tod J. Kaufman, Judge
Case No. 03-AA-74

AFFIRMED

Submitted: September 20, 2005
Filed: December 2, 2005

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JUSTICE STARCHER delivered the Opinion of the Court.

CHIEF JUSTICE ALBRIGHT concurs and reserves the right to file a concurring opinion.

JUSTICE DAVIS concurs and reserves the right to file a concurring opinion.

JUSTICE MAYNARD dissents and reserves the right to file a dissenting opinion.

JUSTICE BENJAMIN concurs, in part, and dissents, in part, and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. "'When the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment.' Point 3, Syllabus, *Willis v. O'Brien*, 151 W.Va. 628 (153 S.E.2d 178)." Syllabus Point 1, *State ex rel. Haden v. Calco Awning & Window Corp.*, 153 W.Va. 524, 170 S.E.2d 362 (1969).

2. The coal production severance taxes contained in current and earlier versions of *W.Va. Code*, 11-12B-3 [2000]; 11-13A-3 [2002]; 11-13A-6 [1997]; 22-3-11 [2005]; and 22-3-32 [1994] do not offend the Import-Export Clause of the *United States Constitution*, art. I, sec. 10, cl. 2.

Starcher, J.:

In the instant case we uphold a determination by the Circuit Court of Kanawha County that West Virginia's coal production severance taxes are constitutional.

I.
Facts & Background

A.

The appellants are companies that mine and process coal in West Virginia, and then sell that coal. Some of the coal that is mined and processed by the appellants in West Virginia is sold by the appellants to customers for use outside the United States; that is, the coal is exported.

According to the briefs, after the appellants separate coal from the adjoining earth and rocks at a coal mine site in West Virginia, the coal is typically transported to a nearby "raw storage" area, and then is taken to a preparation plant at or near the mine site where the raw coal is cleaned and sized (and may be otherwise processed, by freeze-proofing, etc.). Then the prepared coal that will be exported is typically loaded onto railroad hopper cars, which are hauled by railroad engines to a coastal port, where the coal is transferred from the railroad cars into a ship and transported to a foreign or export destination.

The appellee West Virginia State Tax Commissioner is responsible for collecting certain coal production severance taxes that are imposed on entities like the appellants that produce coal for sale or other commercial use. These taxes, generally referred to as "coal severance taxes," are the subject of the instant case.

The current statutory provisions authorizing these coal severance taxes are found at *W.Va. Code*, 11-12B-3 [2000]; 11-13A-3 [2002]; 11-13A-6 [1997]; 22-3-11 [2005] and 22-3-32 [1994].[1] The language of each severance tax statute is slightly different. Generally speaking, they impose a tax upon persons or entities exercising the privilege of severing, extracting, reducing to possession or producing coal for sale, profit, or commercial use.[2]

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[1]Earlier versions of these statutes apparently provided the basis for some of the particular tax amounts paid by the appellants that are at issue in the instant case; the briefs do not indicate any relevant substantive differences in the pertinent language of those earlier statutory versions. The Tax Commissioner suggests that there is some uncertainty as to whether all of these statutes have been directly challenged by all of the appellants in the instant case; we proceed on the assumption that all of the identified taxes are at issue.

[2]In terms of the amount of taxation at issue, it appears that the principal coal severance tax involved in the instant case is set forth in *W.Va. Code*, 11-13A-3 [2002], the relevant portion of which provides:

> (a) *Imposition of tax.* – Upon every person exercising the privilege of engaging or continuing within this state in the business of severing, extracting, reducing to possession and producing for sale, profit or commercial use coal, . . . there is hereby levied and shall be collected from every person exercising such privilege an annual privilege tax.
>
> (b) *Rate and measure of tax.* – The tax imposed in subsection (a) of this section shall be five percent of the gross value of the natural resource produced . . . as shown by the gross income

(continued...)

Two of the taxes at issue in the instant case, codified at *W.Va. Code*, 11-13A-3 [2002] and 11-13A-6 [1997], are calculated as a percentage of the value of the mined and processed coal. Three of the taxes, codified at *W.Va. Code*, 11-12B-3 [2000], 22-3-11 [2005], and 22-3-32 [1994], are taxes that are calculated as fixed amounts of money assessed per ton mined.

In both cases, pursuant to the practice and regulations of the appellee Tax Commissioner, either the final sales price or the invoiced tonnage of the coal that is sold is used to calculate the taxes; even though this final price or tonnage measurement may in fact be determined only when the coal is delivered to the export carrier ship.

Notably, for purposes of establishing a sales price and value for severance tax calculation, any transportation costs from the preparation plant to the port and thereafter to the customer, if they are absorbed or paid by the seller, are *deducted* from the actual sales price. This adjusted sales price used as the coal's value for severance tax calculation purposes is referred to in industry parlance as the coal's "F.O.B. ['Free on Board'] Mine" price.[3]

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[2](...continued)

derived from the sale or furnishing thereof by the producer . . ..

[3]Aside from any constitutional aspects of this F.O.B. Mine method for ascertaining coal's value for purposes of calculating West Virginia's coal severance taxes (for both exports and domestic use), it appears to be the least burdensome feasible method from a compliance standpoint – because it does not require investment in expensive scales at the mine site or preparation plant, nor require redundant paperwork; and it is harmonious and (continued...)

B.

The appellants argue that the imposition of coal severance taxes in connection with the appellants' mining and processing of coal that is shipped to an export customer violates the "Import-Export Clause" of the *United States Constitution*, art. I, sec. 10, cl. 2, which states in pertinent part:

> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws. . . .

The instant case began when the appellants, in accordance with the foregoing statutes, for several years paid severance taxes based on their mining and processing of coal sold for export, and then applied to the appellee Tax Commissioner for refunds. The appellants asserted their claim of unconstitutionality before the Tax Commissioner, who

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[3](...continued)
consistent with normal commercial practice in the coal business.

The appellants direct this Court to language in statements by the Tax Commissioner and the circuit court's findings to the effect that West Virginia coal severance taxes "accrue" at the time of the coal's sale. We do not believe this language is dispositive in relation to the legal issue before this Court – the actual constitutionality of the severance taxes in their operation and effect. The controlling statutes show that it is the mining and processing of coal for sale or commercial use that gives rise to a severance tax obligation. The sale of the coal is merely the event that establishes the basis for calculating the tonnage or value of the coal for purposes of ascertaining the amount of tax due. It is the privilege and occasion of producing coal for sale or commercial use that is taxed. *See* discussion of severance taxes at note 5 *infra*. *De novo* review on appeal means that the result and not the language used in or reasoning of the lower tribunal's decision, is at issue. A reviewing court may affirm a lower tribunal's decision on any grounds. *See GTE South, Inc. v. Morrison*, 199 F.3d 733, 742 (4th Cir. 1999) ("if the administrative order reaches the correct result and can be sustained as a matter of law, we may affirm on the legal ground even though the agency relied on a different rationale").

denied the appellants' refund claims. The appellants appealed that decision to the Circuit Court of Kanawha County, which in an order dated May 27, 2004, upheld the Tax Commissioner's decision. The appellants have appealed the circuit court's decision to this Court.

According to the Tax Commissioner, the current total refund liability for the taxes at issue in the instant case (and other related pending cases) could be as high as $360 million dollars, not including interest; additionally, $40 to $50 million dollars annually in legislatively-mandated future severance tax revenue will not be collected if West Virginia's coal severance taxes on mining and processing coal for export are held to be constitutionally invalid.

II.
Standard of Review

This case presents questions of statutory interpretation and application, and a determination of the constitutionality of several statutes, all of which are matters that this Court reviews *de novo*. Additionally, as we stated in Syllabus Point 1 of *State ex rel. Haden v. Calco Awning & Window Corp.*, 153 W.Va. 524, 170 S.E.2d 362 (1969):

> "When the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment." Point 3, Syllabus, *Willis v. O'Brien*, 151 W.Va. 628 (153 S.E.2d 178).

III.
Discussion

In support of their position that the imposition of coal severance taxes in connection with the appellants' mining and processing of coal that is shipped to an export customer violates the "Import-Export Clause" of the *United States Constitution*, art. I, sec. 10, cl. 2, the appellants principally rely on the case of *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 67 S.Ct. 156, 91 L.Ed. 80 (1946).

In *Richfield Oil*, the State of California assessed a retail sales tax on a sale of oil by a California refinery to the government of New Zealand. The Supreme Court found that the California sales tax was imposed when the oil was delivered into the hold of the foreign purchaser's ship and into the control of a foreign purchaser; that the sales tax was therefore imposed on the oil while it was in the export transit process; and the tax was therefore an impost or duty that violated the Import-Export Clause.[4]

In 1976 the focus of Import-Export Clause analysis took a sharp turn in *Michelin Tire Corp. v. Wages, Inc.*, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976).

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[4]To support its conclusion, the *Richfield Oil* Court looked to language in two earlier cases, *Coe v. Errol*, 116 U.S. 517, 527, 6 S.Ct. 475, 478, 29 L.Ed. 715, ___ [1886] (goods became exports to which the Import-Export Clause automatically applied when they had "been started upon such [export] transportation in a continuous route or journey."); and *A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 68, 43 S.Ct. 485, ___, 67 L.Ed. 865, 867 (1923) (goods became exempt exports "after they had been loaded".) *Richfield Oil*, 329 U.S. at 79-81, 67 S.Ct. at ___, 91 L.Ed. at 91-92. As our discussion *infra* indicates, the coal severance taxes at issue in the instant case are not imposed on goods after they have been loaded, nor after they have clearly been started on their journey.

Finding the terms "impost" and "duty" to be inherently ambiguous, and recognizing a longstanding difficulty in the case law in determining in a principled fashion when goods were or were not in a stream of export or import at the time of taxation so as to invoke the blanket tax exemption set by the Import-Export Clause, the Court "created a regime in which those terms [impost and duty] are conclusions to be drawn from an examination into whether a particular assessment 'was the type of exaction that was regarded as objectionable by the Framers of the Constitution.'" *U.S. v. I.B.M. Corp.*, 517 U.S. 843, 858 116 S.Ct. 1793, 1802, 135 L.Ed.2d 124, 138 (1996) (internal citations omitted).

The Court in *Michelin* adopted an analysis based on the concerns that prompted the founding fathers to write the Import-Export Clause in the first place:

> The Framers of the Constitution thus sought to alleviate three main concerns by committing sole power to lay imposts and duties on imports in the Federal Government, with no concurrent state power: the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the State; and harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically.

423 U.S. at 285-86, 96 S.Ct. at 540-41, 46 L. Ed. 2d at 503 (footnotes omitted).

The new policy-based *Michelin* approach was adopted and slightly modified to fit exports in *Washington Dept. of Revenue v. Assoc. of Washington Stevedoring Cos.*, 435

U.S. 734, 758, 98 S.Ct 1388, 1403, 55 L.Ed.2d 682, 702 (1978) ("[T]he Michelin approach should apply to taxation involving exports as well as imports.").

The first element of the *Michelin* analysis as applied to exports is whether the tax impinges on the federal government's ability to speak with one voice when regulating commercial relations with foreign governments. In *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 194, 103 S.Ct. 2933, 2955, 77 L.Ed.2d 545, 571-72 (1983), the Court stated:

> In conducting this inquiry, however, we must keep in mind that if a state tax merely has foreign resonances, but does not implicate foreign affairs, we cannot infer, "[a]bsent some explicit directive from Congress, . . . that treatment of foreign income at the federal level mandates identical treatment by the States." Thus, a state tax at variance with federal policy will violate the "one voice" standard if it *either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive. The second of these considerations is, of course, essentially a species of pre-emption analysis.

Id. (citations omitted, italics in original).

The appellants argue that West Virginia's coal production severance taxes adversely impact the level of U.S. coal exports, by increasing the price of that coal, and therefore reducing West Virginia coals' competitiveness in the world market.[5]

But the same could be said with respect to any clearly legitimate state tax that is imposed in any fashion – like a workers' compensation tax on the pay of factory workers

[5]The appellant's asserted "decreased competitiveness" of West Virginia's export coal is called into question by recent coal export figures cited by the Tax Commissioner.

in a plant that makes exports – that has the effect of increasing the price of a good that was subsequently exported.

This mere price increase is not the kind of adverse effect on foreign affairs – like causing retaliation by foreign governments – that we think is required under the *Michelin/Washington Stevedoring* approach. The appellants do not identify any such effect. Nor do the appellants identify any substantial clear federal directive (*Container Corp., supra)* that West Virginia's severance taxes violate.

The second element of the *Michelin* analysis, an effect on federal import revenues, is largely irrelevant in the case of exports; and in the instant case, the appellants do not demonstrate any such effect from West Virginia's severance tax on coal production.

The third element of the *Michelin/Washington Stevedoring* analysis, ensuring a fair system of harmony in commerce among the states, coincides with the Commerce Clause test that the tax fall upon a taxpayer with a nexus to the state, be properly apportioned, not discriminate, and reasonably relate to the services provided by the state. *Washington Stevedoring*, 435 U.S. at 754-55, 98 S.Ct. at 1401-1422, 55 L.Ed.2d at 700. This Commerce Clause test is presumptively met in the instant case because the Supreme Court has already held that a coal severance tax like those at issue in this case survives Commerce Clause analysis. *Commonwealth Edison Company v. Montana*, 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981) (discussed further *infra*).[6]

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[6]The appellants also argue that there is a decrease in coal shipments from West
(continued...)

We have fully reviewed the arguments of the appellants on the question of whether the severance taxes in the instant case are of a type that was regarded as objectionable by the Framers of the Constitution under the foregoing *Michelin* analysis. We conclude that they are not.

In apparent recognition that their *Michelin*-based arguments do not have compelling force, the appellants also argue that the *Michelin* policy-based analysis has not fully supplanted the more mechanistic "in export transit" approach of earlier cases like *Richfield Oil.*

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[6](...continued)
Virginia through other states, especially port states, as a result of the asserted decreased competitiveness of West Virginia export coal caused by West Virginia's coal severance taxes. The possibility that port facilities in Maryland and Virginia might suffer from decreased exports due to even-handed and non-discriminatory West Virginia coal severance taxes does not unconstitutionally create disharmony between neighboring states, any more than do even-handed and nondiscriminatory taxes collected by Maryland and Virginia – like gasoline taxes – that increase the cost of transportation through those states. The appellants simply have not shown that West Virginia's severance taxes carry with them unusual circumstances that disturb West Virginia's neighbors. Appellants' argument suggests the absurd result that states with ports could make a constitutional demand that states that export goods through those ports remove otherwise non-discriminatory local taxes, based on local costs of production, in order to maximize the volume of goods shipped through the ports. As much as they undoubtedly love their neighbors, West Virginia taxpayers are not constitutionally responsible for maximizing shipping jobs in Virginia and Maryland, if to do so means gutting their own public fisc. Appellants' argument fundamentally misreads the nature of our federal system, where the interests of diversity and experimentation are served by states retaining a significant flexibility in taxation – a flexibility that of necessity will have economic impacts on other states – without in all cases offending the national *Constitution*.

The appellants point to language in *U.S. v. I.B.M.*, *supra*, 517 U.S. at 862, 116 S. Ct. at 1804, 135 L.Ed.2d at 140: "The Court has never upheld a state tax assessed directly on goods in import or export transit."[7]

The appellants then point to the fact that West Virginia's percentage-of-value coal severance taxes are calculated based on a valuation of the coal that includes the cost of loading the coal into rail cars at the preparation plant under the "F.O.B. Mine" method.

The loading process, argue the appellants, is a part of the coal's being "in export transit;" and including the coal loading process within the severance taxes' ambit means that the tax is being imposed on goods that are in export transit.

This feature of the West Virginia coal severance tax system, according to the appellants, therefore makes the entire coal severance tax unconstitutional when applied to coal that is to be exported – including the much larger portion of the tax that is calculated based on the coal's value just before the beginning of the loading process and after the coal has been mined and prepared.

This Court has recognized that coal severance taxes may include taxation of the value added by the loading of the coal into rail cars by the coal's producer – that is, that the initial loading of coal at the preparation plant for shipment is, at least when combined with

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[7]The *I.B.M.* Court also quoted language from *Michelin* suggesting that the Import-Export Clause would apply to "nondiscriminatory property taxes on goods which are merely in transit when the tax is assessed." 517 U.S. at 862, 116 S. Ct. at 1804, 135 L.Ed.2d at 140 (citations omitted). The taxes in the instant case are nondiscriminatory, but as the discussion *infra* shows, they are not property taxes nor are they imposed on goods that are "merely in export transit."

mining and processing, one of the "taxable events" under the statutes. Syllabus Point 4, *Kanawha Eagle Coal, LLC v. Tax Comm'r*, 216 W.Va. 616, 609 S.E.2d 877 (2004).[8]

However, in *Kanawha Eagle* this Court rejected the Tax Commissioner's argument that further loading of coal that occurs away from the initial point of mining and processing could be used in calculating severance taxation.

Kanawha Eagle thus stands for the proposition that the initial process of loading of coal by the mining and processing company at a coal preparation facility is properly viewed as a part of the coal production/mining and processing process; and once the coal is initially loaded, and thereafter when the coal has begun its movement or transit from the preparation plant toward a final destination, the applicable statutes do not allow the severance tax to be imposed on activity, value, or cost added during that movement or transit.

The holding of *Kanawha Eagle* is therefore consistent with the view that coal that "is being" initially loaded is at the tail end of the "coal production" process, and is

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[8] The initial loading of fully processed clean coal at the preparation plant for shipment is one of the specified activities viewed as a taxable event associated with the privilege of mining in this state. However, any reloading of coal that transpires after the initial loading at the preparation plant is part of the delivery process, rather than the mining process, and accordingly falls outside of the statutorily delineated activities that qualify as part of the taxable treatment processes performed upon coal set forth in *West Virginia Code* § 11-13A-4(a)(1) (1987) (Repl.Vol.2003).

Syllabus Point 4, *Kanawha Eagle*, *supra*.

properly amenable to valuation for severance taxation purposes; and that only once coal "has been" loaded can it enter into a "transit" process that is statutorily excluded from inclusion in severance taxation.

For this reason, the *Kanawha Eagle* decision is not supportive of the appellants' argument that coal being initially loaded at a preparation plant is clearly (much less "merely") "in export transit." *See* note 4 *supra*.[9]

A helpful perspective on the severance taxes at issue in this case can be gained by examining the U.S. Supreme Court's opinion in *Commonwealth Edison Company v. Montana*, 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981).

In *Commonwealth Edison*, a Commerce Clause/Supremacy Clause (*United States Constitution*, Art. I, Sec. 8, cl. 3 and Art. VI, cl. 2) challenge was brought to Montana's coal severance tax. The Montana coal severance tax at issue in *Commonwealth Edison* was very similar to the coal severance taxes at issue in the instant case. Montana's tax was calculated, at varying rates, on the value of the coal after it has been "extracted and prepared for shipment *f.o.b. mine*," *Commonwealth Edison*, note 1, 453 U.S. at 613, 101 S.Ct. at 2951, 69 L.Ed.2d at 891. (Emphasis added.)

The United States Supreme Court held in *Commonwealth Edison* that Montana's coal severance tax was "like a real property tax," 453 U.S. at 624, 101 S.Ct. at ___, 69

[9]Additionally, it is noteworthy that at oral argument before the Circuit Court of Kanawha County, the appellants' counsel stated: "*Once the coal is loaded* onto the rail cars it enters the zone [of] immunity of [the] Import-Export Clause . . . ." Trial Court Hearing Transcript, November 17, 2003, p. 11 (emphasis added).

L.Ed.2d at 899; and was tied to the diminution of future sources of economic activity, the depletion of the resource base of the state, and the necessity of supporting the social infrastructure that is necessary to allow coal severance to occur. *Id.*[10]

[10]Other states have severance taxes similar to West Virginia's. In upholding the South Dakota severance tax, the South Dakota court in *Homestake Mining Company v. Johnson*, 374 N.W.2d 357 (S.D. 1985) stated:

> The Act containing the statutes here in question, Chapter 95 of the 1981 South Dakota Session Laws, is entitled: "An Act to enact a mineral severance tax on precious metals." In SDCL 10-39-43, it states: "For the privilege of severing precious metals in this state, there is imposed a severance tax . . .." Although a legislative tax label does not, ipso facto, determine the nature of a tax, this language evidences the legislative intent to *tax mineral severance* and *not mineral sales.* Merely because the measure of the tax is gross receipts, does not mean the nature of the tax is a sales tax. . . . We find unpersuasive Homestake's assertion that it is a sales tax because a sale triggers the imposition of the tax. The sale cannot occur until there has been a severance from the earth in the first instance. Thereafter, a sale merely determines the metal's value and thus provides a measure for the tax and a time for collection. . . .The operating incidence of the tax is the severance of precious metals in South Dakota. The State of South Dakota is not taxing the sales, profit or income which Homestake makes from selling its gold. In contradistinction, the state is taxing the extraction of natural resources. Our State Legislature, the organ of the people, is concerned with the depletion of natural resources; also, it is apparently concerned with the loss of a future source of revenue and wealth.

Homestake, 374 N.W.2d at 362-63 (emphasis in original).

As a general matter, severance taxes are related not only to the activity of coal production, but to the concomitant depletion of natural resources which leads to a decrease in property tax valuation and business activity. As coal reserves are depleted through mining, the value of those coal properties declines for future property tax purposes. *See Commonwealth Edison Co. v. Montana*, 453 U.S. at 624, 101 S.Ct. at 2957, 69 L.Ed.2d at 898 (1981) ("mining of the coal depletes the resource base and wealth of the State, thereby

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[10](...continued)
diminishing a future source of taxes and economic activity") (footnote and citation omitted). The Supreme Court of Montana, addressing a challenge to that state's severance-tax-funded trust and quoting from its previous opinion in Commo*nwealth Edison v. State*, 189 Mont. 191, 196, 615 P.2d 847, 849 (1980), stated:

> Montana's experience had shown that its mineral wealth could be exhausted and exported with little left in Montana to make up the loss of its irreplaceable resources. Montana has been painfully educated about the extreme economic jolts that follow when the mine runs out, the oil depletes, or the timber saws come still. We have a good many examples that teach us what happens to our hills when the riches of our Treasure State are spent.

Montanans for the Coal Trust v. State, 996 P.2d 856, 858 (Mont. 2000).

The Maine legislature, when enacting that state's mining excise tax, explicitly found: "Mineral resources have historically been a primary source of economic wealth, are valuable and, once removed, are forever lost as an economic asset to the State." Me. Rev. Stat. 36-371-2852(2).

The *State Taxation* treatise by Jerome and Walter Hellerstein states:

> Furthermore, the states can make out a persuasive case for levying higher taxes on coal, oil, and other natural resources than on other subjects, on the ground that the exploitation of natural resources entails costs and losses to the states and benefits to the industry that far exceed those involved in typical industrial operations. Former Governor Arthur A. Link of North Dakota outlined some of the extraordinary costs to the state of coal mining in defending his state's coal severance tax – strip mining the land, removing fertile topsoil, consumption of vast amounts of scarce water, and interference with water aquifers. Such evidence helps to justify selective excises on natural resource industries and insulate them from challenges on the ground that they are discriminatory or not even-handed by comparison with the state's taxes on non-natural resource industries.
>
> Finally, in defending high, selective severance taxes on the extractive industries, the states have an additional argument: the extractive industries, unlike most other industries, deplete the natural resources of the state. Manufacturers create the goods

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One of the conclusions of the Montana Supreme Court in *Commonwealth Edison v. State*, 189 Mont. 191, 198, 615 P.2d 847 (1980) – the decision under review by the U.S. Supreme Court in its *Commonwealth Edison* decision, *supra* – was that the Montana coal

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[10](...continued)

> they sell, farmers grow their crops, and even the timber industry (at least the large companies engaged in timbering) regrows the forests it cuts down. But mining companies and oil producers extract wealth from the earth that is irreplaceable. Those facts offer a strong justification for high, selective severance taxes on the natural resources. Governor Link may thus have been on sound constitutional ground in asserting that a state whose coal is exploited for the benefit of the rest of the nation is entitled to "just compensation for losing forever a one time harvest."

J. Hellerstein and W. Hellerstein, STATE TAXATION: THIRD EDITION ¶ 4.17(2)(d) (2004) (footnotes omitted).

Thus, severance taxes are intended, among other things, to compensate the state for the permanent depletion of its natural bounty, and are entitled to special consideration. Severance taxes are an attempt to make extractive industries pay their fair share for the natural resources and services the state supplies, and that *quid pro quo* concept has been validated by the United States Supreme Court in the context of the Import-Export Clause.

> The Import-Export Clause clearly prohibits state taxation based on the foreign origin [or destination] of the imported [or exported] goods, but it cannot be read to accord imported [or exported] goods preferential treatment that permits escape from uniform taxes imposed without regard to foreign origin [or destination] for services which the State supplies.

Michelin Tire Corp. v. Wages, 423 U.S. at 287, 96 S.Ct. at 541, 46 L.Ed.2d at 504 (1976).

> To be sure, allowance of nondiscriminatory ad valorem property taxation may increase the cost of goods purchased by "inland" consumers. But as already noted, such taxation is the quid pro quo for benefits actually conferred by the taxing State.

423 U.S. at 288-289, 96 S.Ct. at 542, 46 L.Ed.2d at 505.

West Virginia does not distinguish between coal that is exported and coal used domestically when imposing the taxes at issue in this case, and West Virginia's severance taxes are levied as a *quid pro quo* for the benefits the State provides and the permanent loss the State suffers when its natural resources are extracted.

severance tax was imposed *before* the coal had actually entered interstate commerce, and therefore, the Montana tax did not offend the Commerce Clause. 189 Mont. at 196-97, 615 P.2d at 851.

In response to this conclusion by the Montana court, the United States Supreme Court held that "a state severance tax is not immunized from Commerce Clause scrutiny by a claim that the tax is imposed on the goods prior to their entry into the stream of interstate commerce." *Commonwealth Edison*, 453 U.S. at 617, 101 S.Ct. at 2953, 69 L.Ed.2d at 894. The Supreme Court in *Commonwealth Edison* thereby implicitly accepted as correct the Montana court's conclusion that the Montana coal severance tax was imposed on coal prior to its entry into the stream of interstate commerce.[11]

Although *Commonwealth Edison* was a Commerce Clause case and not a case involving the Import-Export Clause, the Supreme Court's acceptance of the Montana court's conclusion – that the events providing the basis for Montana's imposition of a coal severance tax occurred *prior* to the coal's entry into interstate commerce – supports the analogous conclusion that severance taxes like West Virginia's are based upon and imposed upon activity that occurs prior to the mined and processed coal's entry into export transit.

The appellants cite to a decision of the Fifth Circuit, *Louisiana Land & Exploration Company v. Pilot Petroleum Corporation*, 900 F.2d 816 (5th Cir. 1990) in support

[11]The U. S. Supreme Court found that this conclusion by the Montana court did not insulate the severance tax from Commerce Clause review; and upon that review, the Court upheld the severance tax.

of their contention that the Import-Export Clause prohibits the imposition of the coal severance taxes in the instant case.

In *Louisiana Land*, the State of Louisiana imposed a sales tax on jet fuel sold by a Louisiana company and pumped by that company into a tanker for shipment to Nova Scotia. The *Louisiana Land* court found that the tax was levied on the oil while the oil was undisputedly in export transit; and that the *Michelin* policies were offended when a "port state" imposed unfair taxes on goods coming from states having no ports. 900 F.2d at 820-21.

For several reasons, we find that the *Louisiana Land* case is not persuasive on the issues in the instant case. First, the coal severance taxes in the instant case are neither sales taxes nor excise taxes, and they are not imposed on goods that are undisputedly in export transit. Additionally, the *Michelin*-based policy relied upon by the *Louisiana Land* court – of preventing unfair "port-state" taxation of goods that are clearly in export transit – is not implicated by West Virginia's severance tax, which is imposed in the goods' state of origin long before they reach any port, and are applied even-handedly on all commercial coal production – for export to foreign countries, export to other states, or to be used in-state.[12]

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[12]Nor is the appellants' cited case of *Virginia Indonesia Company v. Harris County Appraisal District*, 910 S.W.2d 905, 39 Tex.Sup.Ct.J. 37 (1995) persuasive. In that case, the court found that the goods in question were merely in export transit through Texas, and therefore were exempt under the Import-Export Clause from a local property tax. This situation is far different from the facts of the instant case. As the Texas Supreme Court stated: "It is one thing to tax property that has come to rest within the state; it is quite another to tax property that is merely passing through on its way to its final foreign destination." 910 S.W.2d at 914-915. The coal being mined and processed by the appellants has been "at rest" in West Virginia for many millions of years. The coal being mined and (continued...)

IV.
Conclusion

To review the foregoing points:

(1) West Virginia's coal severance taxes are substantially similar to coal severance taxes that have been found to be constitutional by the United States Supreme Court;

(2) West Virginia's coal severance taxes do not discriminate against coal exports;

(3) West Virginia's coal severance taxes do not offend the policies that the Supreme Court has said underlie the Import-Export Clause;

(4) West Virginia's coal severance taxes provide crucial revenue to the State that fairly reflects the costs to the State associated with coal production;

(5) No court in America has held that coal severance taxes like West Virginia's offend the Import-Export Clause;

(6) The specific tax-related activity that the appellants contend most clearly implicates the Import-Export Clause – the initial loading of coal at coal preparation facilities into rail cars – is not clearly a part of the export transit process. Moreover, this initial loading process comprises a *de minimis* portion of the value of the coal that is included in the

[12](...continued)
processed by the appellants is hardly "merely passing through" West Virginia – unless we are dealing with a geologic and not human time frame.

calculation of some of West Virginia's severance taxes. Nor is the severed coal "merely in transit" through West Virginia; and, lastly,

(7) The standard of review applicable to the coal severance taxes in question in the instant case requires us to affirm the taxes as constitutional unless it appears beyond doubt that they offend the *United States Constitution*.

Numerous *amici*, including State, county, and municipal bodies, have filed briefs documenting the beneficial uses of the tax revenue at issue in the instant case. We need not detail their undisputed submissions that establish the great magnitude of importance attendant to our resolution of the issues in the instant case. Suffice it to say that the coal production severance taxes at issue in this case fund critical environmental reclamation and public welfare programs. Many of these programs are directly related to the effects of coal mining.

To uphold the refunds requested by the appellants and the resulting prospective loss of coal production severance tax revenue would be – again undisputedly – a body blow to the welfare and public fisc of West Virginia and her citizens.

If the severance taxes in question are clearly unconstitutional, they must of course be invalidated, without regard to the fiscal effect of such a ruling.

But for this Court to overrule the studied decision of the West Virginia Legislature to impose certain taxes – to deny the people of the State the benefit of laws enacted by their representatives and of crucial revenue – a strong and clear showing of the taxes' invalidity would be necessary.

No such showing has been made.

In consideration of the foregoing points and applying the proper standard of review, we conclude that the coal severance taxes in question pass constitutional muster.

We hold, therefore, that the coal production severance taxes contained in current and earlier versions of *W.Va. Code,* 11-12B-3 [2000]; 11-13A-3 [2002]; 11-13A-6 [1997]; 22-3-11[2005]; and 22-3-32 [1994] do not offend the Import-Export Clause of the *United States Constitution*, art. I, sec. 10, cl. 2.[13]

The judgment of the Circuit Court of Kanawha County is affirmed.

Affirmed.

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[13]Additionally, if any of the coal production severance taxes set forth in current and earlier versions of *W.Va. Code,* 11-12B-3 [2000]; 11-13A-3 [2002]; 11-13A-6 [1997]; 22-3-1 [2005]; and 22-3-32 [1994] is determined by the United States Supreme Court or other court of competent and final jurisdiction to offend the Import-Export Clause of the *United States Constitution*, art. I, sec. 10, cl. 2., because the tax is based to any degree on coal loading or other activities that are determined to constitute a portion of the "export transit" process, the least intrusive and proper remedy under West Virginia law would be to sever and find invalid and refundable only that portion of the tax that is fairly attributable to the export transit process – and not to invalidate the entire severance tax due. *Compare W.Va. Code*, 2-2-10(cc) [1989] (statutory provisions that are unconstitutional may be severed); *See In re Dostert*, 174 W.Va. 258, 269, 324 S.E.2d 402, 412 (1984) ("These statutory provisions are codifications of basic constitutional statutory construction severability law.").