No. 32528 **<u>U. S. Steel Mining Company, LLC, et al. v. The Honorable Virgil Helton West Virginia State Tax Commission</u>**

FILED
January 4, 2006
released at 10:00 a.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, J., concurring, in part and dissenting, in part:

I agree with the conclusions of the majority decision, albeit for different reasons, that the majority of coal-related taxes[1] at issue do not violate the Import-Export Clause of the United States Constitution. I do not agree that all taxes at issue, as applied, are constitutional. Specifically, I conclude that, pursuant to *Richfield Oil Corporation v. State Board of Equalization*, 329 U.S. 69, 67 S.Ct. 156, 91 L.Ed. 80 (1946), two specific coal-related taxes found in W. Va. Code §§ 11-13A-1 *et seq.*,[2] as applied, violate the Import-Export Clause. I am further of the opinion that, pursuant to *Hope Natural Gas Co.*, 102 W. Va. 272, 135 S.E. 582, (1926), *aff'd.* 274 U.S. 284, 47 S.Ct. 639, 71 L.Ed. 1049 (1927), the scope of these two taxes may be restrained to remove that part of each such tax's application which constitute a violation of the Import-Export Clause.

---

[1]The taxes which I conclude do not violate the Import-Export Clause are the Minimum Severance Tax Act (W. Va. Code § 11-12B-1, *et seq.*), the Surface Coal Mining and Reclamation Act (W. Va. Code § 22-3-11), and the Special Tax on Coal Production for the Mining and Reclamation Operations Fund (W. Va. Code § 22-3-32).

[2]These "Section 13A" taxes are the Basic Severance Tax (W. Va. Code § 11-13A-3) and the Additional Severance Tax on Coal (W. Va. Code § 11-13A-6(a)). These "Section 13A" taxes derive from the Severance and Business Privilege Tax Act of 1993 (W. Va. Code §§ 11-13A-1, *et seq.*).

A. State Taxes Relating to Coal at Issue

A tax by any other name is still a tax. To refer to all taxes at issue in this appeal simply as "severance" taxes suggests erroneously that the only activity which creates tax liability is the removal of coal from the earth of this State.[3] Other activities also create liability for some of the taxes, such as treatment processes and the loading of coal for shipment. The primary issue before this Court is therefore not the name which the State wishes to attach to the taxes it seeks to collect, but whether such taxes, *by their operation and effect*, violate the Import-Export Clause of the United States Constitution. *See Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 84, 67 S.Ct. 156, 164, 91 L.Ed. 80 (1946).

Here, I believe the taxes at issue are more properly termed "privilege" taxes which result in taxes being assessed on a tonnage basis or an "*ad valorem*" taxes based upon a percentage of the value added to coal by certain activities engaged in by appellants. It is this operation and effect of these specific coal-related taxes at issue in this appeal which is

[3]Appellee suggested strongly at argument that a proper reason for the taxes at issue in this litigation is the desire for the State to be compensated in some manner or to otherwise receive "severance" tax proceeds for the permanent removal of a natural resource from the state. I find this argument misleading since West Virginia may apply such "severance" taxes whether the coal is mined in West Virginia *or some other state*. 110 W. Va. C.S.R. §13A-2a.5.2. While this argument may have some political appeal, it is ultimately irrelevant, in my opinion, to the outcome of this appeal. The issue before this Court is not the name which the State wishes to attach to a tax it seeks to collect, but whether that tax, *by its operation*, violates the Import-Export Clause of the United States Constitution.

determinative to the propriety of such taxes. Therefore, I disagree with the majority decision's lack of a specific delineation and consideration of the operation and effect of the coal-related taxes at issue. It is this consideration of the operation and effect of each such tax which, I believe, is crucial to the determination of the effect of the binding precedent applicable to the Import-Export Clause questions on this appeal.

1. Non-"Section 13A Taxes"

There are two[4] coal-related taxes identified by appellants in their brief at issue on this appeal which I believe do not violate the Import-Export Clause. These taxes are a tax under the "Minimum Severance Tax Act" found at W. Va. Code § 11-12B-3(a), and a special tax on coal production under the Surface Mining and Reclamation Act for the Mining and Reclamation Operations Fund found at W. Va. Code § 22-3-32. Both taxes are similar with

---

[4]An additional tax under the Surface Coal Mining and Reclamation Act for the Special Reclamation Fund, found at W. Va. Code § 22-3-11(h) is not specified by appellants as being at issue on this appeal. As noted by the Tax Commissioner in his brief, there is some confusion whether appellants are contesting this tax because appellants seemed to implicate this tax in appellants' arguments in the administrative proceeding below. Neither the administrative decision nor Judge Kaufman's decision below reference this tax as being in dispute. Whatever confusion existed below, this tax is not manifestly different in its operation from the other delineated non-"Section 13A" considered herein.

Yet another "severance" tax is the Additional Tax on the Privilege of Severing Coal under the Workers' Compensation Debt Reduction Act, found at W. Va. Code § 11-13V-4(a). This tax did not become effective until November 1, 2005. Appellants have not listed this tax as being in dispute on this appeal.

respect to the activities taxed and the measures by which the taxes are imposed. It is these similarities which distinguish these two taxes from the "Section 13A taxes" which I find problematic under the Import-Export Clause.

These two non-"Section 13A taxes" tax the privilege of "severing, extracting, reducing to possession or producing coal for sale, profit or commercial use" and measure the taxes in terms of specified "cents per ton of coal produced . . . for sale, profit or commercial use." W. Va. Code § 11-12B-3(a), § 22-3-32. Thus, these are tonnage taxes, not "*ad valorem*" value taxes.

The principal differences between these taxes and the "Section 13A taxes" are that these taxes do not tax activities beyond the production of the coal and that they measure the taxes in terms of "cents per ton of coal produced . . . for sale, profit or commercial use." *Id*. I do not find that their application offends the Import-Export Clause of the United States Constitution.[5]

---

[5]While one might argue whether the term "producing" extends a taxable incident or activity into the stream of export, and thus subject to a *Richfield Oil* condemnation, I do not believe that is possible because of the statutory definition of production. Support for this conclusion is found in this Court's decision in *Gilbert Imported Hardwoods, Inc. v. Dailey*, 167 W. Va. 587, 280 S.E.2d 260 (1981). The issue in *Gilbert* was "whether the processing of raw coal through Gilbert's tipples was part of the 'business of severing, extracting, reducing to possession and producing for sale, profit or commercial use [coal]" under the State's then Business and Occupation Tax. *Id.* at 595, at 265. This Court ruled that "[t]he production of coal, for the purposes [of the language just quoted] ends when the coal is (continued...)

2. "Section 13A Taxes"

As with the non-"Section 13A taxes" related to coal, the "Section 13A taxes" at issue on this appeal are privilege taxes; that is, taxes upon the privilege of engaging in certain specified activities. Although denominated as taxes upon privileges, the taxes are in operation and effect upon the activities specified as privileges. Their calculation is based upon a percentage of the value of the coal enhanced by such activities.

The "Section 13A taxes" at issue arise under the Severance and Business Privilege Tax Act of 1993. Specifically, as delineated by appellants in their brief, there is a "basic severance tax" found at W. Va. Code § 11-13A-3(a), (b) and (f), and an "additional severance tax", found at W. Va. Code § 11-13A-6(a).[6] In language similar to that used by

---

[5](...continued)
reduced to possession on the surface." *Id*. at 596, at 266. Accordingly, I am of the opinion that none of the activities taxed by the coal production/tonnage taxes extends to coal in the export stream, which is well beyond the time when production ends. *Consolidation Coal Company v. United States,* 64 Fed. Cl. 718 (2005), an Export, not an Import-Export, Clause case is not to the contrary. There the federal reclamation fee exaction fell upon "coal produced". "Produced" had a more expansive meaning in that context than it does with respect to the non-"Section 13A taxes" relating to coal at issue herein

[6]Not referenced by appellants in their brief as a tax at issue on this appeal is a tax upon the extraction and recovery of coal from a refuse pile, a gob pile or from other waste sources and the subsequent processing, washing and preparation thereof to produce coal for sale, profit or commercial use under the Severance and Business Privileges Tax Act of 1993, found at W. Va. Code § 11-13A-3e. Apparently, none of the coal exported by appellants was extracted or recovered from a refuse, gob pile, or other waste source.

the non-“Section 13A taxes”, the Section 13A “basic severance tax” imposes a coal tax on “severing, extracting, reducing to possession and producing for sale, profit or commercial use” activities. The Section 13A “additional severance tax” uses slightly different language, specifying the activities it taxes as “severing coal, or preparing coal (or both severing and preparing coal) for sale, profit or commercial use.” Whether there is a substantive difference in this language is not readily apparent.

Unlike the non-“Section 13A taxes”, both the basic and additional severance taxes under Section 13A also tax “[t]he following treatment processes (and the treatment processes necessary or incidental thereto) when applied by the mine owner or operator to [coal] mined in this state[:] . . . Cleaning, breaking, sizing, dust allaying, treating to prevent freezing and loading [of coal] for shipment.” W. Va. Code § 11-13A-4(a). Also unlike the non-“Section 13A taxes” which are tonnage taxes, the tax imposed by the “Section 13A taxes” is a value tax derived from a percentage of the ultimate sale of the coal by the producer. The Section 13A basic tax imposes tax in terms of a specified percentage “of the gross value”[7] as shown

---

[7]“Gross value” is defined in W. Va. Code 11-13A-2(c)(6) as “the market value of the [coal], in the immediate vicinity where severed, determined after application of post production processes generally applied by the industry to obtain commercially marketable or usable [coal].” “For [coal], ‘gross value’ is to be reported as follows: (A) For [coal] severed or processed (or both severed and processed) and sold during a reporting period, gross value is the gross proceeds received or receivable by the taxpayer.” W. Va. Code 11-13A-2(c)(6). There follows subparagraphs (B) through (F) of paragraph (6) of subsection (c) of W. Va. Code 11-13A-2 which describe how “gross value” is to be reported in a variety of situations. Subparagraph (c), for example, provides that ‘[i]n the absence of a sale, gross
(continued...)

by the gross income derived from the sale of the coal. The Section 13A supplemental tax imposes tax in terms of a percentage of the "value"[8] of the coal severed and/or "prepared"[9] as shown by the gross "proceeds"[10] derived from the sale of the coal.

Accordingly, the principal differences between the coal-related taxes at issue on this appeal are that the non-"Section 13A taxes" do not tax activities beyond the production of the coal and that such taxes are tonnage taxes. The "Section 13A taxes" tax activities beyond the production of the coal, including the loading of the coal for shipment, and measure the tax in terms of a percentage of the value or gross value of the coal as shown by the gross income or gross proceeds derived by the sale of the coal. As such, the tax fixed by the

---

[7](...continued)
value shall be the fair market value for [coal] of similar grade and quality." Note that the statutory definition of "gross value" in declaring how "gross value" is to be reported when the coal is sold states that "gross value is the gross proceeds received or receivable by the taxpayer." "Gross proceeds" as used in the foregoing definition is defined in W. Va. Code 11-13A-2(b)(5) as meaning "the value, whether in money or other property, actually proceeding from the sale or lease of tangible personal property . . . without any deduction for the cost of property sold or leased or expenses of any kind." In W. Va. Code 11-13A-3(a), the Legislature has declared that "the gross value of the [coal] produced [is] as shown by the gross income derived from the sale [of the coal] by the producer." "Gross income", unlike "gross proceeds", is not statutorily defined.

[8]"Gross value" is statutorily defined. "Value" is not.

[9]The additional tax uses the term "prepared" rather than "processed" as used by the basic tax.

[10]The basic tax uses the term "gross income."

"Section 13A taxes" include a component of enhanced value of the coal derived by the activity of the producer loading coal for shipment.

B. The Import-Export Clause

It is perhaps understandable that fair minds would disagree on the outcome of a case such as this. The law applicable to the issues raised in this appeal are by no means subject to a simple application of non-divergent case-law. Indeed, one might understandably hope that the United States Supreme Court would take the opportunity to bring a new clarity to this area of constitutional law in the near future.

It is, I believe, fundamental to our consideration of the issues raised on appeal that this Court embrace and enforce that precedent of the United States Supreme Court which best protects the rights and provisions set forth in the United States Constitution. I do not believe that applicable precedent should be ignored or minimized because another line of cases is more to a court's liking. In *Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989), the United States Supreme Court admonished lower courts that "[i]f [its] precedent has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [the lower court] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." 490 U.S. at 484, 109 S.Ct. at 1921-22, 104 L.Ed.2d at 526.

The loading of coal for shipment is, like the severance of coal, a taxable activity under the “Section 13A taxes.” W. Va. Code § 11-13A-4(a). For appellant’s coal which is irretrievably destined for a foreign market and which is taxed under the provisions of the “Section 13A taxes”, the loading of the coal for final transportation, with its concomitant irrevocable commitment of the coal to the foreign market, results in the latest passage of title and completion of the sale.[11] The “Section 13A taxes” set the amount of tax to be payed as a percentage of the gross value of the coal as determined by the sale price of the coal. Necessarily included within this sale price is a component of enhanced value added by the loading of the coal for final shipment. Therefore, it is readily apparent that the tax is set by the value of coal dedicated for a foreign market after that coal’s value has been enhanced by the loading activity in apparent violation of the Import-Export Clause.[12]

---

[11]One may argue that this irrevocable commitment of the coal to the foreign market might take place earlier in time, such as when the coal arrives at the final port of shipping. Contrary to the position that the moment when the coal becomes an export is difficult to ascertain, I disagree. The coal enters the export stream of commerce the moment it is segregated from domestic coal and is irretrievably committed to the foreign market. That may occur as early as the removal of the coal from the coal pile during final loading, and certainly occurs no later that the coal reaching a coal car destined for a foreign market.

[12]Although the Tax Commissioner now disavows legal reasoning he employed in his earlier administrative decision and in his response to the petition for appeal in the circuit court, he therein conceded that (1) immediately following the processing of the coal, it is immediately placed in the export stream to foreign customers, (2) “[t]axpayer’s coal enters the export stream when it is placed onto rail cars at the [mine]”, and (3) “liability for the taxes in question accrues under the statutory law, at the time of sale, in these cases, which is after the coal has entered the continuous stream of export to foreign customers.”

Recognizing our obligation to precedent, I believe that we must abide by the United States Supreme Court's interpretation of the Import-Export Clause as set forth in *Richfield Oil*. I therefore disagree with the majority of my colleagues and believe that *Richfield Oil*'s "stream-of-export" rule, rather than, as they believe, the policy rule[13] set forth in *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976) and *Department of Revenue v. Association of Washington Stevedoring Corp.*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978), provides the precedent that should control the judicial outcome of the issues raised on this appeal.

My problem with the majority opinion is that it seems to presume that *Richfield Oil*'s "stream-of-export" rule has been overruled or disregarded by the United States Supreme Court in favor of *Michelin*'s policy rule with respect to taxes, as here, on goods or products

[13]The *Michelin* approach or analysis examined whether the tax exaction offended any of the policy considerations leading to the presence of the Import-Export Clause:

> The Framers of the Constitution thus sought to alleviate three main concerns . . .: 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 States; 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 285-286, 96 S.Ct. at 540-541. (footnotes omitted.)

in the stream of export. The majority opinion asserts that the Supreme Court "took a sharp turn" in *Michelin*. Sharp or not, the turn has *not* been applied to state taxes on exports in transit.

The Supreme Court acknowledged in *Washington Stevedoring* that it did not reach in that case "the question of the applicability of the *Michelin* approach when a State directly taxes imports or exports in transit . . . As in *Michelin*, decided less than three years ago, we prefer to defer decision until a case with pertinent facts is presented. At that time, with full argument, the issue with all its ramifications may be decided." 435 U.S. at 757, n. 23, 98 S.Ct. at 1403. Indeed, in the more recent case of *United States v. International Business Machine Corp, ["I.B.M."]*, 517 U.S. 843, 116 S.Ct. 1793, 135 L.Ed.2d 124 (1996), the United States Supreme Court stated that "contrary to the Government's contention, this Court's Import-Export Clause cases have not upheld the validity of generally applicable, nondiscriminatory taxes that fall on imports or exports in transit." 517 U.S. at 862, 116 S.Ct. at 1804.[14]

With respect to taxes on the value of goods or products in the stream of export, as I believe the "Section 13A taxes" are, I therefore respectfully disagree with the reasoning of

[14]Accordingly, it is incorrect to cite *I.B.M.* for the proposition that the Import-Export Clause does not prohibit states from imposing "generally applicable, nondiscrimatory taxes even if those taxes fall on . . . exports." That was the Government's argument in *I.B.M.*, which the Supreme Court rejected. 517 U.S. at 852, 862, 116 S.Ct. at 1799, 1804.

the majority opinion and conclude that, in the words of the Supreme Court in *Rodriquez de Quijas*, the precedent which "directly controls" the issues raised in this appeal is *Richfield Oil*.

1. *Richfield Oil*

Distilled to its essence, the Import-Export Clause of the United States Constitution prohibits states from "lay[ing] any Imposts or Duties on . . . Exports . . . ." *United States Constitution*, Art. I, Sec. 10, Cl. 2. For purposes of a *Richfield Oil* analysis, I believe the taxes questioned in this appeal are "Imposts or Duties." 329 U.S. at 76, 67 S. Ct. at 160. Implicit in any consideration of the Import-Export Clause are two basic questions: (1) when is a product an "export"?, and (2) when is there a tax on such an export? *Richfield Oil* addresses both questions in the context of the facts of that case. Those answers are, I believe, determinative of the resolution of the issues in this appeal.

In *Richfield Oil* the Supreme Court was concerned with when the "exportation" or "movement [of a product] abroad" began. The commencement thereof of the product for the foreign market makes the product an export. In *Richfield Oil*, the Court held that oil, the product at issue in that case, became an "export" at the time it was delivered into the hold of a sea-going vessel, at which time it passed into the control of a foreign customer, there being no probability that the oil would thereafter be diverted to domestic use. 329 U.S. at 83, 67 S.Ct. at 164.

In *Richfield Oil*, California had assessed a retail sales tax against the seller/deliverer of the oil measured by the gross receipts from the transaction. The seller protested and sought a refund claiming that the levy of the tax violated the Import-Export Clause. As interpreted by the California Supreme Court, the California tax was described as an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales. It was not a tax on the sale or because of the sale. While the United States Supreme Court in *Richfield Oil* said that it was bound by the California court's construction, being a matter of state law, the Supreme Court found that that determination was not determinative of the question of whether the tax deprived the taxpayer of a federal right, stating "[t]hat issue turns not on the characterization which the state has given the tax, but on **its operation and effect**". 329 U.S. at 84, 67 S.Ct. at 164. (Emphasis added.)

The Supreme Court then made much of a concession by the California court, namely, "that the delivery of the oil 'resulted in the passage of title and the completion of the sale, and the **taxable incident'".** *Id.* (Emphasis added.) The Supreme Court's holding that the California tax was unconstitutional under the Import-Export Clause was based, in my opinion, on its conclusion that "**[t]he incident which gave rise to the accrual of the tax was a step in the export process".** *Id.* (Emphasis added.)

The highlighted phrases are, I believe, of importance to navigating the issues in the case on appeal. These phrases, "**operation and effect," "taxable incident," "incident,"** and **"accrual",** require some consideration. The Supreme Court did not accept the California court's view that the activity or incident taxed by that state's excise tax was the conducting of a retail business and that the gross receipts from sales were only the measure of the tax. Rather, the Court ruled that the "**operation and effect**" of the tax was that it was a tax on the sale of the oil. In other words, the tax *was* a sales tax, as the California court implicitly conceded in describing the completion of the sale as the "**taxable incident".** When the Supreme Court said that "**[t]he incident which gave rise to the accrual of the tax was a step in the export process",** the **"incident"** was the sale itself. The gross receipts from the sale was the measure of the tax on the sale itself and not the measure of the tax on the conducting of a retail business because the conducting of a retail business was not a **"taxable incident"**. In using the phrase, "**[t]he [taxable] incident which gave rise to the accrual of the tax"**, the Supreme Court determined that the sale was "**[t]he [taxable] incident**" which created the liability for the California tax.[15] *Id.* at 84-85, at 164-65

Accordingly, I am of the opinion that *Richfield Oil* stands for the proposition that a coal-related tax is a tax on an export only if (1) an incident or activity involving the coal is taxed

[15]"Accrue" in the context of law is commonly understood as meaning "to become a present and enforceable right or demand." The Random House Dictionary of the English Language, The Unabridged Edition (1996).

simultaneously with, or subsequent to, the commencement of exportation, and (2) that incident or activity contributes or relates to the value of the coal which determines the amount of the tax liability. I do not believe such a coal-related tax would be a tax on an export if the activities or incidents involving coal occurred prior to the commencement of exportation even though the measure of the taxes on such prior activities may not be ascertainable until after the commencement of the exportation. *Accord*, *Washington Stevedoring*.

2. <u>The "Section 13A Taxes" and The Import-Export Clause</u>

At the latest, I believe that the loading of appellant's coal onto a unit train, like the delivery of the oil into the vessel's hold in *Richfield Oil,* marked the commencement of the movement abroad and made the coal an "export". Loading commenced when the coal which was dedicated for a foreign delivery was segregated from domestic coal and ended not with the coal falling into the rail car, as some have contended, but when the coal was on the floor of the rail cars. "Loading" included the filling of the cars. If that were not so, it would be inappropriate to speak of a loaded rail car or a loaded vessel.

This act which made appellants' coal an "export" was also a "taxable incident" under the Severance and Business Privilege Tax Act of 1993. W. Va. Code §§ 11-13A-3(a), 4(a), and 6(a). The tax on that incident was determined in the appellants' case by the coal's gross value as shown by the gross income derived from the sale. This gross value/gross income included a component of value or income attributable to the loading of the coal, a taxable incident that, in the words of *Richfield Oil*, was “a step in the export process”. Since appellants engaged in a taxable activity that made the coal an export and thereby incurred an added measure of tax liability because of the export incident, the tax in operation and effect was, in my opinion, on the export itself.

The Supreme Court in the *Washington Stevedoring* case was careful to point out that the Washington tax on stevedoring did not “relate[] to the *value* of the goods” and fell “upon a service distinct from the goods and *their value*”, and, as a consequence , the tax could not “be considered taxation upon the goods themselves”. 435 U.S. at 757 98 S.Ct. at 1403. (Emphasis added.) In this case, the tax on the loading of the coal related to, and fell upon, that part of the value of the coal that was attributable to the loading thereof. Accordingly, the tax became a tax upon the export itself.[16]

I conclude, therefore, that the application of West Virginia’s “Section 13A taxes” herein offends the Import-Export Clause of the United States Constitution to the extent that such taxes are calculated based upon the value added to the coal by its loading, since the coal was then in

[16]Conversely, the entire tax paid by appellants for non-“Section 13A taxes” related to value of the coal that was based entirely upon pre-export taxable activities, and therefore did not offend the Import-Export Clause.

the export-stream of commerce.[17] Taxes calculated based upon activities which occur prior to the coal's entry into the export stream do not violate the Import-Export Clause.

C. Limitation of the Operation of the "Section 13A Taxes"

In deference to *Richfield Oil* and on the basis of this Court's precedent in *Hope Natural Gas*, I would restrain the activities taxed under W. Va. Code §§ 11-13A-1, *et seq.*, within narrower limits than the words of those Code sections express on the ground that the Legislature did not intend to violate any provision of the United States Constitution. I would accomplish the restraint by deleting from the two "Section 13A taxes" the loading of coal onto a unit train for export shipment as a taxable activity, and by requiring the Tax Commissioner for tax computation purposes in this case to subtract the contribution which such loading made to the gross value/gross proceeds of the coal sold by the appellants to foreign customers.[18]

---

[17]*Commonwealth Edison v. Montana*, 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed. 2d 884 (1981), a commerce clause case, in not relevant. There, the activity taxed was limited to the severance of each ton of coal mined with the tax liability measured by a percentage of the contract sales price. If anything, *Commonwealth Edison* supports my opinion respecting the non-"Section 13A taxes." It is also not contrary to my opinion on the "Section 13A taxes." Montana did not tax the loading of the coal for shipment.

[18]The severability clause contained in W. Va. Code § 11-13A-21 provides further support for the conclusion that the Legislature intended this Court to restrain the activities taxed under the Severance and Business Privilege Tax Act of 1993 to those which do not offend the United States Constitution. Therein, the Legislature provided:

> If any provision of this article or the application thereof shall for

(continued...)

I find this Court's reasoning in *Hope Natural Gas* to be relevant to the issues in this case. In *Hope Natural Gas*, the tax in question was one that taxed "every person engaging or continuing within this state in the business of mining and producing for sale, profit, or use, any coal, oil, natural gas, limestone, sand or other mineral product, or felling timber for sale, profit, or use." 102 W. Va. at 275, 135 S.E. at 583. The amount of the tax was "equal to the value of the articles produced as shown by the gross proceeds derived from the sale thereof by the producer . . . multiplied [by certain specified rates]." *Id.* In the case of natural gas, the rate was "one and seventeen-twentieths of one percent." *Id.*

Hope contended, among other things, that the tax as applied to its natural gas that was transported through its pipe line system and sold to customers in Ohio and Pennsylvania violated the Commerce Clause of the United States Constitution. The Tax Commissioner contended that "there is no tax on the sale of the transportation of the gas or on the proceeds from the sale thereof." 102 W. Va. at 279, 135 S.E. at 584. Rather, "the gross sales price is

[18](...continued)

> any reason be adjudged by any court of competent jursidiction to be invalid, such judgment shall not affect, impair or invalidate the remainder of said article, but shall be confined in its operation to the provision thereof directly involved in the controversy in which such judgement shall have been rendered, and the applicability of such provisions to other persons or circumstances shall not be affected thereby.

W. Va. Code § 11-13A-21.

simply the taxable measure of the commodity." *Id.* Hope, on the other hand, contended that the tax act evidenced a plain intention to tax the gross proceeds of sales in interstate commerce.

This Court held "that the [Tax Commissioner] may not treat the gross proceeds of plaintiff's sales outside the state as the worth of the gas within the state, but that [the Tax Commissioner] enforce the act upon the value thereof within the state and before it enters interstate commerce."[19] 102 W. Va. at 284, 135 S.E. at 586. In so-holding, this Court observed:

> There is a presumption, however, that the Legislature did not intend to violate any provisions of the federal constitution. In fact, it has been declared our duty to "restrain the operation of the statute within narrower limits than its words import" when satisfied that a literal interpretation will include cases not intended by the Legislature. **Consequently, we are warranted in presuming that the Legislature did not mean to include, as an element of value, so much of the gross proceeds of the sale of an article in interstate commerce as is represented by the cost of transportation, and we restrain the operation of the statute accordingly.**

---

[19]*Hope Natural Gas,* a commerce clause case, involved incidents of a tax and a measure of the tax which were essentially the same as the "Section 13A taxes" except for the processing and loading activities. In *Hope Natural Gas,* the transportation of the natural gas while in interstate commerce added to the gross proceeds. In such case, were the product in exportation, the gross receipts for tax purposes could not include the value added by transportation and would have to be limited for tax purposes to the value of the product before becoming part of the export stream.

102 W. Va. at 276, 135 S.E. at 583 (internal citations omitted). (Emphasis added.)[20]

Except for this limited restraint on the operation of the "Section 13A taxes" and resulting subtraction by the Tax Commissioner, I would deny the remainder of Import-Export challenges by appellants based upon *Richfield Oil*. I would order the Tax Commissioner to return to the appellants only that amount of "Section 13A taxes" which were derived from the contribution which the loading for final export made to the gross value/gross proceeds of the coal sold by the appellants to foreign customers.

[20]Significantly, the United States Supreme Court, in affirming the *Hope Natural Gas* decision, noted that this Court "indicat[ed] very definite purpose to follow rulings here" and that "[t]he plain result of [this Court's] opinion and final decree is to require that the tax be computed upon the value of the gas at the well, and not otherwise." 274 U.S. at 286, 288, 47 S.Ct. at 640.