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 v. The Honorable Virgil Helton, West Virginia State Tax Commissioner*

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OF WEST VIRGINIA

Albright, Chief Justice, concurring:

I write separately to make several points.

I commend the majority and concurring opinions for their careful, scholarly, and principled analysis of a difficult issue. All of the members of this Court have acknowledged that drawing appropriate and principled decisional lines in this area of law is not an easy task; and these opinions have done so.

It is appropriate to emphasize that the State of West Virginia, through our courts, our executive branch and our legislative branch, has a strong historic and present basis for appropriate regulation of our coal industry for the protection of our land and people and to promote the well-being of this industry which is a major factor in our state's economy. Likewise, the state has good reason to fairly tax the privilege of removing its nonrenewable natural resources from the ground, giving attention to the economic benefit gained by their owners, to the substantial social costs incurred by our people and our state in the process, and to the need to support an economic and social infrastructure in which the extractive industries can profitably operate.

I disagree strongly with the suggestion in the partially concurring and partially dissenting opinion by Justice Benjamin, at footnote 11, that a workable test for "in export transit" is whether there has been an "irrevocable commitment" of goods to the foreign market. The problem with this "test" is that (as Justice Benjamin's separate opinion acknowledges), any number of various events might be classified as such an "irrevocable commitment." For example, a mine might be opened with export coal production as its sole purpose, just as mines have been opened solely or primarily to serve nearby electric generating facilities. Under the suggested test, every ton leaving the coal face of such a mine could be said to be "in export transit" from the moment of its separation at the face. In that situation, all severance taxation could be said to be constitutionally precluded.[1]

Our Legislature drew on its extensive experience with the coal industry in crafting severance taxes on coal mining. The lines the Legislature has drawn do not unconstitutionally stray into the area of taxation of goods that are merely in export transit.

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[1]Coal mining and production methods can vary substantially, with loading, blending, cleaning, and re-loading occurring in difference sequences. Recognizing this situation, West Virginia tax statutes and regulations, as interpreted in *Kanawha Eagle Coal, LLC v. Tax Commissioner*, 216 W.Va. 616, 609 S.E.2d 877 (2004), draw a bright-line distinction at the completion of initial coal loading; which also, in the case of exports, corresponds to the logical beginning of an "in export transit" process.

In fact, they are evenly applied to coal that may only move in-state, move in other domestic commerce or move in foreign commerce. They are specifically tailored to avoid taxation of any transit costs and to provide convenience to the affected taxpayers in the calculation and payment of the taxes at issue in this case.

The Legislature's decision to base the tax on the selling price of the coal, less actual transportation costs, has been criticized on the ground that it seeks to tax "value added" after the coal has been severed from the ground. I respectfully suggest that the "value added" argument is just plan erroneous. The long experience of the State of West Virginia in ascertaining the "value" of coal has taught our state that there is no easy "litmus test" of "value."

By way of example, a thick seam or a thin seam of coal may yield a product of high or low heat value, with little or very high contaminants, slate, rock, methane or other material mixed in. Calculation of "value" by weight (by ton) or by acreage prior to removal can yield wildly divergent results, at substantial variance from the true "value" of the coal. Thus, accurately measuring the "value" of the natural resource wealth being removed from the ground in the exercise of the privilege of mining coal must be seen as a difficult task. I would point out that the method chosen by the Legislature – essentially the sale price of the coal less any transportation cost – is as fair and accurate a measure as can be devised. In any event, calculation of the tax, based on “value” as defined by the Legislature, especially at the relatively low rate specified by the law in comparison to rates imposed in other jurisdictions, yields an eminently reasonable exercise of the state’s taxing power. The further concession by the Legislature that the tax need not be calculated and paid before a sale is had constitutes an act of grace to the taxpayer and is a reasonable concession to the mining industry. This mechanism avoids imposing the tax before there is an ability to pay and likewise avoids such devices as paying “estimates” when the coal is shipped, subject to later adjustments when a “real value” is finally determined by the actual sale in the marketplace and the actual transportation costs are determined for deduction from the sale price.

Justice Benjamin’s partially concurring and partially dissenting opinion disapproves of any tax on the “value added” by the coal loading process in the instant case. But the only “value added” in the loading of coal onto a rail car is the relatively minimal cost of the mechanical act of scooping up and dumping the coal into the car. A tax on the cost of “loading” is precisely what was approved in *Washington Department of Revenue v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 758 (1978). In any event, the revenue gained by this portion of West Virginia’s severance tax must be recognized as being *de minimis* and incurred in some manner in every case, whether the coal is to be delivered in-state, in domestic commerce or in foreign commerce.

Finally, the majority opinion gives full deference to the fact that the *Richfield Oil* test has not been explicitly overruled. The opinion notes that the future viability of such a mechanistic test has been called into question by *Michelin Tire Corporation v. Wages, Inc.*, 423 U.S. 276 (1976). Therefore, the majority of this Court properly also looked to the *Michelin* approach, which all agree is supportive of the taxes in question.

Accordingly, I concur.