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

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

Maynard, Justice, dissenting:

It is crystal clear to me that at least two of the taxes at issue in this case, the basic severance tax in W.Va. Code § 11-13A-3 and the additional severance tax on coal in W.Va. Code § 11-13A-6(a), are unconstitutional under the federal Import-Export Clause as interpreted by the Supreme Court in *Richfield Oil Corp. v. State Board of Equalization,* 329 U.S. 69, 67 S.Ct. 156, 91 L.Ed. 80 (1946).

The issue in *Richfield Oil* was the constitutionality of a California tax imposed upon an oil refinery for the sale of oil to the New Zealand government. The delivery of the oil to the purchaser by pumping the oil into the foreign purchaser's ship resulted in the passage of title and the completion of the sale which was the taxable incident. In determining that the tax was an improper impost upon an export within the meaning of the Import-Export Clause, the Supreme Court reasoned:

> Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. That delivery marked the commencement of the movement of the oil abroad. It is true, as the Supreme Court of California observed, that at the time of the delivery the vessel was in California waters and was not bound

> for its destination until it started to move from the port. But when the oil was pumped into the hold of the vessel, it passed into the control of a foreign purchaser and there was nothing equivocal in the transaction which created even a probability that the oil would be diverted to domestic use. . . .
>
> It seems clear under the decisions which we have reviewed involving Article I, Section 9, Clause 5 of the Constitution that the commencement of the export would occur no later than the delivery of the oil into the vessel.

Richfield, 329 U.S. at 82-83, 67 S.Ct. 163-164.

This straightforward analysis is clearly applicable to the instant case. The facts herein show that the processed coal moves into export transit as it is loaded onto the train through the flood load facility. From that point, the train travels to the dock where the coal from each car is dumped onto a conveyor belt which loads the coal directly into the vessel for export overseas. Significantly, once the coal is loaded onto the train, it cannot be diverted from its overseas destination. Further, there is no dispute that sale of the coal occurs no earlier than when the coal is loaded onto the railcars, and that the taxes at issue accrue at the time of sale. Thus, I believe that any fair application of the law as articulated in *Richfield Oil* to the undisputed facts mandates the conclusion that the so-called severance taxes at issue are actually taxes imposed upon an export which violate the Import-Export Clause.

The majority opinion chooses to ignore *Richfield Oil* by making the dubious

observation that "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) and *Washington Dept. of Revenue v. Assoc. of Washington Stevedoring Cos.,* 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978). I believe the majority opinion's wholesale rejection of *Richfield Oil* in favor of the *Michelin Tire/Washington Stevedoring* line of cases is improper for several reasons.

First, it is undisputed that the Supreme Court has never overruled *Richfield Oil.* Therefore, this Court should not feel free to completely reject the law set forth by the Supreme Court in that case. Second, the Supreme Court has indicated that it never intended the *Michelin/Washington Stevedoring* line of cases to supplant *Richfield.* Rather, the Court plainly has distinguished *Richfield* from *Michelin/Stevedoring.* For example, in *United States v. IBM, Corp.,* 517 U.S. 843, 116 S.Ct. 1793, 135 L.Ed.2d 124 (1996), the Court explained:

> Our holdings in *Michelin* and *Washington Stevedoring* do not . . . interpret the Import-Export Clause to permit assessment of nondiscriminatory taxes on imports and exports in transit. *Michelin* involved a tax on goods, but the goods were no longer in transit. The tax in *Washington Stevedoring* burdened imports and exports while they were still in transit, but it did not fall directly on the goods themselves. . . .
>
> The Court has never upheld a state tax assessed directly on goods in import or export transit. . . .
>
> . . . Thus, 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. We think those cases leave us free

> to follow the express textual command of the Export Clause to prohibit the application of any tax "laid on Articles exported from any State."

IBM, 329 U.S. at 861-862, 116 S.Ct. at 1803-1804 (citations omitted). Under the distinction made by the Supreme Court, because the facts in this case involve a tax on goods in transit, *Richfield Oil,* not *Michelin/Washington Stevedoring,* applies. Finally, because *Richfield Oil* remains good law and it directly controls this case, it should be followed by this Court. The Supreme Court has explained that "If a precedent of this Court 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 this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484, 109 S.Ct. 1917, 1921-22, 104 L.Ed.2d 526 (1989).

In the instant case, the majority opinion should have relied upon the law set forth in *Richfield Oil.* Application of that law to the present facts indicates that the severance taxes at issue, which are imposed on the coal after it is moved into export transit, is a tax upon an export within the meaning of the Import-Export clause and is therefore unconstitutional. Accordingly, I dissent.[1]

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[1]Because of what I consider to be the majority opinion's insufficient analysis of the constitutionality of the other taxes challenged in this case, I decline to concur with its conclusion that those taxes are constitutional.