

No. 32528

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

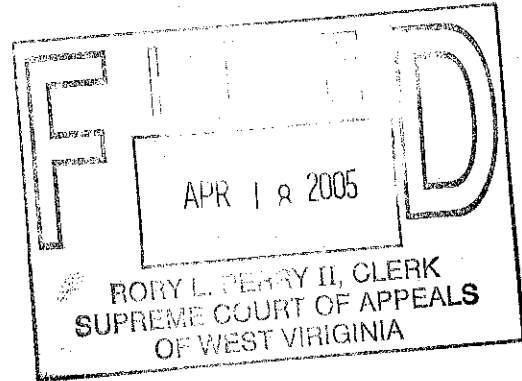
U.S. STEEL MINING COMPANY, LLC,
CONSOLIDATION COAL COMPANY,
LAUREL RUN MINING COMPANY,
McELROY COAL COMPANY,
ARCH COAL, INC.,
MID-VOL LEASING, INC.,
COASTAL COAL - WEST VIRGINIA, LLC,
ELK RUN COAL COMPANY, INC.,
PAYNTER BRANCH MINING, INC.,
KINGSTON RESOURCES, INC.,
PIONEER FUEL CORPORATION,

Appellants,

v.

THE HONORABLE VIRGIL T. HELTON,
West Virginia State Tax Commissioner,
as Successor to
REBECCA CRAIG MELTON,
West Virginia State Tax Commissioner,
Below,

Appellee.



AMICUS BRIEF OF THE WEST VIRGINIA EDUCATION ASSOCIATION

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MISCELLANEOUS

General Revenue Fund Recommended Appropriations, Fiscal Year 2006,
State Budget Office, February 9, 2005 (attached herewith as Exhibit A) 1

Tax Commissioner’s Brief 1

Now comes the West Virginia Education Association (hereinafter WVEA), by and through counsel, and respectfully submits this Amicus Brief in opposition to Appellants.

STATEMENT OF FACT

The West Virginia Education Association (WVEA) is an organization of approximately 17,000 public school employees and retired public school employees in West Virginia. The WVEA represents the interests of these members in matters related to their employment, as well as in their desire to have a positive affect upon the quality of public education in this state. Inasmuch as the vast majority of funding for salaries and benefits for these employees, as well as for the buildings and supplies provided for students, is derived from state tax dollars, the WVEA and its members have a keen interest in any case that could result in a significant reduction of the state tax base.

According to the State Tax Commissioner, the total current total of potential refund liability for this case and related cases currently pending is more than \$100 million, exclusive of interest. Depending upon the timing of final resolution before the United States Supreme Court, and upon economic conditions in the meantime, potential total refund liability could reach \$400 million. See Tax Commissioner's Brief at 2. Future annual loss of tax revenue for the state would be in the range of \$40 million to \$50 million. Id.

The State Budget Office's recommended General Revenue Fund appropriations for fiscal year 2006 indicate that 50.2% of those appropriations, some \$1,638.7 million, will go for public education, while higher education will add another 8.6%, some \$281.0 million, for a total education budget of \$1,919.7 million. See General Revenue Fund Recommended Appropriations, Fiscal Year 2006, February 9, 2005 (attached herewith as Exhibit A). As by far the largest part of coal tax severance revenues go into the General Revenue Fund, education would presumably have to bear its

proportionate 58.8% share in those lost annual general revenues. At the same time, the state's need to refund \$100 million to \$400 million in back taxes to the Appellants could catastrophically further impact school and college budgets, and with them the reasonable expectations, quality of life, and quality of education for school and college employees, school children, and their families all around the state.

The fiscal, educational, and personal impact of holding the present coal severance tax system unconstitutional bears serious contemplation.

WVEA will otherwise subscribe to the State Tax Commissioner's stated facts.

DISCUSSION OF LAW

The West Virginia Coal Severance Tax in no way intrudes upon the stream of export, and in no way infringes upon the Import-Export Clause of the United States Constitution.

Determination of the constitutionality issue in this case is not nearly so complex as Appellants would have it sound. The relevant statutes clearly and unambiguously state that the coal severance tax is imposed upon the privilege of "severing, extracting, reducing to possession and producing" coal for sale, profit or commercial use. W. Va. Code § 11-13A-3(a). This Court has previously held that the foregoing operations, up until delivery to a third party carrier at the processing plant constitute the taxable event. See Kanawha Eagle Coal, LLC v. Tax Commissioner, 609 S.E.2d 877, 877-78, 880-81 (W. Va. 2004). Determination of the gross value of the severed coal, by later weighing and sale, or other means, merely allows the measurement of tax which has already been imposed. W. Va. Code § 11-13A-3(b); 11-13A-2(c)(6). Gross value means "the market value . . . *in the immediate vicinity, where severed*, determined after application of post production processing . . ." Kanawha Eagle at 883, quoting W. Va. Code § 11-13A-2(c)(6) (italics in Kanawha Eagle).

When that loaded railcar moves away, the coal is in the process of delivery to the buyer. Somewhere further on, perhaps at the port facility, in the case of export coal, that coal will be weighed, and its market value will be determined according the sales contract. But when that coal leaves the chute at the processing plant, to fall into the third party hopper for delivery to a buyer, the taxable event is already complete. The tax is already imposed. The producer just doesn't know yet exactly how much he is going to have to pay. When that third party hopper rolls, on its way to a port to be transshipped to a foreign buyer, the coal therein may be in the stream of export, but not before.

Although the gross income derived from a subsequent sale usually is the measure by which the tax is assessed, it is not what is being taxed. The privilege of conducting the business of severing and processing for sale the coal resources of the State of West Virginia is the taxable event. Cf., City National Bank v. City of Beckley, 213 W. Va. 202, 207, 579 S.E.2d 543, 548 (2003) (a Business and Occupations Tax case, finding exactly this relationship between gross income as a tax measurement and the privilege of conducting the business of banking in Beckley as a taxable event).

Like the license tax imposed upon owners of freezer ships within her territorial waters by Alaska, in State of Alaska v. Arctic Maid, 366 U.S. 199, 81 S.Ct. 929, 6 L.Ed.2d 227 (1961) (a Commerce Clause case, in which there was factually no export issue), the West Virginia Coal Severance Tax is imposed upon those "prosecuting or attempting to prosecute" a line of business involving the natural resources of the state (there, fisheries; here, coal mining), and the business in question is the one specified in the statute, and although the tax is in both cases computed on the value of the natural resource processed, that is merely the measure of the tax, not the taxable event. See id. at 202, 931. The taxable event is, in both cases, the prosecution of the natural resource business. Id.

With regard to separation in time of tax imposition from a later tax measurement, the United States Supreme Court has long held, under due process analysis, that the fact that the taxable event and

the eventual tax levy are widely separated in time is quite irrelevant, and that there is no restriction on a state as to how long after a taxable event the tax may be levied or the property valued for purposes of such tax. Central Hanover Bank & Trust Co. v. Kelly, 319 U.S. 94, 63 S.Ct. 945, 87 L.Ed. 1282 (1943) (finding no constitutional reason why a state may not make an inter vivos transfer the taxable event and then measure the tax at the time of death).

Acts of the legislature are always presumed to be constitutional, and the Supreme Court of Appeals will interpret legislation in any reasonable way which will sustain its constitutionality. Frantz v. Palmer, 211 W. Va. 188, 193, 564 S.E.2d 398, 403 (2001); State ex rel. City of Charleston v. Coghill, 156 W. Va. 877, 883, 207 S.E.2d 113, 118 (1973). “In the construction of tax laws, we still must apply our general rules of statutory construction with a view toward upholding the legislative intent. Strict construction should not be used to defeat tax legislation that is reasonable clear in its meaning.” City National Bank, supra, at 207, 548, quoting Town of Burnsville v. Kwik-Pik, Inc., 185 W. Va. 696, 705, 408 S.E.2d 646, 654 (1991). “If there be any doubt as to the constitutionality of an act, that doubt should always be resolved in favor of the validity of the act.” Syl. Pt. 1, City of Huntington v. Chesapeake and Potomac Telephone Company, 154 W. Va. 634, 634, 177 S.E.2d 591, 593 (1970), quoting Syl. Pt. 2, State v. Furr, 101 W. Va. 178, 132 S.E. 504 (1926). Courts will in effect resolve every reasonable doubt in favor of constitutionality of an act. Cole v. Pond Fork Oil & Gas Co., 127 W. Va. 762, 770, 35 S.E.2d 25 (1945).

When a statute is clear and unambiguous and the legislative intent is plain the statute should not be interpreted by the courts, and in such a case it is the duty of the courts not to construe but to apply the statute. Mingo County Redevelopment Authority v. Green, 207 W. Va. 486, 490, 534 S.E.2d 40, 44 (2000) (and numerous cases cited therein). As we have seen above, the West Virginia Coal Severance Tax is set forth in a clear and unambiguous statutory language, and its practical operation

and effect with regard to non-impingement upon the stream of export is equally clear and is consistent with the statutory "label" applied to it, as required by City of Fairmont v. Pitrolo Pontiac-Cadillac Co., 172 W. Va. 505, 507, 308 S.E.2d 527, 529 (1983). It should simply be applied as written, withstanding all challenge under the Import-Export Clause of the United States Constitution.

Even were this Court to find sufficient ambiguity in the statutes establishing the severance tax to require construction, they clearly can be interpreted, as we have also seen above, in an eminently reasonable way which completely sustains them against constitutional challenge.

Indeed, the West Virginia Coal Severance Tax is just as clearly a true severance tax as is Montana's coal severance tax, which withstood constitutional challenge under the Commerce Clause and the Supremacy Clause before the United States Supreme Court in Commonwealth Edison Company v. Montana, 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981), and it no more infringes the Import-Export Clause than Montana law infringed the Commerce Clause in that case. WVEA will bow to the State Tax Commissioner's more thorough explication of Commonwealth Edison, but will briefly present the following from that case:

[T]here can be no question that Montana may constitutionally raise general revenue by imposing a severance tax on coal mined in the state. The entire value of the coal, before transportation, originates in the state, and mining of the coal depletes the resource base and wealth of the state, thereby diminishing a future source of taxes and economic activity. In many respects, a severance tax is like a real property tax, which has never been doubted as a legitimate means of raising revenue by the situs state (quite apart from the right of that or any other state to tax income derived from use of the property). When, as here, a general revenue tax does not discriminate against interstate commerce and is apportioned to activities occurring within the state, the state "is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly civilized society."

Commonwealth Edison, 453 U.S. at 624-25, 101 S.Ct. at 2957.

The United States Supreme Court in Commonwealth Edison further noted that most of the states raise revenue by levying a severance tax on mineral production. Id. at 625 n.13, 2957 n.13.

The West Virginia Coal Severance Tax, imposed when the coal leaves the chute at the processing plant, though valued later, in no way intrudes upon the stream of export, and in no way infringes upon the Import-Export Clause of the United States Constitution. It must be upheld.

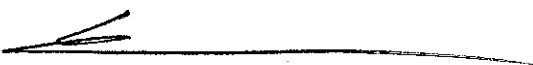
Further, any other conclusion would, as a practical matter, endanger the financial stability and welfare of the State of West Virginia, its educational system, and its people.

CONCLUSIONS

For all of the foregoing reasons, the present Appeal should be DENIED and DISMISSED with prejudice, and the Final Order of the Circuit Court affirming the State Tax Commissioner should be AFFIRMED, and the West Virginia Coal Severance Tax should be UPHeld.

Respectfully submitted this 18th day of April, 2005.

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CERTIFICATE OF SERVICE

I, Henry M. Hills, III, counsel for Amicus Curiae, West Virginia Education Association, do hereby certify that I have on this 18th day of April, 2005, served a true copy of the foregoing Amicus Brief of the West Virginia Education Association upon counsel for the parties herein by depositing same in the United States Mail, first class postage prepaid, addressed as follows:

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