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IN THE
SUPREME COURT OF VIRGINIA

Record No. 800817

COMMONWEALTH OF VIRGINIA, ex rel.,
ATTORNEY GENERAL OF VIRGINIA,

Appellant,

v.

STATE CORPORATION COMMISSION
and
BALTIMORE TANK LINES, INC.,

Appellees.

ADDENDUM TO
JOINT APPENDIX

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2 A I would say so. Our auditors, in my
3 view, have identified, and I think the attorney for the
4 Applicant is in accord with it, we have identified the
5 amount of fuel purchased in excess in Virginia and we
6 have stipulated that that fuel was used in the other
7 State.

8 Q Going back just a moment to the question
9 Commissioner Shannon asked you a moment ago, I am not
10 sure I understood the answer correctly. Perhaps I
11 didn't understand the question. I thought he asked you
12 if you had a carrier operating fifty percent of his time
13 in Virginia, fifty percent in North Carolina, all fuel
14 purchased in North Carolina --

15 COMMISSIONER SHANNON: I changed that.
16 I changed it. I said all fuel purchased in
17 Virginia, he would get half back.

18 WITNESS STUART: I answered half back.
19 But under the present law, we would not give
20 half back, because out of the fuel purchased
21 in Virginia, he would have to absorb the tax
22 differential.

23 COMMISSIONER SHANNON: There is a two
24 cent differential.

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2 copied Virginia's statute word for word.

3 Some of the states still have the same
4 wording. In my inquiries to other tax adminis-
5 trators, I hate to say this, but their adminis-
6 trative procedure varies with the demands of
7 the taxpayers.

8 In the case of North Carolina -- I
9 have enquired and they tell me that, yes, our
10 statute is still like yours, but we just have
11 to wink at it and we do not administer it that
12 way.

13 COMMISSIONER HARWOOD: Let me ask a
14 question: Aren't the laws of Maryland,
15 Pennsylvania, North Carolina, similar in effect
16 but the enforcement or interpretation of the
17 law are different?

18 WITNESS STUART: I would say so, but
19 I would also say similar in effect has never
20 been defined. It is anybody's thought as to
21 what the effect is. Does it merely mean that
22 it is taxing for the use of highway? Does it
23 mean that the same components have to go into
24 the tax as to types of vehicles? Does it mean
that some states can include water vessels in
it? Yachts or motorcycles? And still be similar

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2 in effect. We have approached the idea that
3 it has to tax the same type of vehicle and
4 operation, or person and entity, that is done
5 in Virginia.

6 COMMISSIONER HARWOOD: But the law
7 itself is similar in effect. In fact, it is
8 identical.

9 WITNESS STUART: It was at one time.
10 I am not familiar -- I think Maryland law has
11 been amended now to make compliance elective
12 to the taxpayer.

13 COMMISSIONER HARWOOD: It is a fungible.
14 It is a fungible good. It is impossible to
15 identify five gallons of diesel fuel bought at
16 South Hill, Virginia from five gallons bought
17 at Jessup, Maryland, for instance.

18 WITNESS STUART: We have attempted to
19 apply an inventory approach, which the Commission
20 directed be done in 1961 as a first in, first out.

21 COMMISSIONER HARWOOD: The FIFO
22 approach to the tank is used.

23 WITNESS STUART: It is true it is not a
24 color scheme proposition, where you have one
color in one state, and one in another.

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2 be, and I take it Mr. Wellford was standing
3 to make the same objection, because you have
4 just translated it --

5 MR. MINTER: I thought his objection
6 was on the basis of an opinion or speculation.
7 This obviously has no opinion or speculation
8 if it is based absolutely on the records of
9 this Commission.

10 COMMISSIONER BRADSHAW: I thought his
11 objection went to the effect.

12 MR. MINTER: I have not asked him about
13 the effect. I asked him of the two million
14 dollars at the end of this particular period
15 in tax credits, how many can be -- lets ask
16 him this: How many were refunded?

17 COMMISSIONER BRADSHAW: That is all right.

18 WITNESS STUART: Seven hundred and
19 fifty thousand dollars was refunded through
20 June 30, 1978, applicable to this period. I
21 have no current figures on it since I left that
22 division.

23 BY MR. MINTER (Continuing)

24 Q In the same period, then, why were not
the remaining dollars refunded. If you had two million
dollars in credits, and you refunded only seven hundred

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2 and fifty thousand.

3 A I would say the majority of it was not
4 applied for. There was no application made for the
5 excess credits.

6 Q Do you have any explanation for that?

7 A Well --

8 MR. WELLFORD: I object to that, Your
9 Honor. That is total speculation. Why a user
10 doesn't --

11 COMMISSIONER SHANNON: I think he is
12 getting into the area of speculation.

13 COMMISSIONER BRADSHAW: Let me ask a
14 question. Does that mean that the state is
15 overcollecting what is actually due?

16 WITNESS STUART: It is, sir, and they
17 have always done that.

18 COMMISSIONER BRADSHAW: Okay.

19 BY MR. MINTER (Continuing)

20 Q Let me ask you about one or two final
21 questions. Am I correct in my understanding, that in
22 this particular application, we are concerned really with
23 the operation of only two trucks operating in Virginia?

24 A I don't recall the exact number that
the auditor referred to in his memorandum.

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2 by Maryland, and we are talking about a road
3 tax imposed by Virginia. The stipulation
4 takes care of the Maryland side.

5 Then we go to the questions of credits,
6 and the credit section we are discussing here
7 talks about fuel purchases, and the tax paid
8 on fuel as a credit against the road tax. It
9 says that excess credits can be used against the
10 Virginia liability in the succeeding four quarters,
11 and then it talks about a refund. And it says that
12 if it shall appear that the Applicant has paid to
13 another State under a lawful requirement of such
14 State a tax similiar in effect.

15 This is identical in effect. Then you
16 may award the refund. The problem, as I
17 understand it, generally revolves around the
18 identity question that Judge Catterall's memorandum
19 addresses. And he says that after proving that
20 he, the Applicant, bought in Virginia so much
21 fuel, that his tax credits exceeded his tax
22 debits, he has to prove how much of his Virginia
23 purchased fuel was taxed in some other State.

24 I think we have done that. Now, as
I understood Mr. Stuart, and I will stand

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2 corrected, on questioning by Mr. Minter,
3 as I understood it, he said that there has
4 never been a case like this before the
5 Commission. I think it is a very difficult
6 burden of proof, and I think this is a
7 rather unique case in that it has been proven.

8 Insofar as the statutory amendment
9 proposed in the middle sixties to the Legislature,
10 it didn't address this kind of problem.

11 As I understood Mr. Stuart, the gasoline
12 dealer says if you have excess credits you get
13 them back. You don't have to go through this
14 exercise and prove the user of this fuel in
15 another state that taxes that are imposed is
16 the tax similar in effect. That is all.

17 Now, that is my argument today, and that
18 is what it was back in June.

19 COMMISSIONER SHANNON: You look upon
20 this as being a unique situation. You don't
21 see that this is just a carte blanche application
22 to refund excess credits, per se?

23 MR. WELLFORD: Not based on my review
24 of Judge Catterall's memorandum. And that is
the question of where was that fuel used. Now,

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2 Pennsylvania. Now, what happened was that
3 Maryland's application of its law allowed
4 Baltimore Tank Lines, as I understand Mr.
5 Stuart, to take credit for fuel put in leased
6 vehicles, which he doesn't do, and these
7 vehicles moved into Pennsylvania which I
8 understand also has a law that imposes a tax.
9 But it was purchasing fuel in Maryland for
10 these vehicles, and the result was there was
11 an overpurchase in Maryland and he got a
12 credit in Maryland.

13 But that has nothing to do with this
14 particular case except to the question of
15 payment. Does the statute require out-of-pocket
16 payment or can a debit against your account stand
17 as a payment?

18 I submit that under any sort of present
19 day logic it is payment.

20 COMMISSIONER SHANNON: You are saying it
21 doesn't have to be a cash payment. A bookkeeping
22 payment will comply with the requirements of the
23 statute.

24 MR. WELLFORD: Yes, sir. And we get back
down to the basic, that as to this particular
fuel this company has been paying twenty cents

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2 COMMISSIONER BRADSHAW: You don't
3 consider a credit as payment?

4 MR. MINTER: Your Honor, there can't
5 be a credit in a situation of this kind on
6 any two trucks, and that is what you are
7 talking about. In the State of Maryland, the
8 Applicant here paid no gross receipts. They
9 were credited with all of the gallonage purchased
10 in the State of Maryland.

11 This statute, in order to be administered,
12 requires that you pay, be assessed, on an
13 identifiable gallonage outside the State.

14 If you don't you can't identify it.

15 COMMISSIONER BRADSHAW: I thought,
16 as I understood the facts, that Maryland did
17 assess a liability for all the tax, for
18 gallons used in Maryland, and they had excess,
19 and therefore credit.

20 MR. MINTER: Your Honor, I really don't
21 know how to respond to you. I feel like I am
22 going around and meeting myself coming back again.

23 COMMISSIONER BRADSHAW: Is that a fact?

24 MR. MINTER: It is a fact that in Mary-
land enough fuel tax was paid, purchased at the

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2 pump in Maryland, to offset any liability
3 for road tax in Maryland.

4 COMMISSIONER BRADSHAW: And therefore
5 set up a credit. I mean you would have to --

6 MR. MINTER: That is immaterial.
7 That is all beside the point. The point is
8 that no road tax was paid in Maryland. Now,
9 if no road tax was paid in Maryland, obviously
10 the so-called 'credit,' if you want to call
11 it that, was applicable to every bit of the
12 gallonage bought up there. It could have been
13 millions of gallons. Enough for the entire
14 fleet. There would be no way in Heaven's name
15 of determining any application to two trucks
16 operating in Virginia and Maryland.

17 And it is obvious from this Code
18 Section -- it is just clear, simple, every day
19 english, that to measure on the terms of what
20 you have paid in the foreign state, but not to
21 exceed nine cents per gallon.

22 Now, this isn't a debate over paid or
23 credits or what have you, but it is a question
24 of identifying fuel, and if you don't identify
the fuel, there is no way in this world to make
any sort of a refund.

Maryland has such a tax. They have a road tax measured by fuel purchased, the same as in Virginia.

COMMISSIONER HARWOOD: The problem is the two cent distinction.

MR. MINTER: Again, that is immaterial, Your Honor.

COMMISSIONER HARWOOD: It is not immaterial either to the Commonwealth who is the receiver of the tax, or the payer, who has to pay it.


MR. MINTER: It is immaterial as far as the legal issue in this case is concerned.

It is quite obvious that the Staff is of the opinion that you cannot validly or legally refund this tax. And if the Commission would want any sort of a legal memo, or any of this reduced to writing, we would be more than pleased.

COMMISSIONER SHANNON: I think it would be helpful. Since this is a very vital issue, and I am sure it is going -- the Attorney General is in here, and it could be appealed, I think it would be helpful if each counsel would write a little memorandum. Mr. Wellford, Mr. Marshall,

CERTIFICATE

I hereby certify that I have complied with Rule 5:49 of the Rules of the Supreme Court by filing twenty copies of this Addendum to Joint Appendix in the office of the clerk of the Supreme Court and by mailing three copies to Edward C. Tosh, Esquire, Counsel to the State Corporation Commission, P. O. Box 1197, Richmond, Virginia 23209, and three copies to Alexander Wellford, Esquire, Christian, Barton, Epps, Brent & Chappell, 1200 Mutual Building, Richmond, Virginia 23219, this 23rd day of July 1980.


Kenneth W. Thorson
Assistant Attorney General