No. 31377 Bluestone Paving, Inc. v. Tax Commissioner of the State of West Virginia

FILED
December 9, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Maynard, J., concurring:

I fully concur with the majority's Opinion in this case. I write separately to clarify misconceptions about the majority's decision raised by my dissenting brethren.

At the heart of the dissenters' separate opinion is the belief that the tax credit at issue herein, W. Va. Code § 11-15A-10a(a), has been construed by the majority to provide a credit against the sales tax imposed by W. Va. Code § 11-15-7. Nothing could be further from the truth. W. Va. Code § 11-15A-10a(a) clearly states that the credit is allowed "against the tax imposed *by this article* on the use of a particular item of tangible personal property[.]" (Emphasis added). In this context, "this article" refers to Article 15A, which defines, levies, and limits the *Use* Tax, not the *Sales* Tax. Assuming *arguendo* that the sales tax referenced by the dissenters applied to the transactions underlying the instant appeal, it simply is not within the purview of the statute to extend the credit to taxes levied under *different* articles of the tax code. Thus, the only taxes against which W. Va. § 11-15A-10a(a) provides a credit are use taxes imposed by Article 15A.

Moreover, my dissenting colleagues also misinterpret the tax statutes

applicable to Bluestone's acquisition of gravel for use in West Virginia manufacturing processes. Throughout their separate opinion, the dissenters strongly lament how the majority's decision will effectively stifle West Virginia manufacturers by imposing double taxation upon them through the disallowance of the credit provided by W. Va. Code § 11-15A-10a(a). Were the tax structure as simplistic as they claim it to be, I would wholeheartedly agree with their analysis and share their concerns. However, the tax consequences they foretell are not illustrative of either the facts of the case *sub judice* or the law applicable to the factual scenario upon which they base their dissent.

The factual context of this appeal is much more straightforward than is apparent from the dissenters' reiteration thereof. Simply stated, Bluestone, a West Virginia corporation, traveled to Virginia where it purchased gravel and paid a 4 ½% sales tax to Virginia.[1] No West Virginia sales taxes on the gravel were implicated by this transaction nor were they later imposed on Bluestone's use of the gravel to manufacture the asphalt it now claims is identical to the gravel it initially purchased. The parties do not argue that West Virginia sales taxes are part of the equation the Court was requested to consider in its decision of this case, and Bluestone does not seek a refund of, exemption from, or credit against West Virginia *sales* taxes in this case. In short, West Virginia *sales* taxes are simply

[1]In actuality, the Commonwealth of Virginia levied only a 3 ½% sales tax on Bluestone's purchase of the gravel. The remaining 1% sales tax was imposed by the City of Bluefield, Virginia.

not at issue in this case's factual or procedural posture. I venture to say that if West Virginia sales taxes were, in fact, implicated by the facts presently before this Court, W. Va. Code § 11-15A-10a(a), the statute considered and construed by the majority, which pertains to *use* taxes not *sales* taxes, would not be applicable as its criteria could not have been satisfied.

Furthermore, the dissenters miscomprehend the nature and effect of the tax statutes that would have applied had, hypothetically speaking, Bluestone actually purchased its gravel in West Virginia.[2] It is correctly noted that Bluestone's purchase of gravel in West Virginia would have been subject to a sales tax pursuant to W. Va. Code § 11-15-7. What the dissenters fail to mention, however, is that such a purchase also has a corresponding exemption to which Bluestone would have been entitled. *See* W. Va. Code § 11-15-9(b)(2) (recognizing refundable exemption for "[s]ales of . . . supplies and materials directly used or consumed in the activit[y] of manufacturing"). Additionally, the dissenters indicate that Bluestone's use of the gravel in its manufacture of asphalt would also have been subject to a use tax under Article 15A of the tax code. Again, however, they conveniently neglect to mention that another corollary exemption is available to which Bluestone would have been entitled. *See* W. Va. Code § 11-15A-3(a)(4) (exempting from use taxes imposed by Article 15A "[t]angible personal property . . ., the sale of which in this state is not subject to the West Virginia consumers sale tax"). Thus, it is apparent that, even if Bluestone had purchased its

[2]I reiterate, however, that this is not the factual scenario before us.

gravel in West Virginia, where it would have been subject to sales tax, it would have been entitled to two different refundable exemption provisions in which case it would not have had to request a refund under W. Va. Code § 11-15A-10a(a). I cannot emphasize enough, though, that Bluestone did not pay West Virginia sales tax and was not required, by the facts of this case, to do so. Further, if Bluestone had paid West Virginia sales tax, its remedy would have been to request an exemption from such tax and not a credit pursuant to W. Va. Code § 11-15A-10a(a), which section does not apply to cases involving the payment of West Virginia sales tax.

"Taxes are what we pay for civilized society." *Compania General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100, 48 S. Ct. 100, 105, 72 L. Ed. 177, 183 (1927) (Holmes, J., dissenting). Nothing can be more civilized than carrying out the true meaning and import of the words used by the Legislature in its adoption of a statutory enactment.

For the foregoing reasons, I respectfully concur with the opinion of the Court.