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*Coal Excise Tax Refunds: United States v. Clintwood
Elkhorn Mining Co.*

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September 26, 2008

Abstract. In 1998, a U.S. district court held that the imposition of the coal excise tax, or black lung excise tax, on exported coal was unconstitutional. Refunding the tax has been controversial. This is because some coal producers and exporters attempted to bypass the limitations in the Internal Revenue Code's refund scheme by bringing suit under the Export Clause in the Court of Federal Claims, seeking damages from the United States in the amount of coal excise taxes paid. The Federal Circuit Court of Appeals held there was Tucker Act jurisdiction to hear some of the suits and allowed them as an alternative to the Code's refund process. However, in a 2008 decision, *United States v. Clintwood Elkhorn Mining Co.*, the Supreme Court held that taxpayers must comply with the Code's refund process. Meanwhile, several bills would provide an alternative method for coal excise tax refunds, including the amended version of H.R. 6049 (Energy Improvement and Extension Act of 2008) that was passed by the Senate on September 23, 2008, and H.R. 7060 (Renewable Energy and Job Creation Tax Act of 2008), which was passed by the House on September 26, 2008.

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Summary

In 1998, a U.S. district court held that the imposition of the coal excise tax, or black lung excise tax, on exported coal was unconstitutional. Refunding the tax has been controversial. This is because some coal producers and exporters attempted to bypass the limitations in the Internal Revenue Code's refund scheme by bringing suit under the Export Clause in the Court of Federal Claims, seeking damages from the United States in the amount of coal excise taxes paid. The Federal Circuit Court of Appeals held there was Tucker Act jurisdiction to hear some of the suits and allowed them as an alternative to the Code's refund process. However, in a 2008 decision, *United States v. Clintwood Elkhorn Mining Co.*, the Supreme Court held that taxpayers must comply with the Code's refund process. Meanwhile, several bills would provide an alternative method for coal excise tax refunds, including the amended version of H.R. 6049 (Energy Improvement and Extension Act of 2008) that was passed by the Senate on September 23, 2008, and H.R. 7060 (Renewable Energy and Job Creation Tax Act of 2008), which was passed by the House on September 26, 2008.

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Internal Revenue Code (IRC) § 4121 imposes an excise tax on domestically-mined coal when it is sold by the producer to the first purchaser. The producer is liable for the tax, but may pass it along to others through an increase in the coal's purchase price; thus, it is possible that the producer does not actually bear the burden of the tax.¹

The Constitution's Export Clause states that "No Tax or Duty shall be laid on Articles exported from any State."² Nonetheless, the coal excise tax was imposed on coal destined for export. In 1998, a federal district court held that the tax on such coal clearly violated the Export Clause.³ In 2000, the IRS acquiesced and stopped imposing the tax on coal that was in the stream of export when sold by the producer and actually exported.⁴

Claims for Refunds Under the IRC

The IRC provides a process by which taxpayers who paid the unconstitutional tax may file for a refund from the IRS. The claim must be made within three years from the time the excise tax return was filed or two years from the time the tax was paid, whichever is later.⁵ The producer that paid the tax has first claim to any refund.⁶ Exporters may claim refunds only "if the person who paid such tax [i.e., the producer] waives his claim to such amount."⁷ A taxpayer filing a refund claim must establish that it: (1) did not include the tax in the coal's purchase price or otherwise collect the tax from the purchaser; (2) has repaid, in the event the tax burden was shifted, the amount of tax to the ultimate purchaser; or (3) has filed the ultimate purchaser's written consent for the refund with the IRS.⁸ Taxpayers seeking a refund in court must first file a

¹ See CRS Report RS21935, *The Black Lung Excise Tax on Coal*, by Salvatore Lazzari.

² U.S. CONST. art. I, § 9, cl. 5.

³ See *Ranger Fuel Corp. v. United States*, 33 F. Supp. 2d 466 (E.D. Va. 1998). Similarly, coal producers and exporters have brought suit alleging that a reclamation fee imposed by the Surface Mining Control and Reclamation Act of 1977 on exported coal violates the Export Clause. The reclamation fee is based on each ton of "coal produced" by surface and underground mining. 30 U.S.C. § 1232(a). The coal producers and exporters argue that "coal produced" refers to the process of extracting and selling coal, and therefore the imposition of the fee on coal sold to foreign purchasers violates the Export Clause. The government argues that the term only refers to the extraction, and not the sale, of coal. In June 2008, the Court of Appeals for the Federal Circuit agreed with the government and held that the reclamation fee statute is constitutional. See *Consolidation Coal Co. v. United States*, 528 F.3d 1344 (Fed. Cir. 2008), *rev'ing* 75 Fed. Cl. 537 (Fed. Cl. 2007) and 64 Fed. Cl. 718 (Fed. Cl. 2005). The court, using the principle of statutory construction that "every reasonable construction must be resorted to, in order to save the [challenged] statute from unconstitutionality," found that interpreting the term "coal produced" to refer to "coal extracted" is reasonable. *Id.* at 1347 (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Bldg & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

⁴ See IRS Notice 2000-28, 2000-1 C.B. 1116.

⁵ See I.R.C. § 6511(a).

⁶ See I.R.C. § 6402(a) ("In the case of any overpayment, the Secretary ... may credit the amount of such overpayment ... against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall ... refund any balance to such person"); I.R.C. § 6416(c) ("the amount of any [manufacturers excise] tax ... erroneously or illegally collected in respect of any article exported to a foreign country or shipped to a possession of the United States may be refunded to the exporter or shipper thereof, if the person who paid such tax waives his claim to such amount"). See also IRS Notice 2000-28, 2000-1 C.B. 1116 (mimicking the statutory ordering of refund claims).

⁷ I.R.C. § 6416(c); see also IRS Chief Counsel Advice 200211043 (February 5, 2002) (indicating the IRS was unaware of any producers waiving their claims as of February 2002).

⁸ See I.R.C. § 6416(a); IRS Notice 2000-28, 2000-1 C.B. 1116.

timely refund claim with the IRS and then wait six months, unless the IRS makes a determination prior to that date, before bringing suit.⁹

Claims for Damages Under the Export Clause

Some coal producers and exporters brought suits under the Export Clause seeking damages from the United States in the amount of unconstitutional coal excise taxes they paid. They brought the suits in the Court of Federal Claims, arguing that it had jurisdiction to hear them under the Tucker Act. That act grants the court jurisdiction over “any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.”¹⁰

Taxpayers used these suits as a way to bypass two limitations in the IRC refund process. First, the Tucker Act has a longer statute of limitations—six years from the time the tax is paid¹¹—than the IRC. This allowed taxpayers to seek damages for taxes paid in the several years preceding the years for which they could receive IRC refunds. Second, the Tucker Act, unlike the IRC, does not give priority to producers’ claims. Thus, it potentially allowed parties farther down the supply chain (e.g., exporters) to bring claims alleging they deserved damages because they bore the economic burden of the tax.

A threshold issue has been whether the Court of Federal Claims could hear these suits. The Tucker Act only confers jurisdiction—it “does not create any substantive right enforceable against the United States for money damages.”¹² Thus, the substantive right must be found in another source of law.¹³ One question has been whether the Export Clause provides a right to monetary damages when the government violates it. If the answer is yes, a related question has been whether such a claim could be made independently of an IRC refund claim. If not, then taxpayers would need to meet the IRC’s more stringent requirements.

In *Cyprus Amax Coal Co. v. United States*,¹⁴ the Court of Appeals for the Federal Circuit addressed the jurisdictional question. The court’s holding had two components. The first was that the Export Clause was a money-mandating provision, as required for Tucker Act jurisdiction.¹⁵ The second was that a cause of action founded in a violation of the Export Clause was self-executing.¹⁶ This meant the Clause provided a separate cause of action so that a taxpayer could bring a suit for damages independent of an IRC administrative refund claim. In a later case, the court clarified that the Export Clause was not a money-mandating provision for all parties seeking coal excise tax refunds.¹⁷ In that case, the court held that the Tucker Act did not provide

⁹ See I.R.C. §§ 7422(a), 6532(a).

¹⁰ 28 U.S.C. § 1491(a)(1).

¹¹ See 28 U.S.C. § 2501; *Venture Coal Sales Co. v. United States*, 370 F.3d 1102, 1105 (Fed. Cir. 2004) (stating a claim accrued for Tucker Act purposes each time the coal excise tax was paid).

¹² *United States v. Mitchell*, 463 U.S. 206, 216 (1983) (internal quotations and citations omitted).

¹³ See *id.*; *United States v. Testan*, 424 U.S. 392, 398, 400 (1976).

¹⁴ 205 F.3d 1369 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 1065 (2001).

¹⁵ See 205 F.3d at 1373-74.

¹⁶ See *id.* at 1374.

¹⁷ See *Ontario Power Generation, Inc. v. United States*, 369 F.3d 1298 (Fed. Cir. 2004).

jurisdiction to hear the claim of an ultimate purchaser who alleged it had paid the tax through higher coal prices but did not directly pay the tax to the government.

After the *Cyprus Amax* decision answered the question of its jurisdiction under the Tucker Act, the Court of Federal Claims heard several cases brought by coal brokers and ultimate purchasers that it dismissed due to lack of constitutional standing.¹⁸ To have standing, “[a] plaintiff must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”¹⁹ The parties alleged that they were injured by the government’s unconstitutional imposition of the coal excise tax because the burden of the tax was shifted to them by coal producers charging higher prices for coal. The Court of Federal Claims found the requisite causal relationship between this injury and the government’s action to be lacking. This was because it was the independent actions of the producers that determined whether the parties paid any amount of the unconstitutional tax. As noted, the Federal Circuit Court of Appeals also raised a barrier to claims by non-producer parties by holding there was no Tucker Act jurisdiction to hear the claim of an ultimate purchaser who did not actually pay the tax to the government.²⁰

United States v. Clintwood Elkhorn Mining Co.

In a 2008 decision, *United States v. Clintwood Elkhorn Mining Co.*,²¹ the Supreme Court held that taxpayers seeking refunds for the unconstitutionally-imposed coal excise tax must comply with the IRC refund process. The taxpayers in that case had filed administrative refund claims for the three tax years open under the IRC’s statute of limitations and filed suit in the Court of Federal Claims seeking the amount of taxes paid for the three previous years that were open only under the Tucker Act’s longer limitations period. The Court of Appeals for the Federal Circuit had allowed their suit and denied the government’s request to reverse its *Cyprus Amax* holding.²² The appeals court said that the issue of whether taxpayers could bring suit under the Export Clause without complying with the IRC refund scheme had been “fully aired” in *Cyprus Amax* and it could “discern no basis for reopening this question.”²³

The Supreme Court, in a unanimous decision, held that the plain language of the relevant IRC provisions, § 7422 and § 6511,²⁴ clearly required that the taxpayers file a timely refund claim with the IRS before bringing suit.²⁵ The Court stated that it had basically decided the issue in a 1941

¹⁸ See *Emerald International Corp. v. United States*, 54 Fed. Cl. 674 (Fed. Cl. 2002); *Ontario Power Generation, Inc. v. United States*, 54 Fed. Cl. 630 (Fed. Cl. 2002), *aff’d on other grounds* by 369 F.3d 1298 (Fed. Cir. 2004).

¹⁹ *Allen v. Wright*, 468 U.S. 737, 751 (1984).

²⁰ See *Ontario Power Generation, Inc. v. United States*, 369 F.3d 1298 (Fed. Cir. 2004).

²¹ 128 S. Ct. 1511 (2008).

²² *Clintwood Elkhorn Mining Co. v. United States*, 473 F.3d 1373, 1376 (Fed. Cir. 2007).

²³ *Id.* at 1374-75.

²⁴ I.R.C. § 7422(a) (“No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected ... until a claim for refund or credit has been duly filed with the Secretary ...”); I.R.C. § 6511(a), (b) (applying the IRC’s limitations period to refunds for “any tax imposed by this title” and disallowing any refund “unless a claim ... is filed by the taxpayer within such period”).

²⁵ See *Clintwood Elkhorn*, 128 S. Ct. at 1516 (“[W]e cannot imagine what language could more clearly state that taxpayers seeking refunds of unlawfully assessed taxes must comply with the Code’s refund scheme before bringing suit, including the requirement to file a timely administrative claim.”).

case where it had reasoned that the Tucker Act's statute of limitations was simply "an outside limit" which Congress could shorten in situations requiring "special considerations," such as tax refunds because "suits against the United States for the recovery of taxes impeded effective administration of the revenue laws."²⁶ The Court noted that it had explained in that case that the IRC's refund provisions would have "no meaning whatever" if taxpayers who did not comply with those provisions could still bring refund suits under the Tucker Act.²⁷

The Court did not address whether the Export Clause provided a cause of action that could be brought under the Tucker Act, finding that the IRC refund provisions would apply regardless of the answer to that question.²⁸ Noting that it was clear from its past cases that unconstitutionally-collected taxes could be subject to the same administrative requirements as other taxes, the Court rejected the taxpayers' argument that something unique about the Export Clause required different treatment.²⁹ The Court explained that while the government may not impose unconstitutional taxes, it may create an administrative process to refund such taxes because of its "exceedingly strong interest in financial stability," regardless of whether the tax violated the Export Clause or some other provision of the Constitution.³⁰ The Court also rejected the taxpayers' claim that the IRC refund scheme could not apply to facially unconstitutional taxes, finding the plain language of IRC § 7422 clearly included such taxes.³¹

There appear to be two primary impacts of the Court's decision in *Clintwood Elkhorn*. The first is that taxpayers seeking refunds for the unconstitutionally-imposed coal excise tax must file refund claims with the IRS, subject to the IRC's limitations. Thus, taxpayers are subject to the shorter statute of limitations and non-producer parties may only seek a refund if the producer who paid the tax has waived its right to the refund. Second, the Court's analysis seems broadly applicable to refund claims in general, including those based on violations of other constitutional provisions.³²

Legislation in the 110th Congress

The Senate-passed version of H.R. 6049, § 114 (Energy Improvement and Extension Act of 2008) and H.R. 7060, § 114 (Renewable Energy and Job Creation Tax Act of 2008), passed by the House on September 26, 2008, would provide an alternative administrative procedure for refunding the unconstitutionally-imposed coal excise tax.³³ In order to claim a refund, a coal producer would have to establish that it, or a related party, exported coal produced by it to a

²⁶ *Id.* at 1517 (quoting *United States v. A.S. Kreider Co.*, 313 U.S. 443, 447 (1941)).

²⁷ *Id.* (quoting *A.S. Kreider*, 313 U.S. at 448).

²⁸ *See id.*

²⁹ *See id.* at 1518-19.

³⁰ *Id.* at 1519 (quoting *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18, 37 (1990)).

³¹ *See id.* at 1519-20.

³² Thus, the decision could call into question the validity of a prior Federal Circuit case, *Hatter v. United States*, 953 F.2d 626 (Fed. Cir. 1992), where the court held that the Compensation Clause provided a separate cause of action that allowed Article III judges to bring a claim seeking damages for amounts withheld in social security taxes, independent of the IRC refund process.

³³ Similar provisions are found in S. 3335, § 114; S. 3125, § 114; S. 3349, § 224; H.R. 6049, § 114, which has been passed by the House; H.R. 6817, § 714; a House-passed version of H.R. 6, § 1510; H.R. 1762; and S. 373.

foreign country or shipped it to a U.S. possession, or caused such export or shipment, through means other than by an exporter that met the proposal's requirements to file a claim. A producer with a favorable court judgment related to the excise tax's constitutionality would be deemed to meet this requirement. An "exporter" would have to establish that it exported coal to a foreign country or shipped it to a U.S. possession, or caused such export or shipment. Additionally, the producer or exporter would need to (1) have filed a return between October 1, 1990, and the date of the act's enactment,³⁴ and (2) file a claim for the refund within 30 days of the enactment.

The Treasury Secretary would have to determine whether the refund requirements were met within 180 days of a claim being filed and pay any refund owed (with interest) within 180 days of that determination. Refunds to producers would equal the amount of coal excise tax paid on the exported or shipped coal (minus any amount paid pursuant to a favorable court judgment mentioned above). Refunds to exporters would equal \$0.825 per ton of exported or shipped coal. Refund claims could only be made for coal exported or shipped between October 1, 1990, and the date of the act's enactment. No refund would be allowed if one had already been made to any taxpayer or there was a final settlement between the government and producer, party related to the producer, or exporter. The Senate bill states it would not give producers or exporters standing to commence or intervene in each other's judicial or administrative refund claim proceedings; the House bill does not include such a provision.

It appears the bills' proposed refund process would have three significant impacts. First, taxpayers would be able to seek refunds for taxes paid in years not open under current law. The Supreme Court's holding in *Clintwood Elkhorn* makes clear that current law requires that a refund claim be filed within three years from the time the excise tax return was filed or two years from the time the tax was paid, whichever is later. The bills would allow refunds relating to coal exported or shipped as early as October 1990 so long as the taxpayer filed a refund claim within 30 days of the provision's enactment and met the other requirements. Second, the bills could expand the opportunity for exporters to claim refunds beyond that available under current law, so long as they are able to meet the requirements. Third, the bills would impose short time limits for the taxpayers and IRS to act on the refund claims. Thus, they would encourage quick resolution of the claims, although administrative issues could arise due to the requirement that refunds not be paid twice on the same coal and their silence on the issue of contestability.

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³⁴ The producer would be required to file "an excise tax return," while the exporter would be required to file "a tax return." The bills do not explicitly link either return to the coal excise tax or exported coal.