State Law & State Taxation Corner

"The Little Engine That Could" Wins Its Commerce Clause Claim to a West Virginia Use Tax Credit for Both State and Local Sales Taxes Paid on Its Out-of-State Fuel Purchases

*By John A. Biek**

Introduction

In *Comptroller of Treasury of Maryland v. Wynne*,[1] the U.S. Supreme Court applied the internal consistency test of the dormant Commerce Clause of the U.S. Constitution to hold that Maryland had to allow its resident taxpayers a credit against both Maryland's state and county income taxes for income taxes that the Maryland resident taxpayers had paid to other states on income they earned in those states. Maryland argued that it had the sovereign right to tax its own residents more heavily than nonresidents on interstate income. However, the Supreme Court concluded that, by not giving Maryland resident taxpayers credit against their Maryland county income tax liability for the income taxes the resident taxpayers paid on interstate income being taxed in both the Maryland county and another state, Maryland was subjecting that interstate income to a heavier income tax burden than would be borne by intrastate income earned solely in Maryland.[2]

In *Matkovich v. CSX Transportation, Inc.*,[3] the West Virginia Supreme Court of Appeals recently extended the internal consistency analysis of the *Wynne* case to the credits that state use tax laws provide for sales taxes a taxpayer paid on out-of-state purchases of tangible personal property that the taxpayer then brought into (or had delivered to it) in the state imposing the use tax liability on the taxpayer. The West Virginia Supreme Court concluded in the *CSX* case that the Commerce Clause required that the West Virginia use tax's "sales tax credit" cover both state and local sales taxes that CSX had paid on its purchases of locomotive fuel in other states, for use in CSX's railroad operations in West Virginia. Otherwise, the West Virginia Supreme Court reasoned that the combined state and local sales and use tax burden on CSX's interstate fuel purchases could exceed the amount of sales tax that CSX would have owed if it had both purchased and used the fuel in West Virginia.

The *CSX* case confirms the prediction of this and some other state tax practitioners when the *Wynne* case was decided that its holding was likely to apply to the sales/use tax realm, where states have enacted a hodge podge of state and local

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sales and use taxes. The Commerce Clause clearly does not allow a state or local jurisdiction to restrict its use tax credit for sales taxes paid in other states on the purchase of tangible personal property to the type of sales/use taxes (state versus local) that the state of use has enacted.

The *CSX* Case

CSX Transportation, Inc. ("CSX") is one of the seven remaining Class I line-haul freight rail carriers in the United States.[4] A Virginia corporation headquartered in Jacksonville, Florida, CSX operates freight trains and maintains rail yards throughout West Virginia and other states.[5] A 2010 field audit of CSX by the West Virginia State Tax Department (the "Department") determined that CSX should be paying West Virginia motor fuel use tax on the locomotive fuel that CSX purchased from suppliers outside West Virginia and brought into West Virginia for use in its railroad operations in the state.[6]

The West Virginia motor fuel use tax is imposed, pursuant to West Virginia Code §11-15A-13a, upon taxpayers who purchase motor fuel outside of the state of West Virginia and then bring that motor fuel into West Virginia for use in the state.[7] Motor carriers operating in West Virginia pay this use tax on the average wholesale price of all gallons of motor fuel used in the operations of the motor carrier in West Virginia.[8] Interstate motor carriers compute their West Virginia tax liability by multiplying their total gallons of motor fuel by the ratio of miles traveled in West Virginia to total miles traveled everywhere.[9]

The West Virginia Use Tax Act provides a "sales tax credit" against the motor fuel use tax liability for sales taxes that the motor carrier paid to other states on purchases of the motor fuel that the motor carrier brought into and used in West Virginia. This sales tax credit is found in West Virginia Code §11-15A-10a(a), which provides:

> A person is entitled to a credit against the tax imposed by this article on the use of a particular item of tangible personal property, custom software or service equal to the amount, if any, of sales tax lawfully paid *to another state* for the acquisition of that property or service; Provided, that the amount of credit allowed does not exceed the amount of use tax imposed on the use of the property in this state.[10]

The term "sales tax" used in this sales tax credit provision includes a sales tax or compensating use tax imposed on the use of tangible personal property or a service *by the state* in which the sale occurred.[11] The term "state," in turn, "includes the District of Columbia but does not include any of the several territories organized by Congress."[12] These statutory definitions make it clear that the sales tax credit provided against West Virginia motor fuel use tax liability covers both sales taxes and use taxes that the motor carrier has previously paid on the acquisition or use (*e.g.*, storage) of motor fuel in another state before bringing that motor fuel into West Virginia for use in that state. It was less clear from the statutory language, however, as the italicized language indicates, whether the sales taxes "paid to other states" include *local* sales taxes imposed on the motor carrier's fuel purchases by a municipality, county or other local jurisdiction outside West Virginia.

Following this field audit determination, CSX filed amended West Virginia motor fuel use tax returns to claim credits not only for sales taxes that CSX had paid to other states on the locomotive fuel that CSX used in West Virginia but also the sales taxes that CSX had paid on that fuel to cities, counties and other localities in those other states.[13] Based on a literal reading of the language of the use tax credit statute, the West Virginia State Tax Commissioner (the "Tax Commissioner") rejected CSX's claim that the West Virginia sales tax credit extended to local sales tax of other states, denying CSX's refund claims. The Department's auditors also utilized a "new" methodology to determine how many gallons of motor fuel CSX were deemed to have been used in West Virginia and how many of those gallons had been purchased and taxed in other states.[14] As a result, the Tax Commissioner issued a notice of assessment to CSX on June 5, 2013, for additional motor fuel use tax liability.[15]

CSX timely filed a petition for refund and a petition for reassessment with the West Virginia Office of Tax Appeals (the "OTA"). On January 23, 2015, the OTA granted CSX its refund claims and vacated the 2013 tax assessment because the OTA agreed that the dormant Commerce Clause required West Virginia to apply its sales credit to the local sales taxes that CSX had paid in other states on the locomotive fuel that CSX used in West Virginia.[16] On August 24, 2015, the West Virginia Circuit Court affirmed the OTA's decision, again on the grounds that denying CSX a sales tax credit for the local sales taxes that it had paid in other states could result in CSX paying a greater amount of sales/use tax liability on its interstate purchases and use of locomotive fuel than if CSX had purchased and used that fuel in West Virginia.[17]

On the Tax Commissioner's appeal to the West Virginia Supreme Court of Appeals, that court presented the issue in the *CSX* case as whether "a taxpayer, who is required to pay the motor fuel use tax imposed by W. Va. Code §11-15A-13a, [is] entitled to a sales tax credit, under W. Va. Code §11-15A-10a, for sales taxes paid both to other

states and the municipalities of other states."[18] The West Virginia Supreme Court agreed with the lower courts in the *CSX* case that the scope of the West Virginia sales tax credit provision was governed by the dormant Commerce Clause, which "precludes states from 'discriminat[ing] between transactions on the basis of some interstate element.'"[19] Thus, the West Virginia Supreme Court explained, "a state may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the state, nor may a state impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, or by subjecting interstate commerce to the burden of 'multiple taxation.'"[20]

In *Complete Auto Transit, Inc. v. Brady*, the U.S. Supreme Court explained that in order for a state tax on interstate commerce to satisfy the dormant Commerce Clause, the state tax must (1) have a substantial nexus within the taxing state, (2) be fairly apportioned, (3) not discriminate against interstate commerce, and (4) be fairly related to the services being provided by the taxing state.[21]

The West Virginia Supreme Court had no difficulty concluding that the imposition of the West Virginia motor fuel use tax on CSX, and the sales tax credit allowed against that use tax liability, satisfied the "substantial nexus" requirement of the dormant Commerce Clause because "the parties do not dispute that CSX operates its rail service through the State of West Virginia" and CSX "purchases fuel outside of West Virginia which it uses in its operations in this State."[22] Similarly, the West Virginia Supreme Court determined that the state's motor fuel use tax and its sales tax credit were fairly related to the services that West Virginia provided to CSX's railroad operations in the state.[23]

However, the Tax Commissioner came a cropper on the "fair apportionment" requirement of the dormant Commerce Clause, which includes an "internal consistency test" of whether "the imposition of a tax identical to the one in question by every other state would add no burden to the interstate commerce that intrastate commerce would not also bear."[24] The West Virginia Supreme Court noted that the U.S. Supreme Court had applied this internal consistency test in the previous year, in *Comptroller of Treasury of Maryland v. Wynne,*[25] to determine the scope of the Maryland personal income tax credit that Maryland resident taxpayers may claim for income taxes they paid to other states on their interstate income that Maryland is also taxing. The West Virginia Supreme Court determined that its legal analysis of the proper scope of the sales tax credit in the *CSX* case was controlled by the U.S. Supreme Court's holding in the *Wynne* case that the dormant Commerce Clause required Maryland to provide a tax credit against both its state and local income taxes for the income taxes that Maryland resident taxpayers had paid to other states on their interstate income. Because the *Wynne* case was so central to the dormant Commerce Clause analysis of the West Virginia sales tax credit provision, the *Wynne* case is discussed in detail below.

The *Wynne* Case

Brian and Karen Wynne were residents of the state of Maryland and Howard County.[26] In the 2006 tax year, Brian Wynne was one of the seven shareholders of Maxim Healthcare Services, Inc. ("Maxim"), an S corporation that provided home health, medical staffing and wellness services throughout the United States. Maxim filed income tax returns with 39 states in the 2006 tax year. Most of those states, including Maryland, followed the federal income tax's passthrough entity treatment of S corporations, resulting in Brian Wynne and the other Maxim shareholders owing personal income taxes on their *pro rata* shares of Maxim's income to those states where Maxim did business.[27] On their 2006 Maryland personal income tax return, the Wynnes claimed a resident tax credit against both their Maryland state and county income tax liabilities for their *pro rata* share of the income taxes that Maxim had paid to states other than Maryland on behalf of its shareholders.[28]

However, the Wynnes' claim to a resident tax credit against their Maryland county income tax liability was not directly supported by the language of the Maryland income tax statutes. The Maryland *state* income tax law provided that:

> a resident may claim a credit *only against the State income tax* for a taxable year in the amount determined under [Tax General Code § 10-703(c)] for State tax on income *paid to another state* for the year.[29]

The term "state" was defined in the Maryland personal income tax law to include "a state, possession, territory, or commonwealth of the United States … or … the District of Columbia," but not, at least on the face of the statute, a county, municipality or other local jurisdiction.[30] In addition, no resident tax credit had been given against the Maryland county tax, since that credit had been repealed in 1975.[31]

Relying on the language of the Maryland tax statutes, the Comptroller allowed the Wynnes to claim the income taxes they had paid to other states on their distributive shares of Maxim income as a credit against their Maryland *state* income tax liability, but *not* against their Howard County income tax liability.[32] The Wynnes claimed, however, that income taxes they had paid to other states should also be credited against their Maryland county

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income tax liability because Maryland, as their state of residence, was subjecting *all* of their interstate income to both its state and county income taxes. Indeed, the Comptroller administered the county income taxes as part of the Maryland state income tax.

The U.S. Supreme Court agreed that this Maryland scheme of subjecting resident taxpayers to both the Maryland state and county income taxes on all of their income wherever earned, but providing a tax credit only against the Maryland state income tax, and only for taxes the resident paid *to other states* on that income, violated the internal consistency test of the Commerce Clause.[33] The majority opinion concluded that the application of the internal consistency test to the Maryland tax scheme identified impermissible double taxation of interstate income:

> A simple example illustrates the point. Assume that every State imposed the following taxes, which are similar to Maryland's "county" and "special nonresident" taxes: (1) a 1.25% tax on income that residents earn in State, (2) a 1.25% tax on income that residents earn in other jurisdictions, and (3) a 1.25% tax on income that nonresidents earn in State. Assume further that two taxpayers, April and Bob, both live in State A, but that April earns her income in State A whereas Bob earns his income in State B. In this circumstance, Bob will pay more income tax than April solely because he earns income interstate. Specifically, April will have to pay a 1.25% tax only once, to State A. But Bob will have to pay a 1.25% tax twice: once to State A, where he resides, and once to State B, where he earns the income.[34]

At oral argument, counsel for the Comptroller had conceded that he "didn't dispute the mathematics" of this type of example.[35]

The Comptroller and the principal dissenting opinion in the *Wynne* case complained that, far from discriminating against interstate commerce, Maryland was foregoing tax revenue from its residents who earned income from sources outside Maryland as a result of providing those residents a tax credit against the resident's Maryland state (but not county) personal income tax liability. The majority was unpersuaded: "This argument is a red herring. The critical point is that the total tax burden on interstate commerce is higher, not that Maryland may receive more or less tax revenue from a particular taxpayer. [Citation omitted.] Maryland's tax unconstitutionally discriminates against interstate commerce, and thus it is invalidated regardless of how much a particular taxpayer must pay to the taxing State."[36] Put another way, the Comptroller and the principal dissent were confusing Maryland's power under the Due Process Clause to tax all income of its residents with the state's duty under the Commerce Clause not to tax interstate commerce more heavily than intrastate commerce.

The *CSX* Case's Application of the Internal Consistency Test to Use Tax Credits

The West Virginia Supreme Court concluded in its *CSX* opinion that the internal consistency analysis of the *Wynne* case applied with equal force to state use tax credits and compelled the Tax Commissioner to extend the state's sales tax credit to the sales taxes that CSX had paid to municipalities in other states on the locomotive fuel it was using in West Virginia.[37] As in the *Wynne* case, the "critical point" was that West Virginia was imposing a higher tax burden on interstate commerce by not giving a credit for all sales taxes that CSX had paid to other states and municipalities on the locomotive fuel that West Virginia was subjecting to its motor fuel use tax compared with the sales tax burden CSX would have borne if it had both purchased and used that locomotive fuel in West Virginia.

Similarly, the West Virginia Supreme Court observed, in *General Motors Corp. v. City and County of Denver*, the City and County of Denver provided a credit against their use tax for sales taxes the taxpayer paid to municipalities in other states, but *not* for sales taxes paid to those other states.[38] Applying the internal consistency test, the Colorado Supreme Court held that:

> Denver must provide GM with a credit for the sales and use taxes paid to other states and their subdivisions such that GM will pay no more tax on the automobiles than it would have paid by purchasing the component parts in the City and County of Denver, State of Colorado.[39]

Anything less than such a fully offsetting sales tax credit would, the Colorado Supreme Court determined in the *General Motors* case, violate the dormant Commerce Clause.

In *Arizona Dep't of Revenue v. Arizona Public Service Co.*, the Arizona Court of Appeals considered whether the tax credit against Arizona's use tax liability had to apply to *both* sales taxes paid to other states *and* sales taxes paid to the counties of such states.[40] The Arizona Court of Appeals held that the internal consistency test required the Arizona tax credit to

apply to both state and local sales taxes that Arizona Public Service had paid in such other states. "Otherwise, it reasoned, taxpayers paying both taxes but not receiving credit for both taxes would incur a higher tax burden than an in-state taxpayer who had not made such out-of-state purchases."[41]

Turning to CSX's dormant Commerce Clause challenge to the narrow way that the Tax Commissioner was interpreting the West Virginia sales tax credit statute, the West Virginia Supreme Court concluded:

> Applying these authorities to the case *sub judice*, we agree with the circuit court's determination that the sales tax credit afforded by W. Va. Code § 11-15A-10a extends *both* to sales taxes CSX has paid to other states on its purchases of motor fuel therein *and* to sales taxes that CSX has paid to the subdivisions of other states when it has purchased motor fuel in such locales. Any other construction of this statute would invariably violate the Commerce Clause's prohibition on subjecting interstate transactions to a greater tax burden than that imposed on strictly intrastate dealings. The easiest way to demonstrate this dichotomy is through a simple math analysis. If, for example, CSX is required to pay a 5% use tax on all motor fuel it uses in this State and if it is allowed a corresponding sales tax credit for all fuel it has purchased out of state, such sales tax credit serves as an offset to CSX's use tax liability. Thus, in this example, if CSX pays 5% sales tax to State A, it would receive a 5% sales tax credit that completely offsets its use tax liability.
>
> If, however, CSX pays 3% sales tax to State A and 2% sales tax to the City of Metropolis in State A, it still is paying 5% out-of-state sales tax but, under the Tax Commissioner's interpretation of the sales tax credit, CSX would pay substantially more use tax than a taxpayer who had not paid sales tax to another state's subdivision. This is so because CSX is assessed the same 5% use tax, which is offset by the 3% State A sales tax and yields a residual 2% use tax liability. Because, in this scenario, CSX did not receive a sales tax credit for the additional 2% sales tax it paid to the City of Metropolis, however, CSX essentially is paying 7% in total taxes, *i.e.,* 5% use tax (which is partially offset by 3% credit for sales tax paid to State A) + 2% sales tax paid to City of Metropolis (for which Tax Commissioner did not grant it a sales tax credit) = 7%, simply because CSX transacted business interstate in a jurisdiction that allowed its subdivisions to charge sales tax. Strictly in-state taxpayers would not incur this additional tax liability, nor would out-of-state taxpayers who paid sales taxes assessed only by states and not their subdivisions.[42]

Accordingly, the West Virginia Supreme Court held in the *CSX* case that the fair apportionment requirement of the dormant Commerce Clause required West Virginia Code §11-15A-10a to provide credit for both state and local sales taxes paid in other states against CSX's West Virginia motor fuel use tax liability.[43] For similar reasons, the West Virginia Supreme Court concluded, the "no discrimination" requirement of the dormant Commerce Clause required that the sales tax credit take into account both the state and local sales taxes CSX had paid in other states in order not to "unfairly discriminate against interstate commerce."[44]

In April 2017, the Tax Commissioner filed a petition for a writ of certiorari with the U.S. Supreme Court, asking that court to reverse the West Virginia Supreme Court *CSX* decision on the grounds that (1) West Virginia is only subjecting the locomotive fuel that CSX used within the borders of West Virginia based on mileage to the state's motor fuel use tax and (2) the West Virginia Supreme Court improperly required West Virginia to offset local sales taxes that the state does not itself impose against the West Virginia motor fuel use tax liability of CSX.[45] CSX filed its brief in opposition in June 2017, and, as of when this column was written, the parties were awaiting a decision by the Supreme Court whether to accept the Tax Commissioner's appeal of the *CSX* case.

The *CSX* Case's Application of the Internal Consistency Test to Use Tax Credits

The West Virginia courts were on track with their dormant Commerce Clause analysis of the West Virginia sales tax credit in the *CSX* case. There is a certain superficial appeal to the Tax Commissioner's argument throughout the case that because counties, municipalities and other local jurisdictions in the state of West Virginia do not have their own local sales/use taxes, the state has no constitutional obligation to provide a credit against the West Virginia state level use tax for local sales taxes that CSX paid on its purchases of locomotive fuel in other states for use in the CSX railroad operations in West Virginia. However, this argument gives too much weight to the labels on sales and use taxes. As the West Virginia Supreme Court pointed out in its *CSX* opinion, a state that has both state and local sales and use taxes may well have a lower rate for the *state* sales/use tax than a state with only a state level sales/use tax would, as the latter state is probably sharing a portion of its state sales/use tax revenue with its local jurisdictions to fund their operations. It would be myopic to allow a

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state to limit its use tax credit to sales taxes paid in other states that correspond to the type of sales/use tax that the state of use has chosen to adopt.

It is for this reason that the dormant Commerce Clause and its internal consistency test focus on the *comparative tax burdens* that the taxing state is creating between interstate commerce and intrastate commerce through its state tax scheme. In the *Wynne* case, the U.S. Supreme Court required Maryland to provide a credit against a resident taxpayer's county income tax liability in Maryland for income taxes that a resident taxpayer had paid to other states (and local jurisdictions) on the same interstate income that the Maryland county was taxing. This was a pretty straightforward example of the Maryland taxing scheme imposing a heavier income tax burden on interstate income than intrastate income as a result of the Maryland State Comptroller not applying the resident tax credit against the resident taxpayer's Maryland county income tax liability.

The *CSX* case presented the other side of the coin. There was no local/use tax liability in West Virginia for the Tax Commissioner to apply the state sales tax credit against, but the Tax Commissioner was unwilling to give CSX credit against its West Virginia state use tax liability for local sales taxes that CSX had paid in other states on its purchases of locomotive fuel that it was using in West Virginia. It was entirely possible that a taxpayer like CSX would incur a greater amount of combined sales/use tax liability in the state of purchase and the state of use (West Virginia), even after application of the West Virginia sales tax credit for the sales taxes CSX had paid to the state of purchase, than CSX would bear if it purchased and used the fuel in West Virginia. This hypothetical discrimination against interstate commerce is all the dormant Commerce Clause requires to render the West Virginia use tax and sales tax credit scheme unconstitutional.

It is unlikely, then, that the U.S. Supreme Court will agree to review the *CSX* case. Not only was the West Virginia Supreme Court's dormant Commerce Clause analysis correct and consistent with the Supreme Court's holding in the *Wynne* case, but there does not appear to be a split in the state or federal courts on this question.

ENDNOTES

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1 *Comptroller of Treasury of Maryland v. Wynne*, SCt, 135 SCt 1787 (2015).

2 For a more detailed discussion of the *Wynne* case, *see* John A. Biek, *Big Taxpayer "Wynne:" The Commerce Clause Requires State Resident Tax Credits to Apply to All Taxes Paid on Out-of-State Income,* J. PASSTHROUGH ENTITIES, Sept.–Oct. 2015, at 33.

3 *Matkovich v. CSX Transportation, Inc.*, 793 SE2d 888 (W. Va. 2016).

4 The Surface Transportation Board defines Class I freight railroads as having annual operating revenue of $250 million or more in 1991 dollars ($433 million in 2011 dollars). These seven U.S. line haul freight railroads include BNSF Railway, Canadian National Railway, Canadian Pacific Railway, CSX Transportation, Kansas City South Railway, Norfolk Southern Railway, and Union Pacific Railway. *See www.en.wikipedia.org/wiki/Railroad_classes#class_I.*

5 *CSX*, 793 SE2d 891.

6 *Id.*

7 W. Va. Code §11-15A-13a.

8 W. Va. Code §11-15A-13a(c).

9 W. Va. Code §11-15A-13a(c)(1).

10 W. Va. Code §11-15A-10a(a) (emphasis added).

11 W. Va. Code §11-15A-10a(b)(1) (emphasis added).

12 W. Va. Code §11-15A-10a(b)(2).

13 *CSX Transportation, Inc. v. Matkovich,* [W. Va.] St. Tax Rep. ¶401-241, at ¶ 3 (W. Va. Cir. Ct., Aug. 24, 2015).

14 *Id.*, slip op. at ¶ 4.

15 *Id.*

16 *CSX*, 793 SE2d 892.

17 *Id.*

18 *Id.*, at 893.

19 *Id.*, at 894 (quoting from *Boston Stock Exchange v. State Tax Comm'n,* SCt, 429 US 318, 322, 97 SCt 599, n 12 (1977)).

20 *CSX*, 793 SE2d 894 (quoting from *Armco, Inc. v. Hardesty*, SCt, 467 US 638, 642, 104 SCt 2620 (1984); *Northwestern States Portland Cement Co. v. Minnesota,* SCt, 358 US 450, 458, 79 SCt 357 (1959)).

21 *Complete Auto Transit, Inc. v. Brady,* SCt, 430 US 274, 279, 97 SCt 1076 (1977).

22 *CSX*, 793 SE2d 895.

23 *Id.*, at 899.

24 *Id.* (quoting from *Oklahoma Tax Comm'n v. Jefferson Lines*, SCt, 514 US 175, 185, 115 SCt 1331 (1995)).

25 *Comptroller of Treasury of Maryland v. Wynne*, SCt, 135 SCt 1787 (2015).

26 *Id.*, at 1793.

27 *Id.*

28 *Id.*

29 Md. Tax-Gen. Code Ann. §10-703(a) (emphasis added).

30 Md. Tax-Gen. Code Ann. §1-101(u).

31 Former Md. Tax-Gen. Code Ann. §10-703(a), repealed by Ch. 3, Laws of Maryland (1975). The repeal of the resident tax credit for the county tax was discussed in *Comptroller v. Blanton*, 390 Md. 528, 890 A2d 279 (2006); and *Stern v. Comptroller*, 271 Md. 310, 316 A2d 240 (1974).

32 *Wynne*, 135 SCt 1793.

33 *Id.*, at 1802–1806.

34 *Id.*, at 1803–1804.

35 *Id.*, at 1804.

36 *Id.*, at 1805.

37 *CSX*, 793 SE2d 896.

38 *General Motors Corp. v. City and County of Denver*, 990 P2d 59 (Colo. 1999).

39 *Id.*, at 71.

40 *Arizona Dep't of Revenue v. Arizona Public Service Co.*, 188 Ariz. 232, 934 P2d 796 (Ariz. Ct. App. 1997).

41 *CSX,* 793 SE2d 897.

42 *Id.*, at 897–898 (emphasis in original).

43 *Id.*, at 898.

44 *Id.*

45 *Steager v. CSX Transportation, Inc.*, Docket No. 16-1251 (U.S. cert petition filed on Apr. 19, 2017).

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