

The Virgin Islands Consortium

Territory Should Be Able To Resume Collection Of Excise Tax Soon, Governor-elect Bryan Says

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The Government of the Virgin Islands, which over the years has collected upwards \$20 million in excise tax, and in more recent times more than \$40 million following a surge in commerce and construction work that followed Hurricanes Irma and Maria, has found itself in a dilemma after District Court Judge Curtis Gomez in November ordered the G.V.I. to cease its collection of the tax.

As the territory's law relative to the excise tax currently stands, the tax must be paid on all goods, merchandise, or commodities manufactured in or brought into the U.S. Virgin Islands for sale or disposition in the course of a trade or business, according to the Bureau of Internal Revenue. The tax is based on the invoice value of such merchandise,

plus a markup of 5 percent, according to the bureau.

The government had continued its collection of the excise tax following a motion in September to stay the judgement until the Third Circuit ruled on the matter. But in November that motion was denied — meaning the government had to stop its collection of excise tax immediately until a ruling from the Third Circuit.

This week, the Third Circuit Court of Appeals, located in Philadelphia, sided with Judge Gomez's ruling by holding up the District Court's decision. The case will make a final appeals appearance in the Third Circuit to determine whether the territory could reconvene its collection of excise tax, however, the current ruling is expected to stand.

Even so, Governor-elect Albert Bryan sees the current problem as temporary, telling The Consortium [during an interview on Wednesday night](#) that once the government puts the right rules and regulations in place, collections should continue. He said the matter should hopefully be resolved before Governor Kenneth Mapp leaves office.

"Governor Mapp's team has been working on the matter," Mr. Bryan said, revealing that he had spoken with Mr. Mapp's financial team, who was giving him an update on the territory's financial condition, during the day on Wednesday. "It's a matter of having the right rules and regulations."

Mr. Bryan added, "The way that it is administered is illegal, but if you accompany the law with the right set of rules and regulations, then we will be able to collect. The bad news is that Christmas is one of the buying seasons and a lot of stuff is being shipped in, so we're losing a considerable amount of money on this. But hopefully we'll be able to get this matter wrapped up before Governor Mapp leaves office."

The challenge to the territory's excise tax law was first brought by Reefco Services, Inc., a corporation organized in the USVI and engages in the marine refrigeration business, in December 2014. The company installs and provides repair services for refrigeration units, air conditioning units, ice makers, and water makers on boats.

Reefco, which was charged for equipment that it brought into the territory dating back to 2011, contended in its complaint that the taxes violated the Commerce Clause

The complaint included five counts: Count one asserts a claim for an unconstitutional taking; count two asserts that the excise tax violates the Commerce Clause; count three asserts that the excise tax violates the Import/Export Clause; count four asserts a claim for a refund of excise taxes paid; and count five also asserts a claim for an unconstitutional taking.

The District Court in 2015 granted the GVI a motion to dismiss, but only in part, while denying the motion to dismiss relative to counts four and five. In April 2017, however, the court moved to vacate the trial, settling the matter.

But there was reconsideration this year of count two, according to court documents The Consortium has obtained. Count two contends that the excise tax law violates the Commerce Clause of the U.S. Constitution. "The excise tax is facially unconstitutional under the Commerce Clause as the excise tax discriminates against interstate commerce," reads a portion of count two. Citing precedent, the District Court said it was

“necessary to reconsider its decision dismissing count two of the amended complaint and revive that count.”

According to the September 28 District Court judgement, Reefco was assessed excise taxes in accordance with 33 Virgin Islands Code, Section 42 for items that Reefco imported into the territory. Section 42 was passed by the Virgin Islands Legislature in 1959. The section says ostensibly, the law requires the payment of “an excise tax on all articles, goods, merchandise or commodities manufactured in or brought into the Virgin Islands for personal use” or “any business use or purpose,” unless the items are “specially taxed, exempted or excluded.”

In 1984, the Virgin Islands amended Section 42 to require the payment of excise taxes on “all articles, goods, merchandise and commodities manufactured in or brought into or manufactured in the Virgin Islands.” Section 42b outlined the procedure for collection of excise taxes on foreign imports, while 42c outlined the procedure for collection of excise taxes on domestic imports. However, no statutory provision exists outlining the procedures for the collection of excise taxes on locally manufactured goods. Instead, Section 42a directs the director of the Bureau of Internal Revenue to “promulgate rules concerning procedures for the valuation of goods and payment of excise taxes on items manufactured in the Virgin Islands.” According to the District Court, “Significantly, however, such regulations were never promulgated.”

In a separate case cited as precedent in the Sept. 28 proceedings, an appeal to the Third Circuit Court in JDS Realty Corp. v. Gov’t of Virgin Islands explained that “[a] cardinal rule of Commerce Clause jurisprudence is that ‘[n]o state, consistent with the Commerce clause, may impose a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business.’”

“By imposing a tax only on imported goods” but not locally manufactured goods, the excise tax did just that, the Third Circuit said in its ruling of the JDS Realty Corp. v. Gov’t of Virgin Islands matter.

The District Court’s Sept. 28 ruling noted that the Third Circuit was “hard pressed to imagine a taxing scheme more patently violative of the Commerce Clause than [the excise taxes under Section 42].” Accordingly, the Third Circuit held that, “because the challenged excise tax ha[d] a discriminatory purpose and effect, it violate[d] the commerce clause,” added the District Court.