

The Virgin Islands Consortium

B&B Manufacturing Files Motion To Hold Government In Contempt Of Court For Contravening Order Forbidding The Collection Of Excise Taxes

Business / **Published On February 11, 2019 11:18 AM /**

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As the Government of the Virgin Islands continues to wait for a District Court ruling to determine the fate of the collection of excise taxes in the U.S. Virgin Islands -- once a reliable source of tens of millions of dollars for the government's coffers annually -- it is facing yet another challenge in what has become one of the hottest cases in the District Court.

B&B Manufacturing, a St. Thomas-based firm that produces several roofing products, [filed a motion](#) asking the court to issue a show cause order why the G.V.I. shouldn't be

held in contempt of court for what B&B argued was the contravening of the court's order halting the collection of excise taxes.

B&B staked its claim on the court's November 15 order enjoining the government from "collecting excise taxes in a manner inconsistent with the Court's holding in its September 28, 2018, judgment; that is, the GVI is enjoined from collecting excise taxes in a manner that violates Commerce Clause principles; and it is further ordered that, to the extent it wishes to do so, the GVI may advise the court if and when it is prepared to collect excise taxes in a manner consistent with the court's September 28, 2018, judgment and memorandum opinion, at which point the court may reconsider the injunctive relief ordered herein."

The court's original order came on September 28. However, the government continued to collect excise taxes claiming that the order did not specifically state that the Bureau of Internal Revenue was precluded from continuing its collection efforts. Yet even after the court's November 15 order clarifying the matter, the government on November 21 issued a letter to on-island manufactures, including B&B Manufacturing, stating that the G.V.I. would be collecting excise taxes effective December 1, 2018, moving unilaterally to lift a court-ordered injunction even before a decision on the matter was rendered.

"Beginning December 1, 2018, the government would like to start assessing excise taxes on locally manufactured goods. The excise taxes on locally manufactured goods will be due thirty days after the close of each month. Thus, the December tax return will be due and payable by January 30, 2019," read the B.I.R.-issued letter.

"One has to wonder why the defendants represented at the November 8 hearing "that developing and implementing a procedure for the collection of excise taxes on locally manufactured items was a difficult endeavor that would take a great deal of time," but lo and behold by November 21 the B.I.R. had developed and implemented a fix to the problem," B&B said in its motion. "This leads to one of two mutually exclusive possibilities – (1) that the representations to the court were false (a contention the undersigned does not believe) or (2) that the new scheme has not fixed the problem (a more reasonable interpretation of the situation). But if the answer is the latter, then the court should not lift the injunction that is currently in force and effect and hold the defendants in contempt."

[The G.V.I. responded](#) by contending that though it issued the letter to manufacturers, it had yet to resume the collection of excise taxes and therefore the plaintiff's motion was moot and should be ignored. It further stated that the letter was issued because the G.V.I. believed it would have been able to restart excise tax collection by Dec. 1, 2018.

"The government, in an effort to begin collecting excise taxes again, has been working diligently on implementing the proper steps to ensure the new tax structure will pass constitutional muster. As part of this effort, the government on or about November 21, 2018, issued letters ("Manufacturers Letter") to local manufacturers, including the intervenor, stating that the government would like to begin taxing on December 1, 2018. The manufacturers letter also set forth the date and time for several educational workshops to explain to local manufactures how to file and pay excise tax... Given the court's injunction, the tax has not yet been assessed and the government has not resumed collection of excise taxes," said the G.V.I. in its response.

The government's decision to issue a letter notifying manufacturers of its intention to resume excise tax collection by December 1 shows how gravely the G.V.I. has underestimated the matter before the court, and further shows how badly the halt in excise tax collection has been hurting its bottomline; the G.V.I. is projected to lose \$45 million annually if it can no longer collect excise taxes. [During a December interview with The Consortium](#), then-Governor-elect Albert Bryan was confident that the matter would have been resolved before he took office on January 7, 2019. "Hopefully we'll be able to get this matter wrapped up before Governor Mapp leaves office," Mr. Bryan said.

The challenge 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.

Depending on the ruling when the new case is heard in the Third Circuit, the repercussions could be significant for the local government, which for years has been struggling with a structural deficit, and is in continuous need of funds to meet its obligations. A diminishing or complete rejection of the excise tax would force the government to look elsewhere to recoup those funds.