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Third Circuit Court of Appeals Ruling Restores GVI's Ability to Collect \$40 Million Annual Haul in Excise Taxes

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Aerial view of business port with shore crane loading container in container ship in import/export and business logistics with crane and shipping cargo. By. INTERNATIONAL CONCEPTS/123RF/VI CONSORTIUM

A ruling by the Third Circuit Court of Appeals on Wednesday in the Reefco Services Inc. v Government of the Virgin Islands landmark case, has restored the GVI's ability to once again collect excise taxes, though the government must first prove that rules and regulations the GVI said it implemented in February 2019 are actually being followed. Additionally, Reefco could appeal the case, further stymying the restart of excise tax collection.

The annual excise tax haul for the local government is estimated to be \$40 million, though the figure fluctuates. That source of revenue was eliminated when the District Court of the Virgin Islands in November 2018 [ordered the GVI to halt the collection of excises taxes](#), ruling that the local government was in contravention of the Dormant Commerce Clause. In simple terms, the Dormant Commerce Clause means because Congress has been given power over interstate commerce, states cannot discriminate against interstate commerce nor can they unduly burden interstate commerce, even in the absence of federal legislation regulating the activity.

On the surface, the local government's excise tax law appears to fall in line with the Dormant Commerce Clause. Title 33 of V.I. Code, Section 42 (a), reads, "Every individual and every firm, corporation and other association doing business in the Virgin Islands, except those specially taxed, exempted, or excluded shall pay an excise tax on all articles, goods, merchandise or commodities manufactured in or brought into the Virgin Islands for personal use, use in a business, for disposition or sale in the course of trade or business, for processing or manufacturing or for any other business use or purpose."

But in actuality, until the GVI changed the rules in February 2019, an action that was forced by the lawsuit, the local government had failed to levy the excise tax on local manufacturers for 35 years — since the law was enacted in 1984 — in contravention of the GVI's own statute.

"That failure is nothing short of a blatant preference for domestic commerce over [interstate] commerce," opined the Third Circuit Court of Appeals [in its Wednesday judgment](#). "Local manufacturers were afforded a tax break not available to foreign and domestic importers. The resulting violation of the Commerce Clause is obvious and the GVI's claims to the contrary do not merit further discussion."

Reefco Services — a St. Thomas-based company specializing in marine refrigeration, air conditioning, ice makers, and water-makers — filed a lawsuit against the GVI seeking relief from injury caused by the preferential excise tax collection rules.

The District Court's judgment on the matter on September 28, 2018, which declared the GVI's collection of excise taxes unconstitutional, was disregarded by the local government, which forced the court on November 17 of the same year to order the halt of excise tax collection.

However, the Third Circuit Court of Appeals in its Wednesday judgment opined that the District Court had overstepped its authority when it required that the GVI pass rules and regulations that met the court's approval.

"The District Court effectively compelled the GVI to enact regulations that would meet with the court's approval. That was a bridge too far. The Judicial Power authorized by Article III vests courts with the power to adjudicate violations of the law, not to make law," opined the Third Circuit. "Consequently, if and when the GVI began assessing the excise tax on local manufacturers, it complied with the District Court's judgment, and the court should have had no more say in the matter."

As to whether the February 2019 rules and regulations implemented still violates the Dormant Commerce Clause, the Third Circuit said any such injury should be brought against the government by an injured party, not the District Court.

"Upon obtaining proof that the GVI is assessing the excise tax on local manufacturers, we direct the District Court to lift the injunction," ruled the Third Circuit.

The judgment means the excise tax collection could see significant growth from the estimated \$40 million collected annually before the February 2019 rules and regulations were implemented, under which local manufactures will be levied an excise tax.

"This can work out quite well for the GVI in that it paves a way forward for us to start collecting excise taxes, hopefully in the near future," said V.I. Attorney General Denise George. "It is important to note that Reefco has 14 days to petition for a rehearing. If no further action is filed in the Third Circuit, the decision becomes final in 30 days upon the Court's issuance of a mandate."

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