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B.I.R. Will Collect Excise Tax on Local Manufactures Beginning Jan. 1, But Not on Imported Items

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The Bureau of Internal Revenue said Monday it intends to start the collection of excise taxes on goods manufactured in the Virgin Islands Jan. 1, representing a major shift in how B.I.R. levy the excise tax, which for years had only targeted importers.

Governor Albert Bryan told the Consortium Tuesday that while the excise tax would be collected on local manufacturers, the government must wait for a ruling by Judge Molloy before levying the tax on importers.

"We have to go back to the court in February and until we get a decision from Judge Molloy we cannot" levy excise taxes on items imported, Mr. Bryan said. The governor said even the collection of excise taxes on local manufacturers was "treading a thin line."

"We're moving forward with it but tentatively," he said.

The government's move to levy the excise tax on local manufacturers appears to be a decision aimed at fulfilling the court's demand so that clearance could be given by Judge Molloy for collection on imported items.

A ruling by the Third Circuit Court of Appeals [on Oct. 7](#) in the Reefco Services Inc. v Government of the Virgin Islands landmark case, restored the GVI's ability to once again collect excise taxes, though the government has to first prove that rules and regulations the GVI said it implemented in February 2019 were actually being followed. District Court Judge Robert Molloy earlier this month [upheld](#) the Third Circuit's ruling, opining that the local government must first prove that the excise tax is being levied not only on importers, but local manufacturers as well.

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 Oct. 7 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."

"Manufacturers who import raw material to be used in their manufacturing business will be required to report those items at the time of importation," said B.I.R. in its release. "Manufacturers will be required to file a manufacturer's excise tax return, Form 721VI, which will cover the monthly sale of items manufactured in the Virgin Islands."

Reefco Services — a St. Thomas-based company specializing in marine refrigeration, air conditioning, ice makers, and water-makers — filed the 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 Oct. 7 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.

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