



Export Clause: Limitation on Congress's Taxing Power

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Summary

The Export Clause, found in Article I, Section 9, Clause 5 of the U.S. Constitution, directly states “No Tax or Duty shall be laid on Articles exported from any State.” The Clause represents one of the few restrictions on Congress’s otherwise broad taxing power. Examples of taxes that have been found unconstitutional as applied to exports include the harbor maintenance tax and the excise tax on domestically mined coal.

The Clause prohibits taxes and duties that are targeted at exports or imposed on goods during “the course of exportation.” It also protects those services and activities that are “closely related” to the export process. Importantly, pre-export goods and services are not exempt from otherwise generally applicable taxes.

The Export Clause only prohibits the imposition of taxes and duties. It does not prohibit user fees. Congress’s choice to call something a tax or a fee will not be determinative in assessing the provision’s constitutionality; rather, a court will likely examine the provision’s substantive characteristics to determine if it is a fee or tax. According to the Supreme Court, the primary characteristics of a user fee are that it, unlike a tax, is (1) proportional to the government services or benefits received by the payor and (2) not determined solely on an ad valorem basis (i.e., not based solely on the quantity or value of the goods or services on which it is placed). Thus, it is possible that a charge referred to in statute as a “fee” could be recharacterized by a court to be a “tax” if it failed to meet these criteria, and vice versa.

When a government charge has been imposed in violation of the Export Clause, one issue that arises is the remedy for persons who paid the unconstitutional amount. Typically, taxpayers who overpay a tax are required to seek a refund using the process found in the Internal Revenue Code (IRC). In the event that a “fee” was recharacterized as an impermissible tax, there might be a similar administrative refund procedure. The question here is whether it is possible to bring suit in the Court of Federal Claims under the Tucker Act seeking damages from the government in the amount of unconstitutional amounts paid. Taxpayers may prefer the Tucker Act because it has a longer statute of limitations than the IRC—six years from the time the tax is paid versus three years—and, in some situations, might allow parties farther down the supply chain (e.g., exporters) to bring claims alleging they deserve damages because they bore the economic burden of the tax through higher prices.

A threshold issue has been whether the Court of Federal Claims can hear these suits. In order for a claim to be permissible under the Tucker Act, two things must be true: (1) the Export Clause must provide a right to monetary damages when the government violates it, and (2) it must be permissible to make such a claim independent of an IRC (or other administrative) refund claim. In 2008, the Supreme Court held that taxpayers must comply with the IRC procedures when seeking refunds for the unconstitutionally imposed coal excise tax. It appears the Court’s holding would apply to any tax covered by the IRC refund process. The Court did not address whether the Export Clause provides a right to monetary damages, finding that the IRC refund process applies regardless. Because these issues are matters of statutory construction, Congress has the option to modify the refund procedures for taxes imposed in violation of the Export Clause, if it so chooses. For example, after the 2008 Supreme Court case, Congress provided an alternative refund process for the coal excise tax that extended the statute of limitations and expanded the opportunity for exporters to seek refunds.

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The Export Clause states that “No Tax or Duty shall be laid on Articles exported from any State.”¹ The clause is perhaps among the lesser-known provisions of the U.S. Constitution. Nonetheless, it is an important one for Congress because it is one of the few limitations on Congress’s taxing power.² The Clause’s prohibition typically becomes relevant in discussions about certain energy and transportation-related taxes (such as the coal excise tax and harbor maintenance tax).³

Scope of the Prohibition

The Export Clause is an absolute prohibition on taxing exports by the federal government.⁴ Whether a tax discriminates against exports is irrelevant—even a generally applicable tax that applies to all goods equally is unconstitutional as applied to exports.⁵

The Clause prohibits any federal tax or duty that is imposed on goods during “the course of exportation” or targeted at exports, as well as those imposed on services and activities “closely related” to the export process.⁶ A situation where a good may be found to be in the course of exportation is when it is loaded onto an export vessel and title is transferred from the producer to a foreign purchaser.⁷ Once a good is in the course of exportation, it does not matter that there may be some theoretical possibility it might not actually be exported—the good cannot be taxed.⁸

On several occasions, the Supreme Court has found a tax to be impermissible when it was essentially imposed on an export good even though it was not directly imposed on it. For example, in a 1915 case, *Thames & Mersey Marine Ins. Co. v. United States*,⁹ the Court held that a federal stamp tax on insurance policies against marine risks could not be applied to policies covering exports. The Court explained that “proper insurance during the voyage is one of the necessities of exportation” and “taxation of policies insuring cargoes during their transit to

¹ U.S. Const. Art. 1, §9, cl. 5. The Export Clause is distinct from the Import-Export Clause, which limits the states’ taxing power. U.S. Const. Art. I, §10, cl. 2 (“No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it’s inspection Laws....”).

² U.S. Const. Art. I, §8, cl. 1 (“The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States ...”).

³ I.R.C. §§4121, 4461 & 4462.

⁴ See, e.g., *United States v. IBM Corp.*, 517 U.S. 843, 848 (1996) (Export Clause “strictly prohibits any [federal] tax or duty ... that falls on exports during the course of exportation”).

⁵ See *id.* (Export Clause prohibits all taxes on exports, whether or not discriminatory); *United States v. Hvoslef*, 237 U.S. 1, 18 (1915) (rejecting argument that tax was permissible because it was nondiscriminatory).

⁶ See *Turpin v. Burgess*, 117 U.S. 504, 507 (1886) (“a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition”); *IBM Corp.*, 517 U.S. at 846, 848 (“our cases have broadly exempted from federal taxation not only export goods, but also services and activities closely related to the export process” and “broadly suggested that the Export Clause prohibits both taxes levied on goods in the course of exportation and taxes directed specifically at exports”); *Fairbank v. United States*, 181 U.S. 283, 294 (1901) (striking down a federal stamp tax on bills of lading for export shipments that discriminated against exports, finding that while the tax was not directly imposed on goods being exported, it was “in effect a duty on the article transported”).

⁷ See *A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923) (goods entered the course of exportation when delivered to the export carrier and title transferred); IRS Notice 2000-28, 2000-1 C.B. 1116 (same).

⁸ See *A. G. Spalding & Bros.*, 262 U.S. at 69-70.

⁹ *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19 (1915).

foreign ports is as much a burden on exporting as if it were laid on ... the goods themselves.”¹⁰ In a more recent case, *United States v. IBM Corp.*,¹¹ the Court recognized *Thames & Mercy* as still good law, which led it to conclude that a tax on insurance premiums paid to foreign insurers not subject to the federal income tax could not be applied to insurance for exports.¹² Additional taxes that have been found to be essentially imposed on the good itself are those imposed on charter contracts¹³ and a federal stamp tax on bills of lading for export shipments.¹⁴ Other than these examples, there is not much guidance on when an activity or service is protected from tax because it is “closely related” to the export process.¹⁵

Importantly, the Clause does not prohibit a generally applicable tax from being imposed on goods prior to export.¹⁶ In other words, goods that are exported are not exempted “from the prior ordinary burdens of taxation which rest upon all property similarly situated.”¹⁷ Thus, for example, a manufacturing tax on filled cheese was permissible even though the specific cheese at issue was manufactured under contract for exportation and was in fact exported.¹⁸ Similarly, a stamp charge of 25 cents per package of tobacco intended for export was upheld when the stamp charge, which indicated the tobacco was otherwise exempt from tobacco excise taxes, was designed to prevent fraud with respect to the excise tax exemption.¹⁹ This purpose led the Court to conclude the stamp charge was not a tax on exports.

Tax v. User Fee

The Export Clause only prohibits the imposition of “taxes” and “duties.” It does not prohibit user fees.²⁰ Thus, the distinction between a tax and user fee is important. Congress’s choice to call something a tax or a fee will not be determinative in assessing the provision’s constitutionality.²¹ Rather, a court will likely examine the provision’s substantive characteristics to determine if it is a fee or tax.²² Thus, it is possible that a charge referred to in statute as a “fee” could be

¹⁰ *Id.* at 27.

¹¹ *United States v. IBM Corp.*, 517 U.S. 843 (1996).

¹² I.R.C. §4371.

¹³ *United States v. Hvoslef*, 237 U.S. 1 (1915).

¹⁴ *Fairbank v. United States*, 181 U.S. 283 (1901).

¹⁵ For example, it was possible that the Court in *IBM* would address the “closely connected” concept when assessing the constitutionality of a tax on certain insurance premiums. However, the Court avoided the issue because it characterized the tax as a “hybrid in which the tax both burdens exports during transit and ... is essentially a tax on the goods themselves” and therefore “[r]eexamination of the question whether a particular assessment on an activity or service is so closely connected to the goods as to amount to a tax on the goods themselves must await another day.” *IBM Corp.*, 517 U.S. at 863.

¹⁶ *See id.* at 846; *see also* *William E. Peck & Co. v. Lowe*, 247 U.S. 165 (1918) (upholding imposition of tax on income of company engaged in export business).

¹⁷ *Cornell v. Coyne*, 192 U.S. 418, 427 (1904).

¹⁸ *See id.*

¹⁹ *Pace v. Burgess*, 92 U.S. 372 (1876); *see also* *Turpin v. Burgess*, 117 U.S. 504, (1886) (same result even after Congress later repealed the stamp charge by legislation that explicitly referred to it as an “export tax”).

²⁰ *See* *United States v. U.S. Shoe Corp.*, 523 U.S. 360, 369 (1998) (the Court’s holding, which struck down the harbor maintenance tax as applied to exports after rejecting its characterization as a user fee, “does not mean that exporters are exempt from any and all user fees designed to defray the cost of harbor development and maintenance. It does mean, however, that such a fee must fairly match the exporters’ use of port services and facilities.”).

²¹ *See* *NFIB v. Sebelius*, 132 S. Ct. 2566, 2594-95 (2012).

²² *See* *U.S. Shoe Corp.*, 523 U.S. at 369.

recharacterized by a court to be a “tax” if it failed to meet the characteristics of a user fee (described below), and vice versa.

A case that illustrates this distinction is *United States v. U.S. Shoe Corporation*.²³ At issue in that case was the harbor maintenance tax (HMT), which imposes a charge on cargo passing through U.S. ports in order to fund harbor maintenance projects.²⁴ The question was whether the HMT was a tax, in which case it could not be imposed on exports, or a user fee that would fall outside the Export Clause’s scope. The Supreme Court held that the HMT was a tax and therefore could not be imposed on goods in the process of exportation. In so doing, it exhibited a willingness to engage in substantive analysis to determine whether a government charge was a user fee or a tax. To make the determination, the Court relied on a prior case, *Pace v. Burgess*.²⁵ According to that case, the primary characteristics of a user fee for purposes of the Export Clause are that it, unlike a tax, is (1) proportional to the government services or benefits received by the payor and (2) not determined solely on an ad valorem basis (i.e., not solely based on the quantity or value of the goods or services on which it is placed).²⁶ Applying that analysis here, the Court determined there was not a close enough relationship between the services rendered by the U.S. ports and the charges levied under the HMT since the HMT was solely determined on an ad valorem basis. Even though the HMT was considered a tax in this context, the Court made clear this should not be interpreted to mean that exporters are exempt from user fees intended to defray costs associated with harbor maintenance.²⁷ Rather, it meant that any such fee “must fairly match” their use of port services and facilities.²⁸

Modern Application of the Clause

After decades of no serious Export Clause challenges, several taxes were found in the late 1990s to be unconstitutional as applied to exports. In the 1996 *IBM* case, the Supreme Court struck down the tax on insurance premiums paid to foreign insurers that are not subject to federal income tax as applied to insurance for exports. In 1998, the Court in *U.S. Shoe* struck down the imposition of the HMT as applied to exports. Later that same year, a federal district court ruled that imposing the excise tax on domestically mined coal in the stream of exportation clearly violated the Export Clause.²⁹

After that streak of taxes being struck, a different result was reached in several recent cases brought by coal producers and exporters alleging that a reclamation fee imposed by the Surface Mining Control and Reclamation Act of 1977³⁰ on exported coal violates the Export Clause. The reclamation fee is based on each ton of “coal produced” by surface and underground mining.³¹

²³ *United States v. U.S. Shoe Corporation*, 523 U.S. 360 (1998).

²⁴ I.R.C. §§4461, 4462.

²⁵ *Pace v. Burgess*, 92 U.S. 372 (1875).

²⁶ *See U.S. Shoe Corp.*, 523 U.S. at 369.

²⁷ *See id.*

²⁸ *Id.*

²⁹ *Ranger Fuel Corp. v. United States*, 33 F. Supp. 2d 466 (E.D. Va. 1998).

³⁰ P.L. 95-87, as amended (codified at 30 U.S.C. §§1201-1328).

³¹ 30 U.S.C. §1232(a) (“All operators of coal mining operations ... shall pay ... a reclamation fee of 35 cents per ton of coal produced by surface mining and 15 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine, as determined by the Secretary....”).

Neither the statute nor the agency regulations define the term “coal produced.”³² The coal producers and exporters argued that the term refers to the process of extracting and selling coal, and therefore the imposition of the fee on coal sold to foreign purchasers violates the Export Clause. The government argued the term only refers to the extraction, and not the sale, of coal. In 2008, the Court of Appeals for the Federal Circuit agreed with the government and upheld the reclamation fee statute as constitutional.³³ The court, using the principle of statutory construction that “every reasonable construction must be resorted to, in order to save the [challenged] statute from unconstitutionality,” found that interpreting the term “coal produced” to refer to “coal extracted” is reasonable.³⁴

Taxes Struck Under the Export Clause

Courts have found several federal taxes to violate Article I, Section 9, clause 5 to the extent they were imposed on exports. Examples include the following.

Fairbank v. United States, 181 U.S. 283 (1901), struck down a stamp tax on foreign bills of lading [Act of June 13, 1898 (30 Stat. 448, 459)].

United States v. Hvoslef, 237 U.S. 1 (1915), struck down a tax on charter parties as applied to shipments exclusively from U.S. ports to foreign ports [Act of June 13, 1898 (30 Stat. 448, 460)].

Thames & Mersey Marine Ins. Co. v. United States, 237 U.S. 19 (1915), struck down a stamp tax on marine insurance policies on exports [Act of June 13, 1898 (30 Stat. 448, 461)].

United States v. IBM Corp., 517 U.S. 843 (1996), struck down a federal tax on insurance premiums paid to foreign insurers not subject to the federal income tax as applied to insurance for losses incurred during the shipment of goods from locations within the United States to purchasers abroad [Act of Aug. 16, 1954 (ch. 736, 68A Stat. 521, 26 U.S.C. §4371(1))].

United States v. United States Shoe Corp., 523 U.S. 360 (1998), struck down the Harbor Maintenance Tax as applied to goods loaded for export at U.S. ports [Act of Nov. 17, 1986 (P.L. 99-662, title IV, §1402(a), 100 Stat. 4266, 26 U.S.C. §§4461, 4462)].

Ranger Fuel Corp. v. United States, 33 F. Supp. 2d 466 (E.D. Va. 1998) struck down the excise tax on domestically mined coal as applied to coal destined for export [Act of Feb. 10, 1978 (P.L. 95-227, §2(a), 92 Stat. 11, 26 U.S.C. §4121)].

Source: Congressional Research Service.

Claims for Damages Under the Export Clause

Courts have found several taxes to be unconstitutional as applied to exports, including the coal excise tax and the harbor maintenance tax (see the text box above). One question that arises in these situations is what remedy exists for taxpayers who paid an unconstitutional charge imposed by the government.

³² See 30 U.S.C. §1232(a); 30 C.F.R. §870.12 (regulation of Office of Surface Mining Reclamation and Enforcement).

³³ See *Consolidation Coal Co. v. United States*, 528 F.3d 1344 (Fed. Cir. 2008), *reversing* 75 Fed. Cl. 537 (2007) and 64 Fed. Cl. 718 (2005); *Consolidation Coal Co. v. United States*, 615 F.3d 1378 (Fed. Cir. 2010) (reaching same conclusion with respect to the regulations). See also *Consolidation Coal Co. v. United States*, 102 Fed. Cl. 489 (2011); *Eaglehawk Carbon, Inc. v. United States*, 105 Fed. Cl. 128 (May 29, 2012); *Red River Coal Co. v. United States*, No. 01-441 C, 2012 U.S. Claims LEXIS 649 (Fed. Cl. June 21, 2012).

³⁴ *Id.* at 1347 (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Bldg & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

Taxpayers who overpay a federal tax are typically required to seek a refund from the IRS using the refund process found in the Internal Revenue Code (IRC).³⁵ The question here is whether there is another option: can taxpayers bring suit in the Court of Federal Claims under the Tucker Act seeking damages from the government in the amount of unconstitutional taxes paid? The Tucker Act grants the court jurisdiction over claims against the United States, including those founded in the Constitution.³⁶ This same question may arise in the event that a government charge outside the IRC refund procedure was invalidated (e.g., if a non-IRC “fee” was recharacterized by a court to be a “tax”): could a person who paid the unconstitutional charge bring suit under the Tucker Act outside of any applicable administrative refund procedure?

Taxpayers may prefer the Tucker Act because it bypasses two limitations in the IRC refund process. First, the Tucker Act has a longer statute of limitations than the IRC—six years from the time the tax is paid,³⁷ compared to three years from such time.³⁸ Thus, taxpayers could seek damages for taxes paid in the several years preceding those for which they could receive IRC refunds. Second, the IRC sometimes gives priority to producers’ refund claims,³⁹ while the Tucker Act does not. As a result, the Tucker Act could allow parties farther down the supply chain (e.g., exporters) to bring claims alleging they deserved damages because they bore the economic burden of the tax through higher prices.

A threshold issue is whether the Court of Federal Claims can hear these suits. The Tucker Act only confers jurisdiction—it does not create an enforceable right against the United States for monetary damages.⁴⁰ Rather, the right must be found in another source of law,⁴¹ which here would be the Export Clause. Thus, a key question is whether the Export Clause provides a right to monetary damages when the government violates it. If the answer is yes, the next question is whether such a claim can be made independent of an IRC (or other administrative) refund claim.

In 2000, the Court of Federal Claims held that the Export Clause provided a separate cause of action so that taxpayers could bring a suit for damages independent of an IRC refund claim.⁴² The

³⁵ See I.R.C. §§6511, 6532, 7422 (taxpayers seeking a refund in court must first file a timely refund claim with the IRS and then wait six months, unless the IRS makes a determination prior to that date, before bringing suit). Not all government charges found to violate the Export Clause will be subject to these procedures. See, e.g., 19 C.F.R. §24.24 (U.S. Customs and Border Protection regulations addressing refund procedure for unconstitutionally imposed HMT).

³⁶ See 28 U.S.C. §1491(a)(1) (granting the court jurisdiction over “any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort”).

³⁷ See 28 U.S.C. §2501; *Venture Coal Sales Co. v. United States*, 370 F.3d 1102, 1105 (Fed. Cir. 2004) (stating a claim accrued for Tucker Act purposes each time the coal excise tax was paid).

³⁸ See I.R.C. §6511(a).

³⁹ See I.R.C. §6416(c) (“the amount of any [manufacturers excise] tax ... erroneously or illegally collected in respect of any article exported to a foreign country or shipped to a possession of the United States may be refunded to the exporter or shipper thereof, if the person who paid such tax waives his claim to such amount”).

⁴⁰ *United States v. Mitchell*, 463 U.S. 206, 216 (1983) (internal quotations and citations omitted).

⁴¹ See *id.*; *United States v. Testan*, 424 U.S. 392, 398, 400 (1976).

⁴² See *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 1065 (2001). Notably, the court dismissed several other cases brought by coal brokers and ultimate purchasers who argued they were injured by the government’s unconstitutional imposition of the coal excise tax because the tax burden was shifted to them by producers charging higher prices. The court found the parties did not have standing to bring suit because the requisite causal relationship between their alleged injury and the government’s action was lacking since it was the independent actions of producers that determined whether they paid any amount of the unconstitutional tax. See *Emerald International Corp. v. United States*, 54 Fed. Cl. 674 (2002); *Ontario Power Generation, Inc. v. United States*, 54 Fed. Cl. 630 (2002), *aff’d on other grounds by* 369 F.3d 1298 (Fed. Cir. 2004).

court based this conclusion on its findings that the Export Clause was a money-mandating provision, as required for Tucker Act jurisdiction, and that the cause of action founded in a violation of the Export Clause was self-executing.⁴³

However, in a 2008 decision, *United States v. Clintwood Elkhorn Mining Co.*,⁴⁴ the Supreme Court held that taxpayers seeking refunds for the unconstitutionally imposed coal excise tax must comply with the IRC refund process. Notably, the Court did not address whether the Export Clause provides a cause of action that could be brought under the Tucker Act, finding that the IRC refund provisions would apply regardless.⁴⁵ Thus, that question remains unanswered.

The taxpayers in Clintwood Elkhorn had filed administrative refund claims for the three tax years open under the IRC's statute of limitations and filed suit in the Court of Federal Claims seeking the amount of taxes paid for the three previous years that were open only under the Tucker Act's longer limitations period. The Supreme Court held that the plain language of the relevant IRC provisions, Sections 7422 and 6511,⁴⁷ clearly required taxpayers to file a timely refund claim with the IRS before bringing suit.⁴⁸ The Court stated that it had basically decided the issue in a 1941 case where it had reasoned that the Tucker Act's statute of limitations was simply "an outside limit" which Congress could shorten in situations requiring "special considerations," such as tax refunds since suits against the government to recover taxes would hinder administration of the tax laws.⁴⁹ As the Court had explained in that case, the IRC's refund provisions would have "no meaning whatever" if taxpayers who did not comply with those provisions could still bring refund suits under the Tucker Act.⁵⁰

Post-Clintwood Elkhorn

After *Clintwood Elkhorn*, Congress changed the law to provide an alternative administrative procedure for refunding the unconstitutionally imposed coal excise tax.⁴⁶ Among other things, it extended the period of time for which refunds could be claimed and expanded the opportunity for exporters to claim refunds.

Further, noting that it was clear from its past cases that unconstitutionally collected taxes could be subject to the same administrative requirements as other taxes, the Court rejected the taxpayers' argument that something unique about the Export Clause required different treatment.⁵¹ The Court explained that while the government may not impose unconstitutional taxes, it may create an administrative process to refund them because of its "exceedingly strong interest in financial stability," regardless of whether the tax violated the Export Clause or some other provision of the Constitution.⁵² The Court also rejected the taxpayers' claim that the IRC refund scheme could not

⁴³ See *Cyprus Amex*, 205 F.3d at 1373-74.

⁴⁴ *United States v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1 (2008).

⁴⁵ See *id.* at 9.

⁴⁶ P.L. 110-343, Div B ("Energy Improvement and Extension Act of 2008"), Title I, Subtitle B, §114, 122 Stat. 3826.

⁴⁷ I.R.C. §7422(a) ("No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected ... until a claim for refund or credit has been duly filed with the Secretary ..."); I.R.C. §6511(a), (b) (applying the IRC's limitations period to refunds for "any tax imposed by this title" and disallowing any refund "unless a claim ... is filed by the taxpayer within such period").

⁴⁸ See *Clintwood Elkhorn*, 553 U.S. at 7-8 ("[W]e cannot imagine what language could more clearly state that taxpayers seeking refunds of unlawfully assessed taxes must comply with the Code's refund scheme before bringing suit, including the requirement to file a timely administrative claim.")

⁴⁹ *Id.* at 8-9 (quoting *United States v. A.S. Kreider Co.*, 313 U.S. 443, 447 (1941)).

⁵⁰ *Id.* at 9 (quoting *A.S. Kreider*, 313 U.S. at 448).

⁵¹ See *id.* at 11-12.

⁵² *Id.* at 12 (quoting *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business* (continued...))

apply to facially unconstitutional taxes, finding the plain language of Section 7422 clearly included them.⁵³

Looking to the implications of *Clintwood Elkhorn*, it seems clear that any tax collected in violation of the Export Clause that is subject to the IRC refund process may only be refunded through that process. Because these issues are matters of statutory construction, Congress has the option to modify the refund procedures for taxes imposed in violation of the Export Clause, if it so chooses (e.g., as it did by providing an alternative refund process for the coal excise tax post-*Clintwood Elkhorn*). With respect to whether the Export Clause provides its own cause of action for purposes of Tucker Act jurisdiction, the Court in *Clintwood Elkhorn* did not address this issue. The Court of Federal Claims has previously answered the question affirmatively, thus indicating that claims for taxes or any fees recharacterized as taxes imposed in violation of the Export Clause that fall outside the IRC (or another administratively mandated) refund process may be brought in that court,⁵⁴ unless another provision of law removes jurisdiction.

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Regulation, 496 U.S. 18, 37 (1990)).

⁵³ *See id.* at 13.

⁵⁴ *See* *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369 (Fed. Cir. 2000); *Consolidation Coal Co. v. United States*, 351 F.3d 1374 (Fed. Cir. 2003).

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