

3rd Circuit backs Gomez ruling in excise tax case

By BRIAN O'CONNOR
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The Virgin Islands government has been dealt a setback in fixing a multimillion-dollar hole in the territory's budget.

Two judges with the 3rd U.S. Circuit Court of Appeals on Wednesday upheld a lower court's ruling preventing the territorial government from collecting excise tax on constitutional grounds.



Curtis Gomez

U.S. Court of Appeals judges Thomas Ambro and Thomas Vanaskie issued a one-page memo dated Nov. 27 and published on Tuesday, affirming a Nov. 15 order by U.S. District Court Judge Curtis Gomez.

No legal memorandum accompanies the order, making it hard to determine why Ambro and Vanaskie issued their ruling. The ruling is interlocutory, meaning the case must still proceed to a final appeal judgment on whether or not the V.I. government can collect excise tax.

An excise tax is an indirect tax levied against manufacturers of goods, as opposed to a direct tax, usually levied against sellers or purchasers of certain goods. Gomez's ruling, and a subsequent memorandum opinion on the tax, ruled the government has been improperly collecting the tax for decades.

Reefco, a company that installs refrigerators, ice machines and other equipment on boats, argued that because "boat parts" are exempt from excise tax, their business should be exempt.

The tax usually generates more than \$20 million of government revenues each year, according to



Daily News file photo

The 3rd U.S. Circuit Court of Appeals has backed a ruling by the U.S. District Court blocking the territory from collecting excise tax levied against items like those awaiting delivery at the Crowley Shipping Terminal on St. Thomas. If collected, excise and trade taxes are projected to generate \$45.1 million for the territory in fiscal year 2019.

court documents.

The government had continued to collect the tax even after a September ruling that it violated the U.S. Constitution's Commerce Clause, according to court documents. At one point during an evidentiary hearing, Gomez asked why the government shouldn't be held in contempt, according to court documents.

The Commerce Clause gives Congress alone the power to regulate commerce between the states.

Officials had collected \$39 million in excise tax for 2018 as of Nov. 15, according to a Nov. 26 opinion Gomez wrote in support of his ruling. The proposed fiscal year 2019 budget includes \$45.1 million for

trade and excise taxes. That's about 5.5 percent of all government tax revenues (\$820.6 million), according to the budget.

The ruling impacts not just Reefco, but the territory's economy as a whole, Gomez wrote.

Government officials had not presented exact information about how the end of the excise tax would impact the government checkbook, Gomez wrote.

"A functioning government is clearly in the public's interest, and a functioning government certainly requires money," he wrote. "The GVI has provided the court with no information regarding the amount of money it collects from excise taxes."

A stay benefits specific segments of the public because government officials have testified they plan to levy excise tax on local businesses, Gomez wrote.

"The interest of importers would favor not issuing a stay, as their interest is certainly in not paying a discriminatory excise tax," he said. "The interest of local manufacturers

would favor issuing a stay, as their interest would be not paying an excise tax."

Discrimination against importers outweighs local economic interests, Gomez wrote.

On appeal, Virgin Islands Attorney General Claude Walker, Solicitor General Pamela Tepper, and Assistant Attorney General Dionne Sinclair, argued that the government had previously been granted congressional authority to levy the tax against imports.

The consequences of Gomez's ruling are dire, they wrote.

Gomez "has effectively curtailed the government's ability to collect revenues, thrown the excise tax system authorized by Congress into a state of chaos, created uncertainty among taxpayers, and instilled insecurity in local and federal officials whose daily responsibility it is to assess and collect excise taxes," they wrote.

The effect is particularly pronounced because of the importation of materials for hurricane recovery, the lawyers wrote.

Alex Golubitsky, Reefco's attorney, argued that while the government could easily bill companies if it won on appeal, and fine or jail people if they didn't pay, the reverse isn't true.

"The ability of Reefco or other taxpayers to extract refunds from the government, even judicially awarded refunds, is notoriously difficult in the Virgin Islands," he wrote.

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Setting the record straight

An article on page 5 of The Daily News on Tuesday about the upcoming murder trial of V.I. Police Officer Francis Williams Jr.

misidentified the photos accompanying the article. The photo was of one of the victims, V.I. Police Officer Kai Javois.

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