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## Who Spilled Coke on My Laptop?

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# *Who Spilled Coke On My Laptop?*

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5. The Coca Cola loss puts the “WHO”, “WHAT” and “Where” of a “Manufacturer’s Business Equipment” in play again.
- a. ***Local Tax Authorities May Vivisect Manufacturing Businesses Between “Direct” and “Indirect”.*** The Virginia Supreme Court’s March 3, 2000 decision in Coca-Cola Bottling Company of Roanoke, Inc. v. County of Botetour, Record No. 990409, holds that Coke vending equipment used by Coke bottler to sell the product it manufactures is not classified as “intangible personal property” and therefore subject to local tax property because Coke’s vending equipment is not part of Coke’s overall manufacturing business.
  - b. ***Coke Facts.*** Coca-Cola sought refunds of local property tax paid by it on its vending equipment based on the *American Woodmark* precedent because (a) making Coca-Cola is manufacturing and (b) Coca-Cola uses its vending equipment to sell the soft drinks it manufactures. *Ipsa facto*, the vending equipment was “used in a manufacturing business” and thus taxable only by the state as intangible personal property. One circuit court and four other localities had agreed with Coca-Cola and issued refunds. After a full trial in Botetourt County, the trial court there denied the refund.
  - c. ***Both Retail and Wholesale Equipment Involved.*** The vending equipment at issue included both coin-operated vending machines used by Coke to make its own retail sales *but also* open door coolers which Coke kept stocked with its product that Coke sold at *wholesale* to storeowners where the Coke coolers are located. Thus because wholesale sales equipment of a manufacturing business was involved this case *may* be used by localities to tax the sales equipment of manufacturer’s who make only wholesale sales. Plus, numerous manufacturers are now selling at retail on the web, e.g., Gateway and Dell.
  - d. ***Justice Whiting (Retired) Holds That Selling What You Make is Not Part of Your Business.*** Justice Whiting reasoned that Coke was engaged in two businesses for tax purposes: (1) “manufacturing” and (2) a “separate sales business”. His sole support for this vivisection of Coke’s obviously integrated business was the BPOL case of Caffee v. Norfolk where a retail bakery was not allowed to escape BPOL gross receipts tax as a retail merchant. However, Caffee involved only retail sales.
  - e. ***The Test Now: Equipment Must Be “Part of” The Manufacturing Function; “Indirectly” Used Equipment is Taxable.*** The Court reasoned:

Unlike the computers and office equipment in the American Woodmark and Tultex cases, which were used, in whole or in part, in planning, directing or administering the manufacturing function, the evidence in this case indicates that the sales equipment in question was not used in manufacturing business but merely in selling the finished product. Thus, we conclude that the evidence supports the court’s holding that this equipment could be considered as sales equipment used in a separate sales business.

f. ***Brown Boveri and the “Substantiality” Test Rejected.*** The Court also rejected any reliance on the “substantiality” test of Brown Boveri, in essence saying that BBC limited to its facts.

g. ***Does The Court Intend to Denominate Wholesale Sales As A Business Separate and Apart from the Manufacturing Business.*** Whiting’s opinion is unclear whether any personal property of a manufacturing business used to make wholesales sales (e.g. the North American sales office of a server manufacturer) is taxable as part of a “separate sales business.” Despite detailed evidence in both the Coke record on appeal and explicit discussion of same before the Court at oral argument, Whiting treated that evidence as non-existent. However, his opinion does at least imply that “a separate wholesale business” may be taxed differently than a retail sales business of a manufacturer. Whiting states:

We need not decide whether the taxpayer was also engaged in a separate wholesale business because the taxpayer has not borne his burden under Code § 58.1-3984 of showing, which, if any, of the taxed property was used in sales at the wholesale level.

The Court’s comment about failure to carry “the burden” of showing evidence of wholesale use is astonishing. The evidence of wholesale use by individual machine was in the record! The Court just ignored it to reach the desired result.

h. ***Virginia General Assembly and Attorney General Ignored.*** Confusingly, the Court did not even mention the Virginia legislature’s codification after American Woodmark where it stated that the State’s tax base over “intangible personal property” included but was “not limited to” corporate headquarters equipment. The AG’s ruling holding a pleasure yacht used by a manufacturing business presumably to entertain business customers was ignored as well. The Court even ignored its own holding in American Woodmark that the scope of intangible personal property is to be read broadly and construed strictly against localities.

i. ***Local Reaction.*** Many Virginia localities may now be emboldened by the Coke decision and assert property tax on the business equipment of manufacturers located outside their headquarters, e.g. the sales offices, call centers, web support center, customer technical support, and even regional headquarters of manufacturers including computer hardware fabricators are now at risk. While the facts in Coke involved decidedly low-tech vending equipment, the casual reasoning of the Supreme Court’s ruling opens the door to attack high tech manufacturers , even those who do no retail sales.

j. ***Is the Spectre of “No Car Tax” Visible in the Coke Decision?***

(i) Court perceives itself as perhaps last defense of local tax base, i.e., painting itself out of corner. Brown Boveri and American Woodmark were the paint.

(ii) Unlike the governor Gilmore and the Virginia legislature, the Virginia Supreme Court may be technology deaf.

## **II. Other Recent Developments**

**A. Failed Legislation: HB 1175 (Burden of proof when fighting local real property tax assessment)**

**B. Virginia Department of Taxation (VDOT) Able to Hear Personal Property Tax Appeals**

1. See VDOT Guidelines

**C. Nagging Issues**

1. Does I.R.C. 338(h)(10) election affect property tax assessments?
2. Sales tax in M&A Asset Sales: VDOT Hates Steuart Petroleum

**D. Recent Case Law (Other Than Coke)**

1. Columbia HCA v. Fairfax County