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Sterl Franklin Shinaberry
West Virginia University College of Law

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**Due Process—Jurisdiction—Corporate Amenability to
Substituted Service of Process**

D, a Tennessee corporation, sold and delivered its products in South Carolina, but maintained no offices within that state. *P*, a resident of South Carolina, brought action by substituted service based on a personal injury caused by a defect in *D*'s product. *D* sought dismissal on the grounds that it was not amenable to substituted service of process in South Carolina. The district court overruled the motion to dismiss on the basis that *D* was "doing business" in South Carolina and was subject to its jurisdiction. *D* was allowed an interlocutory appeal. *Held*, affirmed. A Tennessee corporation, maintaining no place of business in South Carolina, but selling and delivering its products in quantity to dealers for resale, had sufficient "minimum contacts" to be amenable to suit in the state under the South Carolina statute. *Shealy v. Challenger Mfg. Co.*, 304 F.2d 102 (4th Cir. 1962).

As a corporation can only act through its agents, what types of activities are necessary by the agents in another state to constitute "doing business" for the purpose of service of process? Are the types of activities which subject a foreign corporation to a state's courts the same types which subject it to taxation?

"Doing business" is generally treated in terms of the degrees of doing business, depending upon the purpose for which this requirement is needed. As a result three distinct lines of decisions have been handed down by the United States Supreme Court, namely, cases concerning a state's power to tax an interstate enterprise, to subject it to local suits, and to license it. *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 289 (1961). For a state to assert jurisdiction, in any event, some contacts must exist between the state and the person or entity it seeks to tax, license, or subject to service of process. *Hanson v. Denckla*, 357 U.S. 235 (1958). Otherwise, due process of law would not be met. This article will be limited to the discussion of the types of activities which subject a foreign corporation to the jurisdiction of a state for the purposes of taxation and service of process. For a discussion of licensing or qualification see Note, 39 VA. L. REV. 841 (1953), and Comment, 57 Nw. U.L. REV. 306 (1962).

The activities necessary to subject a foreign corporation to the jurisdiction of a state for service of process have changed from time to time. The Court in resolving the problem has developed the

theories of implied consent, *Railroad Co. v. Harris*, 79 U.S. 65 (1870); presence, *Philadelphia & Reading Ry. v. McKibben*, 243 U.S. 264 (1917); and the modern test of minimum contacts as enunciated in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The old test of implied consent and presence looked to a quantum of activities sufficient to establish a basis of jurisdiction. Mr. Chief Justice Stone's approach, however, in the *International Shoe* case emphasized the "quality and nature" of the activities and their connection with the obligation sued upon. The Court held that the defendant must have certain "minimum contacts" with a state so that suit there does not offend the "traditional notion of fair play and substantial justice."

The activities necessary to meet the "minimum contacts" tests have varied. In the *International Shoe* case the appellant employed several salesmen who solicited orders in Washington and sent them to the firm's principal office in St. Louis for acceptance or rejection. The salesmen did not have authority to enter into any contract, nor make collections. The appellant had no office in Washington. The Court found that the "systematic and continuous" solicitation by the company was sufficient contact with the forum state to make it reasonable and just to permit the state to enforce the obligations incurred there.

While the *International Shoe* case involved continuous activity, a more recent case, *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), involved only a single act. Here, a Texas corporation was held to be amenable to an action brought in a California court to enforce a claim under a contract of insurance. Not only did the insurance company have no agents in California, but also it appeared from the record that this was the only policy it had issued in California. The most recent case which denied jurisdiction demanded only "some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws." *Hanson v. Denckla, supra*. Thus, while a single act may be sufficient "minimum contacts" there are other factors which may have to be considered.

The character of the activity of the foreign corporation is of dual significance. If the activity results in a substantial benefit to the corporation, it would seem reasonable for the state to compel the corporation to defend within the state in return for the protection of the state laws which made the gain possible. *Traveler's Health Ass'n*

v. *Virginia*, 339 U.S. 643 (1950). Also, if the activity presents a great risk of harm to state residents, the state has a greater interest in forcing the corporation to respond in suit for those obligations arising from that activity. *International Shoe Co. v. Washington*, *supra* at page 320.

The trend to extend jurisdiction results from the increased flow of interstate commerce which has increased the number of such causes of action and the improvements in communications and transportation which has lessened the hardship to the foreign corporation in defending such suits. *Hanson v. Denckla*, *supra*. The question of burden upon interstate commerce under the commerce clause does not appear to be an issue in the jurisdiction cases. Rather, the question is whether there exist sufficient contacts within a state so that due process is afforded the corporation.

As a result of the United States Supreme Court cases which have extended jurisdiction for the purpose of service of process, most states have passed statutes which attempt to take advantage of the expanded jurisdiction. In 1957 an amendment to the W. VA. CODE ch. 31, art. 1, § 71 (Michie 1961), was passed. Section 71 now provides, *inter alia*, that for the purposes of jurisdiction over a foreign corporation, even if unqualified, the making of a contract to be performed wholly or partly in this State by any party to the contract is deemed to be doing business in the State. The actual effect of this statute is not known since no cases have been decided upon it, nor have there been any West Virginia cases since *International Shoe Co. v. Washington*, *supra*. In the old cases the business being transacted was in the ordinary sense of commercial activity, but was not recognized as such by the court due largely to the supposed effect of the commerce clause. See *United Shoe Repairing Mach. Co. v. Carney*, 116 W. Va. 224, 179 S.E. 813 (1935); *Underwood Typewriter Co. v. Piggott*, 60 W. Va. 532, 55 S.E. 664 (1906). In a 1960 decision, *Gavenda Brothers v. Elkins Limestone Co.*, 116 S.E.2d 910 (W. Va. 1960), the court indicated that it would act favorably toward jurisdictional expansion. In this case, however, the court was merely upholding an Illinois judgment based upon Illinois law.

In the area of taxation not only must the sufficiency of the contact be considered, but more importantly, the prerogative of Congress to regulate interstate commerce against the rights of the states

to demand from foreign corporations reimbursement for the protection afforded them under state laws must be considered. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940). Two tests have been used in considering the repugnancy of state taxes to the commerce clause. These are the doctrine of multiple taxation and the direct-indirect test. Under the doctrine of multiple taxation, the states could tax interstate transactions or receipts therefrom, and such taxes were declared invalid only if the Court thought that they subjected interstate commerce to a risk of multiple taxation not borne by local commerce. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). This case is based upon the idea that while gross receipts from interstate commerce cannot be taxed, a tax can be levied upon that portion of the receipts attributable to intrastate commerce. Under the more recent test, known as the direct-indirect test, state taxes are invalid which directly burden interstate commerce, but valid if the burden is only indirect. *Freeman v. Hewit*, 329 U.S. 249 (1946).

Taxation cases have been treated in three ways by the court, depending upon the type of tax levied. If the tax is based upon use, the commerce clause argument has been quickly disposed of. The Court has held that the tax falls on the purchaser and not on the corporation and is therefor not a burden to interstate commerce. *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960). In fact, it is an over-simplification to say that there is no burden on the foreign corporation since it is made the collection agency of the state and is liable despite deficiencies from purchasers. The duty of collection, however, has been dismissed by the Court as a "familiar and sanctioned device." *General Trading Co. v. Commissioner*, 322 U.S. 335 (1944). When the incidence of a tax is income or use of purchased goods, and the amount of the tax is proportional to benefits received from activity within the state, the tax is valid though imposed on exclusively interstate commerce. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1958). The effect of this case is to strike down any argument based on the commerce clause, unless discrimination can be shown, and require only that contacts with the taxing state be sufficient to afford due process.

The activities sufficient for a state to levy a use tax have varied. In *Scripto, Inc. v. Carson*, *supra*, the Court held that solicitation for sales by an independent contractor was enough to satisfy the re-

quirement. In *General Trading Co. v. Commissioner*, *supra*, a Minnesota corporation solicited sales in Iowa and shipped the goods by common carrier from outside the state. The corporation maintained no place of business there. The Court held that the corporation must collect a use tax levied by an Iowa statute and pay it to the state. Compare, *Miller Brothers Co. v. Maryland*, 347 U.S. 340 (1954).

If the subject of the tax is income the Court has likewise overcome the commerce clause argument. The first cases before the Court involved general taxes allocated to income arising within the state, and were sustained on the theory that a net income tax imposed only an "indirect and incidental" charge upon commerce. *Shaffer v. Carter*, 252 U.S. 37 (1920); *Underwood Typewriter Co. v. Chamberlin*, 254 U.S. 113 (1920). In most of the subsequent cases the imposition of net income taxes has been upheld, *West Publishing Co. v. McColgan*, 328 U.S. 823 (1946), except where an attempt has been made to impose a franchise or privilege tax measured by net income upon income from a concern doing wholly interstate business. *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951); *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203 (1925). Taxes on the receipt of gross income from interstate transactions, however, have been held invalid on the basis that multiple taxation can result on the same transactions. *Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938). In *Western Live Stock v. Bureau of Revenue*, *supra*, the Court indicated that a tax on gross income would be valid if properly allocated to the local activity which produced the income. Thus, the tax may be invalid under the commerce clause only if it is discriminatory or unreasonably burdensome. The Court has held that interstate commerce is not relieved of paying its fair share just because the incidental effect of a valid tax is to increase the cost of doing interstate business. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940). A recent decision upheld a tax on the net profits of a corporation engaged in exclusively interstate commerce on the basis that it was a means of requiring the foreign corporation to pay its fair share for benefits received from the taxing state. *Northwestern States Portland Cement Co. v. Minnesota*, *supra*. In this case the company was engaged only in soliciting sales in the state, but maintained no offices there. The effect of this case put the activities necessary for the levy of net income taxes and those necessary for service of process upon the same level.

Congress as a result of the above cases, enacted a statute which reduces the effect of the above decision. 15 U.S.C. § 381 (Supp. II 1959-60), provides that no state shall have power to impose a net income tax on the income derived within the state by any person from interstate commerce if the only activities within the state are the solicitation of orders by such person for the sale of tangible personal property or the solicitation by another for the benefit of such person of the same, where the orders are sent outside the state for approval or rejection, and if approved, are filled by shipment from a point outside the state. Subsection (c) of the same section further provides that a corporation will not be held to be "doing business" by reason of the maintenance of an office in the state if the office is strictly a "sales office." The net effect of this statute is to describe certain minimum activities which must be present to subject a foreign corporation to a tax on income from interstate commerce.

As to the matter of requiring a foreign corporation to withhold income taxes on persons not excluded by the statute, the statute appears to have no effect. Thus if it is no burden to interstate commerce to require a foreign corporation to collect a use tax and pay it to the state, the same reasoning should apply for the collection of an income tax. See *General Trading Co. v. Commissioner*, *supra*.

If the tax is in the nature of a privilege tax to engage in interstate business, than it will be held invalid. The Court conceptualizes the distinction between privilege taxes and net income taxes by holding that the former fall "directly" upon interstate commerce. Compare *Spector Motor Service Co. v. O'Conner*, *supra*, and *Northwestern States Portland Cement Co. v. Minnesota*, *supra*. Thus, the fact that the tax is laid upon the privilege of transacting interstate business is sufficient to invalidate it without any possible discrimination or burdensome effect upon the free flow of commerce. *Railway Express Agency, Inc. v. Virginia*, 347 U.S. 359 (1954).

In conclusion, the courts have taken the punch out of the commerce clause argument and have placed the state's jurisdiction to subject a foreign corporation to suit in its courts and to subject it to a use tax on the same basis. The same could be said for net income taxes which are not discriminatory were it not for the watchful eye of Congress which has set certain requirements that must first be met. However, the courts have continually held that the

right to engage in interstate commerce can only be regulated by Congress and a state tax which attempts to withdraw that right is invalid.

Sterl Franklin Shinaberry

**Equity—Unfair Competition—Injunction Granted
Against Community Antenna**

P, community antenna service, brought this anti-trust suit against *D*, local television station. *D* counterclaimed seeking an injunction to prevent the community antenna service from picking up certain programs sent to the local station under a contract agreement with three network stations in Salt Lake City, Utah. *Held*, the injunction was granted to the local station on the counterclaim. The court found that the local station had acquired a contractually exclusive right to the first run of network and film programs in the community of Twin Falls, Idaho. The community antenna service was held to be tortiously interfering with and unfairly competing with the local station, and the local station had no adequate remedy at law. *Cable Vision, Inc. v. KUTV, Inc., K.L.I.X. Corp.*, (D.C. Idaho, 1962).

The principal case presents a new and unique application of the law dealing with unfair competition. The problem stems from the rapid growth of the television industry in this country.

This case was brought in the District Court of Idaho attempting to curtail the activities of the community antenna service in Twin Falls, Idaho. An earlier litigation was instituted by the Salt Lake City stations against the community antenna service. *Intermountain Broadcasting and Television Corp. v. Idaho Microwave, Inc.*, 196 F. Supp. 315 (D.C. Idaho 1961). These stations were attempting to enjoin the community antenna service from picking up and retransmitting their signals in Twin Falls without their permission. In refusing to grant the injunction the court pointed out that the community antenna service was guilty of no "unfair competition" or "unjust enrichment" as against the Salt Lake City stations and could operate without their consent.

The court, in deciding the principal case, was concerned with whether it would be invading any preempted field of national jurisdiction or conflicting with any phase of national policy in granting the injunction against the community antenna service basing its