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Constitutional Law-Taxation of Interstate Sales

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CONSTITUTIONAL LAW—TAXATION OF INTERSTATE SALES.—The City of New York imposed a tax of 2% upon the receipts from any sale within the city. The statute defines "sale" as any transfer of title or possession or both for a consideration or other agreement therefore. The vendor, who is authorized to collect the tax, is required to charge it to the consumer and pay the same to the city. If the goods are purchased for resale, there is no tax. Defendant, a Pennsylvania corporation, mined coal in Pennsylvania upon specified orders secured by defendant's agents for New York City purchasers. The coal was delivered to purchaser's plant or steamship by the defendant where the purchaser did the unloading. Held, the tax is not an unconstitutional burden on interstate commerce. *McGoldrick v. Berwind-White Coal Mining Co.* (1940), 60 S. Ct. 388.¹

State taxation of interstate commerce must hurdle not only the commerce clause² but also the equality clause³ and the due process clause.⁴ The general rule is that a state may not unreasonably tax interstate commerce.⁵ Any possible state taxation may conceivably have some slight effect upon such commerce⁶ thus the scope and refinements of the rule can best be illustrated by stating the holdings of specific decisions.

¹ Two companion cases involving the same tax were decided the same day. In *McGoldrick v. Felt and Tarrant Mfg. Co.* (1940), 60 S. Ct. 404, the defendant, an Illinois corporation manufactured and sold comptometers. Agents solicited orders in New York City which were forwarded to Illinois for approval. The order was filled in Illinois by allocating a specific machine designated by a serial number and shipped to defendant's agents in New York City who delivered to the purchaser. Remittances were made by purchaser directly to the Illinois office. Upon authority of the principal case the tax was upheld. In *McGoldrick v. Dugrenier Inc.* (1940), 60 S. Ct. 404, defendant, a Massachusetts corporation, manufactured and sold vending machines. An exclusive sales agent solicited orders in New York City which were forwarded to Massachusetts for approval. If the order was accepted, it was filled by shipping the purchased machine direct to the purchaser who paid the freight. The tax was upheld.

² *Case of the State Freight Tax* (1872), 15 Wall. (82 U. S.) 232, 21 L. Ed. 146.

³ *Ward v. Maryland* (1870), 12 Wall. (79 U. S.) 418, 20 L. Ed. 449; *Welton v. Missouri* (1875), 91 U. S. 275, 23 L. Ed. 347; *Walling v. Michigan* (1886), 116 U. S. 446, 6 S. Ct. 454.

⁴ *Powell, Due Process Tests of State Taxation* (1926), 74 U. of Penn. L. R. 423.

⁵ WILLIS, *CONSTITUTIONAL LAW* (1936) p. 310.

⁶ *Brown, State Taxation of Interstate Commerce* (1933), 81 U. of Penn. L. R. 247, 248.

"A state may not tax persons while carried in interstate commerce,⁷ nor goods while in transit in interstate commerce⁸ nor persons for the privilege of making interstate sales or transporting goods or information in interstate commerce.⁹"¹⁰ On the other hand, the instrumentalities of interstate commerce may be the subject of non-discriminatory state taxation,¹¹ and net income wholly derived from interstate commerce may be the subject of state taxation.¹²

Property shipped in interstate commerce may be the subject of state taxation before its movement begins,¹³ while it is at rest during an interstate journey,¹⁴ or after it ends.¹⁵ Further, the "original package doctrine"¹⁶ does not prevent the state of the buyer from placing a non-discriminatory tax upon a sale of goods upon their arrival in the state after an interstate journey whether in the original package or not.¹⁷ If the original package doctrine is correct as to when interstate commerce has ended, then previous decisions have permitted state taxation of goods immediately prior to the termination of an interstate journey yet denied the states the right to exercise their police power because the package had not been broken or one sale made.

A proper subject for a state excise is the warehousing of goods previous to its interstate shipment or upon its use¹⁸ or withdrawal for use¹⁹ by the consignee after the interstate character of the goods has ended. A state may impose a fixed-sum license tax on the agent of an interstate seller for the privilege of selling merchandise brought into the taxing state for the purpose

⁷ Passenger Cases (*Smith v. Turner*) (1849), 7 Howard (48 U. S.) 283, 12 L. Ed. 702; *Henderson v. Mayor* (1875), 92 U. S. 259, 23 L. Ed. 543.

⁸ *Coe v. Errol* (1886), 116 U. S. 517, 6 S. Ct. 475; *Kelley v. Rhoads* (1903), 188 U. S. 1, 23 S. Ct. 259.

⁹ *Case of The State Freight Tax* (1872), 15 Wall. (82 U. S.) 232, 21 L. Ed. 146; *McCall v. California* (1890), 136 U. S. 104, 10 S. Ct. 881; *Real Silk Hosiery Mills Inc. v. City of Portland* (1925), 268 U. S. 325, 45 S. Ct. 525.

¹⁰ WILLIS, CONSTITUTIONAL LAW (1936), p. 310.

¹¹ *Adams Express Co. v. Ohio State Auditor* (1897), 165 U. S. 194, 17 S. Ct. 305; *Wells Fargo and Co. v. Nevada* (1918), 248 U. S. 165, 39 S. Ct. 62; *Southern Railway Co. v. Watts* (1923), 260 U. S. 519, 43 S. Ct. 192.

¹² *United States Glue Co. v. Oak Creek* (1918), 247 U. S. 321, 38 S. Ct. 499; *Underwood Typewriter Co. v. Chamberlain* (1920), 254 U. S. 113, 41 S. Ct. 45; *Matson Navigation Co. v. State Board of Equalization* (1936), 297 U. S. 441, 56 S. Ct. 553.

¹³ *Bacon v. Illinois* (1913), 227 U. S. 504, 33 S. Ct. 299.

¹⁴ *Coe v. Errol* (1886), 116 U. S. 517, 6 S. Ct. 475; *Minnesota v. Blasius* (1933), 290 U. S. 1, 54 S. Ct. 34.

¹⁵ *Brown v. Houston* (1885), 114 U. S. 622, 5 S. Ct. 1091; *Pittsburg and Southern Coal Co. v. Bates* (1895), 156 U. S. 577, 15 S. Ct. 415; *American Steel and Wire Co. v. Speed* (1904), 192 U. S. 500, 24 S. Ct. 365.

¹⁶ *Brown v. Maryland* (1827), 12 Wheaton (25 U. S.) 419, 6 L. Ed. 678; *Austin v. Tennessee* (1900), 179 U. S. 343, 21 S. Ct. 132.

¹⁷ *Woodruff v. Parham* (1868), 8 Wall. (75 U. S.) 123, 19 L. Ed. 382; *Hinson v. Lott* (1868), 8 Wall. (75 U. S.) 148, 19 L. Ed. 387; *Wiloil Corp v. Pennsylvania* (1935), 294 U. S. 169, 55 S. Ct. 358.

¹⁸ *Federal Compress and Warehouse Co v. McLean* (1934), 291 U. S. 17, 54 S. Ct. 267; *Chassaniol v. Greenwood* (1934), 291 U. S. 584, 54 S. Ct. 541.

¹⁹ *Eastern Air Transport v. South Carolina Tax Commission* (1932), 285 U. S. 147, 52 S. Ct. 340; *Gregg Dyeing Co. v. Query* (1932), 286 U. S. 472, 52 S. Ct. 631; *Edelman v. Boeing Transport Inc.* (1933), 289 U. S. 249, 53 S. Ct. 591.

of sale.²⁰ Peddlers,²¹ persons selling for themselves,²² and installers²³ may be taxed by a state. On the other hand, "interstate sales"²⁴ from 1887 to 1935 enjoyed the somewhat firmly established doctrine of immunity from state taxation.²⁵ Under this rule drummers soliciting orders within a state for tangible goods to be shipped from without the state directly to the purchaser could not be taxed.²⁶ Further, if the foreign manufacturer delivered in his own trucks²⁷ or shipped goods to an agent within the state to be sorted and delivered by such agent,²⁸ no tax could be imposed. During this period however, the court consistently allowed taxes imposed by the buyer's state upon interstate sales measured by the volume of sales.²⁹

In 1935 the court allowed the Pennsylvania sales tax of three cents per gallon on gasoline to be placed on tank cars of gasoline shipped from Delaware into Pennsylvania because interstate commerce was not required nor contemplated when the sale was made.³⁰ The court avoided making any decision as to when interstate commerce had terminated. This appeared to limit the doctrine of tax immunity of interstate sales by requiring a condition precedent that interstate transportation be contemplated or required.³¹ Following this decision in 1937 the court sustained a use tax equal to 2% of the purchase price imposed by the state of Washington upon the use within the state of goods purchased at retail, except those goods for which a 2% retail sales tax had been paid in Washington or some other state. The court seemed to place its decision on the basis that interstate commerce had ended.³² This was another blow to tax immunity of interstate sales for it allowed the state to collect the equivalent of a sales tax from all local purchasers even though their purchases required subsequent interstate delivery or were made exclusively in another state.³³ That interstate commerce should pay its "just share of the

²⁰ *Howe Machine Co. v. Gage* (1879), 100 U. S. 676, 25 L. Ed. 754; *Emert v. Missouri* (1895), 156 U. S. 296, 15 S. Ct. 367; *Wagner v. Covington* (1919), 251 U. S. 95, 40 S. Ct. 93.

²¹ *Emert v. Missouri* (1895), 156 U. S. 296, 15 S. Ct. 367.

²² *Ficklen v. Shelby County Taxing District* (1892), 145 U. S. 1, 12 S. Ct. 810; *Banker Brothers v. Pennsylvania* (1911), 222 U. S. 210, 32 S. Ct. 38.

²³ *Browning v. Waycross* (1914), 233 U. S. 16, 34 S. Ct. 578.

²⁴ A sale negotiated prior to interstate transportation of the goods into the purchaser's state for delivery.

²⁵ *Robbins v. Shelby County Taxing District* (1887), 120 U. S. 489, 7 S. Ct. 592; *Asher v. Texas* (1888), 128 U. S. 129, 9 S. Ct. 1; *Caldwell v. North Carolina* (1903), 187 U. S. 622, 23 S. Ct. 229; *Dozier v. Alabama* (1910), 218 U. S. 124, 30 S. Ct. 649; *Western Oil Refining Co. v. Lipscomb* (1917), 244 U. S. 346, 37 S. Ct. 623; *Real Silk Hosiery Mills Inc. v. City of Portland* (1925), 268 U. S. 325, 45 S. Ct. 525.

²⁶ *Real Silk Hosiery Mills Inc. v. City of Portland* (1925), 268 U. S. 325, 45 S. Ct. 525.

²⁷ *Wagner v. Covington* (1919), 251 U. S. 95, 40 S. Ct. 93.

²⁸ *Caldwell v. North Carolina* (1903), 187 U. S. 622, 23 S. Ct. 229.

²⁹ *Ficklen v. Shelby County Taxing District* (1892), 145 U. S. 1, 12 S. Ct. 810; *Banker Brothers v. Pennsylvania* (1911), 222 U. S. 210, 32 S. Ct. 38.

³⁰ *Wiloil Corp. v. Pennsylvania* (1935), 294 U. S. 169, 55 S. Ct. 358.

³¹ *Lockhart, Sales Tax In Interstate Commerce* (1939), 52 Harv. L. R. 617, 639.

³² *Henneford v. Silas Mason Co.* (1937), 300 U. S. 577, 57 S. Ct. 524; 51 Harv. L. Rev. 130 (1937).

³³ *Lockhart, Sales Tax In Interstate Commerce* (1939), 52 Harv. L. Rev. 617, 641.

state tax burden" and that the court was willing to apply a unit rule, so as to allow state taxation of a local privilege, measured by a portion of the gross receipts from interstate commerce was declared in 1938.³⁵

Although interstate commerce might have to pay its own way, it did not have to run the risk of a multiple tax burden to which local commerce was not exposed.³⁶ However, if the tax is conditioned upon the exercise of the taxpayer's franchise or privilege of manufacturing in the tax state, the court has said it would be sustained despite its incidental effect on interstate commerce since the taxpayer's local activities or privileges are sufficient to support such a tax and it can fairly be measured by the sale price of the goods.³⁷ This would allow taxation by the state of the seller.

The court's decisions since 1935 have consistently favored taxes measured by the value or volume of interstate sales when imposed by the buyer's state. The doctrine of immunity from taxation for interstate sales has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate. The principal case sustains a statute which imposes a tax by the buyer's state on the transfer of possession when the goods are purchased for consumption even though the delivery is a necessary part of interstate commerce. The ground for this decision is well laid.³⁸ By failing to make a point as to whether interstate commerce has ended, the court has extended the states' taxing power over interstate commerce.

The companion case comes very near to allowing a direct tax on interstate commerce. It appears to completely overrule the doctrine of tax immunity of interstate sales.³⁹ The majority opinion in the principal case does not mention the possibility of multiple taxation. A dictum in a previous decision approves taxation of the taxpayer's franchise or privilege of manufacturing within the state and the measuring of the tax by the sales price of the goods.⁴⁰ If this is allowed, the effect would be the same as allowing taxation of interstate commerce both by the state of the seller and the buyer. The solution of the question of taxation by the seller's state is yet to come. It has been suggested that Congress has power to solve this difficulty by statute.⁴¹ F. J. N.

³⁴ *Western Live Stock v. Bureau of Revenue* (1938), 303 U. S. 250, 58 S. Ct. 546.

³⁵ 52 Harv. L. Rev. 502 (1939).

³⁶ *Gwin White and Prince Inc. v. Henneford* (1939), 305 U. S. 434, 59 S. Ct. 325, State tax measured by the gross income of a marketing agent who solicited interstate and extrastate sales for local fruit held invalid. *Cf. Adams Manufacturing Co. v. Storen* (1938), 304 U. S. 307, 58 S. Ct. 913 (Tax upon gross receipts of a domestic manufacturing company selling 80% of its products in interstate and foreign commerce involved the possibility that the purchaser's state might also tax the same gross receipts).

³⁷ See *Adams Manufacturing Co. v. Storen* (1938), 304 U. S. 307, 310, 312, 58 S. Ct. 913, 915, 916.

³⁸ *Wiloil Corp. v. Pennsylvania* (1935), 294 U. S. 169, 55 S. Ct. 358; *Henneford v. Silas Mason* (1937), 300 U. S. 577, 57 S. Ct. 524.

³⁹ *McGoldrick v. A. H. Dugrenier* (1940), 60 S. Ct. 404.

⁴⁰ See *Adams Manufacturing Co. v. Storen* (1938), 304 U. S. 307, 58 S. Ct. 913.

⁴¹ Lowndes, *State Taxation of Interstate Sales* (1935), 7 Miss. L. J. 223.