Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 13 | Issue 5

Article 9

6-1938

Western Live Stock v. Bureau of Revenue

Gustav H. Dongus
Member, Indianapolis Bar

COMMENT

WESTERN LIVE STOCK v. BUREAU OF REVENUE

(Feb. 28, 1938), 58 Sup. Ct. 546.

By GUSTAV H. DONGUS*

The reasoning of the Supreme Court of the United States in the recent decision of *Western Live Stock v. Bureau of Revenue* is of particular import to those lawyers and taxpayers in Indiana who are interested in the outcome of the case of *J. D. Adams Manufacturing Co. v. Storen* (Ind. 1937), 7 N. E. (2d) 941, now on appeal from the Supreme Court of Indiana. (No. 641 in the Supreme Court of the United States; argued March 30, 31, 1938.)[1]

---

*Of the Indianapolis Bar.

[1] Since this comment was written the Supreme Court of the United States has handed down a decision in the J. D. Adams case reversing the Supreme Court of Indiana on the point referred to herein.

In the *Western Live Stock* case the State of New Mexico attempted to tax the gross receipts of a local publisher from advertising contracts entered into with non-residents. The New Mexico statute, section 201, chapter 7, of the Special Session Laws of 1934, provided for a "privilege tax" measured by "an amount equal to 2 per cent of the gross receipts of any person" engaged in the publication of newspapers and magazines, such gross receipts only to include amounts received for the sale of advertising space. The taxpayer published a monthly live stock journal which was circulated both within and without the State of New Mexico. It solicited advertising from parties in other states and payment for advertising was made at the principal and only office in New Mexico. It was held that the taxation of such gross receipts was not an unconstitutional burden on interstate commerce.

At first blush it would seem that the Court might have disposed of the case on the ground that the negotiation and execution of the advertising contracts is not commerce; therefore, a tax on the gross receipts from such contracts would not burden interstate commerce. The Court did set forth the established principle that the mere formation of contracts is not commerce, citing the insurance cases such as *Paul v. Virginia* (1868), 8 Wall 168. It then, however, proceeded to assume that the advertising contracts contemplated an interstate performance, that but for the out-of-state circulation no income would have been received from non-resident advertisers, a *causa sine qua non.* It is the ensuing statements by Mr. Justice Stone, who delivered the majority opinion of the Court, which are of interest.

Mr. Justice Stone discusses the numerous cases involving state gross receipts taxation on interstate commerce and says at pages 548-549 of 58 Sup. Ct. that the *ratio decidendi* of the decisions is as follows:

"The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable in point of substance, of being imposed, . . . or added to, . . . with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce."

Dicta from several cases, and which could hardly be straws in the wind, is cited in support of the proposition. In fact, what Mr. Justice Stone is doing is to lay down new law under the commerce clause; law similar to that now developing under the due process clause. In applying this newly discovered principle of multiple taxation on interstate commerce to previous decisions by the Court, showing how cases fall on one side of the line or the other, he experiences some difficulty. Regarding the case before the bar, the principle furnished an additional reason, besides the established "direct burden" doctrine, to uphold the tax, inasmuch as no other state was in a position to levy a tax on the transactions involved.

It is this possibility of multiple taxation which is overlooked by Judge Fansler in the majority opinion of the Supreme Court of Indiana in the *J. D. Adams* case. Judge Fansler's opinion is based on the premise that the Indiana Gross income tax is a general tax, does not discriminate against persons doing an interstate business, and that such persons are only bearing their fair burden of taxation in return for benefits furnished by the State of Indiana. Equality to all is the theme.

An intrastate sale in Indiana bears no further tax but that is not true with respect to an interstate sale, which *ex necessitate* involves activities in another state and may bring into operation the taxing laws of that foreign state. For example, a number of states have a "use" tax or "compensating" tax and as soon as goods shipped by an Indiana seller arrive in such a state the use tax operates, thus resulting in an additional burden on the interstate sale. The use tax has been approved by the Supreme Court of the United States in *Henneford v. Silas Mason Co.* (1937), 300 U. S. 577. The argument of Mr. Justice Cardoza in giving the majority opinion of the Court is that of equality to all taxpayers within the state, the use tax being complementary in identical amount to a local sales tax.

It follows that if the State of Indiana, or state of origin of an interstate sale, may tax the gross receipts from such sale, and the state of destination may tax the goods upon their arrival, then interstate sales are subjected to a two-fold burden, whereas local sales in both states are only subject to one. Applying Mr. Justice Stone's principle of law to this situation and conceding the power of the state of destination to tax, the State of Indiana or state of origin should be prohibited from taxing the gross receipts. That result should logically follow irrespective of whether the Indiana gross income tax is a direct tax on gross receipts, or a local privilege tax measured by gross receipts, on an "in lieu of" property tax.

At precisely this point the principle cannot be applied with inexorable logic. Compare the case of *American Manufacturing Co. v. St. Louis* (1919), 250 U. S. 459, with that of *Crew Levick Co. v. Pennsylvania* (1917), 245 U. S. 292. In the former case the Court sustained a local manufacturing tax measured by the value of the goods sold including those sold in interestate commerce as a privilege tax measured by gross receipts; in the latter case a local tax on wholesalers measured by a percentage of the gross receipts including gross receipts from interstate and foreign commerce was held invalid as a direct tax on gross receipts. Assuming that the goods in each case are similar and are sent to the same state of destination and are taxed there, an equal possibility of multiple taxation exists. Mr. Justice Stone contrasts both cases in his opinion and apparently approves of both, although they lead in opposite directions and cannot be reconciled under any theory of multiple taxation.

A recent decision following the *Western Live Stock* case is that of *Cloverdale v. Arkansas Louisiana Pipeline Company* (April 4, 1938), 58 Sup. Ct. 736. It was there argued that the "energy" tax of the State of Louisiana as applied to power produced by motors operating compressor units on an interstate gas line was unconstitutional since each state through which the pipe line passed could lay a similar tax. The Supreme Court rejected that argument for the reason that a tax by another state would be on power produced by different motors at different compressors and therefore would not be on the same activity.

If that is true, then it becomes difficult to apprehend any state tax which might be prohibited by multiple taxation, since the activity taxed in one state would usually not be the same as that taxed in another. One such tax, however, might be mentioned, and that is a direct tax on interstate transportation which is not apportioned to the transportation carried on within the taxing state. Such a tax would reach the transportation in another state which could also be taxed there. But multiple taxation as further defined in the *Cloverdale* case would not solve the state privilege tax cases measured by gross receipts for the reason that the privilege exercised in one state is never the same in point of fact as that exercised in another state. Multiple taxation as so defined would not condemn such privilege taxes although the measure of such taxes might include gross receipts unapportioned.

With respect to the Indiana gross income tax which has been said by the Supreme Court of Indiana to be a general privilege tax measured by gross receipts, and which is not a tax on any particular privilege, such as that of manufacturing or producing energy, each state is in an equal position to tax the same general privilege, i. e., the privilege of receiving gross income. If a manufacturer in Indiana sells to a wholesaler in a second state, the receiving of gross income in Indiana by the manufacturer is a distinct and separate activity from the receipt of gross income by the wholesaler. Each state could thus apparently tax the so-called privilege, although the wholesaler might sell to a broker in a third state, who in turn might sell to the ultimate consumer in a fourth state. However, if the Indiana gross income tax is taken for what it actually is, a direct tax on gross income or gross receipts, then in as much as such gross receipts are attributable in part to activities carried on in other states and are not apportioned, then the tax is invalid. As a privilege tax or as a direct tax on gross receipts, the burden is the same.

The *Western Live Stock* case and the *Cloverdale* case also pose the problem whether the criteria of a state tax unconstitutionally burdening interstate commerce is the ability of another state or states to tax, or whether the doctrine of direct burden and multiple taxation are two independent conceptions which must be met if a tax is to be valid. Mr. Justice Stone, in his opinion, states, as heretofore noted, that the test of previous decisions which had been determined under the direct burden doctrine is that of multiple taxation, but further on in his opinion states that an "added reason" for sustaining the tax is that as a practical matter no other state could tax. Mr. Justice Reed in the *Cloverdale* case says that the tax there did not "interfere" with interstate commerce, and further says that among other factors showing a lack of interference is that the particular tax connot be imposed by more than one state. These decisions would seem to indicate that multiple taxation is merely one of several, perhaps of many, factors that go to make up an unconstitutional burden on or interference with interstate commerce and that it is not the decisive test as indicated in the first part of the *Western Live Stock* opinion.

Perhaps the most that can be said for the principle announced in the *Western Live Stock* case is that in some situations it furnishes an additional possible ground upon which a state tax may either be upheld or invalidated. It does not explain the dichotomy in the existing cases nor can it be expected to furnish an open sesame for counsel in future litigation. The comparatively numerous cases of multiple taxation under the due process clause of the Fourteenth Amendment indicate that unconstitutional multiple taxation is not a clear-cut conception. There is no reason to expect a greater degree of clarity under the commerce clause.

Mr. Justice Stone recognizes the difficulties in making interstate commerce pay its way and at the same time not unduly hampering such commerce and states that "practical rather than logical distinctions must be sought." That is the very formula which has apparently been followed under the direct burden doctrine, and since it means that each case will be governed by the facts and not abstract propositions, no unprecedented certainty in this conflicting field of the law is to be anticipated.