Michigan Law Review

Volume 59 | Issue 3

1961

Constitutional Law - Due Process - Collection of State Use Tax From Nonresident Vendor

Jerome M. Salle
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Constitutional Law Commons, Fourteenth Amendment Commons, Taxation-State and Local Commons, and the Tax Law Commons

Recommended Citation
Jerome M. Salle, *Constitutional Law - Due Process - Collection of State Use Tax From Nonresident Vendor*, 59 MICH. L. REV. 441 (1961).
Available at: https://repository.law.umich.edu/mlr/vol59/iss3/7

This Recent Important Decisions is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

CONSTITUTIONAL LAW — DUE PROCESS — COLLECTION OF STATE USE TAX FROM NONRESIDENT VENDOR — Plaintiff, a Georgia corporation not qualified to do business in Florida, solicited orders for merchandise from Florida residents through independent brokers[1] who forwarded the orders to plaintiff's Georgia office for acceptance. Plaintiff did not maintain any place of business in Florida nor have any regular employee or agent there.[2] In a suit to enjoin the enforcement of a distress warrant issued upon plaintiff's failure to collect the Florida use tax,[3] the chancellor denied relief and the Florida Supreme Court affirmed.[4] On appeal to the United States Supreme Court, *held,* affirmed, one Justice dissenting.[5] Enforcement of the statute requiring collection of the use tax by plaintiff did not violate due process because plaintiff's solicitation of orders, although through independent contractors, formed a sufficient contact with the state. *Scripto, Inc. v. Carson,* 362 U.S. 207 (1960).

[1] Plaintiff contracted with ten independent brokers who also sold the products of other manufacturers. Scripto, Inc. v. Carson, 105 So. 2d 775, 778 (Fla. 1958).

[2] Plaintiff employed one salesman in Florida, but he handled a different line of products than the one involved in the principal case. The Florida courts found his presence was not relevant to the determination whether the plaintiff was included within the terms of the statute. Principal case at 207 n.2 (1960). Compare Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941).

[3] FLA. STAT. § 212.06 (1959).

[4] Scripto, Inc. v. Carson, *supra* note 1.

[5] Justice Whittaker dissented.

The use tax is designed to prevent evasion of a state sales tax by residents completing normally taxable purchases in states where no sales tax is imposed[6] and the home state's sales tax cannot be constitutionally enforced.[7] If the use tax is collected from the person using the property within the taxing state, its constitutionality can no longer successfully be challenged.[8] However, a small amount of tax owed by numerous purchasers presents a difficult and costly collection problem. Therefore, many states have enacted statutes requiring vendors to serve as tax collectors.[9] Although application of these statutes to nonresident vendors may violate the due process clause of the fourteenth amendment, the due process requirement will be fulfilled if there is a sufficient connection between the vendor and the taxing state.[10] In this area, there has geen a gradual reduction in the contacts required for due process. First, the Court upheld a California use tax statute[11] when applied to a nonresident vendor who maintained a sales office and sales agents within the state.[12] Later, Iowa was permitted to require collection of its use tax[13] on mail order sales by a nonresident vendor who operated within the state retail stores which were not related to the mail order business.[14] Subsequently, in *General Trading Co. v. State Tax Comm'n*,[15] the Court held that mere solicitation by an agent of a nonresident vendor was sufficient activity to satisfy the due process requirement.[16] However, in *Miller Bros. Co. v. Maryland*,[17] the state was not permitted to enforce its use tax collection statute[18] where the nonresident vendor's local activities were limited to deliveries with its own equipment and indirect solicitation through the local effects of general advertising.[19] Any doubts which *Miller Bros.* may have raised concerning

[6] Henneford v. Silas Mason Co., 300 U.S. 577, 581 (1937).

[7] McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944); Norton Co. v. Department of Revenue, 340 U.S. 534 (1951). See generally Kust, *State Taxation of Interstate Sales*, 46 VA. L. REV. 1290 (1960).

[8] Henneford v. Silas Mason Co., *supra* note 6.

[9] See, *e.g.*, Miller Bros. Co. v. Maryland, 347 U.S. 340, 343 (1954); Monamotor Oil Co. v. Johnson, 292 U.S. 86, 92 (1934).

[10] Miller Bros. Co. v. Maryland, *supra* note 9. See also Kust, *supra* note 7, at 1303-09.

[11] CAL. REV. & TAX CODE § 6203.

[12] Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62, 66 (1939).

[13] IOWA CODE §§ 423.1, .9 (1958).

[14] Nelson v. Sears, Roebuck & Co., *supra* note 2; *accord*, Nelson v. Montgomery Ward & Co., 312 U.S. 373 (1941).

[15] 322 U.S. 335 (1944); compare International Shoe Co. v. Washington, 326 U.S. 310 (1945) in which on similar facts a state was held to have jurisdiction over a foreign corporation for purposes of suit.

[16] Justice Frankfurter treated the due process question in *General Trading* at 338: "[T]o make the distributor the tax collector for the State is a familiar and sanctioned device." This view solicited a vigorous dissent by Justice Jackson who wrote at 340: "I can think of nothing in or out of the Constitution which warrants this effort to reach beyond the State's own border to make out-of-state merchants tax collectors because they engage in interstate commerce with the State's citizens." See also Powell, *Sales and Use Taxes: Collection From Absentee Vendors*, 57 HARV. L. REV. 1086, 1093 (1944).

[17] 347 U.S. 340 (1954), 53 MICH. L. REV. 133 (1954).

[18] MD. ANN. CODE art. 81, §§ 372(k), 376 (1957).

[19] Delaware newspapers and radio stations which carried Miller Bros. Co. advertising

the strength of the *General Trading Co.* decision have surely been removed by the principal case, which extends state power on fewer contacts than present in *General Trading.* In *Scripto* the Court emphasized the mere presence of the solicitation activity rather than the technical relationship between vendor and solicitor in order to prevent "a stampede of tax avoidance"[20] based upon formal contractual shifts. *Miller Bros.* was distinguished: "Miller had no solicitors in Maryland; there was no 'exploitation of the consumer market'. . . . Marylanders went to Delaware to make purchases — Miller did not go to Maryland for sales."[21] Thus, it would appear that sufficient contact may be established by any personal solicitation within the taxing state, but not by such activities as delivery[22] which only serve to perform a completed sale agreement. The Court has not considered whether solicitation through the use of catalogues[23] and advertising[24] directed to the residents of the taxing state will provide a sufficient contact. Although in *Miller Bros.* the limited advertising activity which reached Maryland residents was held to be insufficient, it is probable that a more extensive advertising program directed to those residents would give the state power to enforce the collection of the use tax.

Prompted by the need for additional revenue, many states have attempted to exploit to constitutional limits the power to require collection of the use tax. In apparent sympathy with the state financial problem, the Court has allowed a broad extension of state power which has resulted in substantial uncertainty for nonresident vendors. Uniformity and certainty might be achieved by a proposed bill[25] whereby Congress would establish minimum standards of activity for application of the use tax collection statutes.

Jerome M. Salle

occasionally reached Maryland residents. Direct mail advertising was sent to Maryland residents who were former customers.

20 Principal case at 207, 211 (1960). Compare McGee v. International Life Ins. Co., 355 U.S. 220 (1957), where the Court held that jurisdiction for suit could be based upon the ownership of a single contract with a state resident, and International Shoe Co. v. Washington, *supra* note 15. These cases indicate a parallel development in the area of jurisdiction for purposes of suit.

21 Principal case at 212.

22 However, California has indicated that a nonresident vendor will be required to collect its use tax if he makes substantial deliveries with his own trucks to points within the state. Sales Tax Counsel Ruling, October 16, 1957, CCH STATE TAX CAS. REP. CAL. § 63-004.

23 The following statutes indicate that some states have decided that distribution of catalogues does provide sufficient contact: ALA. CODE tit. 51, § 790 (1958); GA. CODE ANN. § 92-3404a (8) (Supp. 1960); TENN. CODE ANN. § 67-3017 (1955).

24 The following statutes indicate that some states have decided that advertising within the state does provide sufficient contact: ALA. CODE tit. 51, § 790 (1958); GA. CODE ANN. § 92.3404a (8) (Supp. 1960); R.I. GEN. LAWS ANN. § 44-18-23 (1956); TENN. CODE ANN. § 67-3017 (1955).

25 H.R. 12235, S. 3549, 86th Cong., 2d Sess. (1960). This bill is proposed as an amendment to 73 Stat. 555 (1959), 15 U.S.C. §§ 381-4 (Supp. I, 1959), the act passed in response to the decision in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).