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

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CONSTITUTIONAL LAW—DUE PROCESS—ENFORCED COLLECTION OF STATE USE TAX FROM NONRESIDENT VENDOR—Appellant is a Delaware corporation engaging in the retail furniture business in Delaware. It has no place of business in Maryland, nor does it solicit orders in that state. It does not accept mail or phone orders from Maryland, nor does it advertise in any Maryland publications. The only contacts which the appellant has with Maryland customers, aside from direct dealings at appellant's retail store, are occasional direct mail advertisements, which it sends to all of its customers wherever located, and deliveries of goods purchased by Maryland customers. These deliveries are either made by commercial carrier or by appellant's own truck. On one of its delivery runs into Maryland this truck was seized by Maryland authorities and held for satisfaction of a tax claim asserted against appellant by that state. The tax claim was based on the Maryland use tax,[1] which provides that a vendor engaging in business in the state must collect the tax from its customers and remit it to the state or be personally liable. Appellant alleged that imposition of this tax and seizure of its truck were unconstitutional, but the Maryland Supreme Court held it liable for the tax.[2] On appeal to the Supreme Court of the United States *held,* imposition on appellant of liability for the tax was contrary to the due process clause of the Fourteenth Amendment. *Miller Brothers Company v. Maryland,* 347 U.S. 340, 74 S.Ct. 535 (1954).

Two generally recognized rules concerning the power of a state to tax are that it may tax property and persons subject to its sovereignty[3] and that it may

[1] Maryland Code Ann. (Flack, 1951) art. 81, §368 et seq.

[2] Miller Brothers Co. v. Maryland, (Md. 1953) 95 A. (2d) 286.

[3] McCulloch v. Maryland, 4 Wheat. (17 U.S.) 316 at 429 (1819); Curry v. McCandless, 307 U.S. 357 at 366, 59 S.Ct. 900 (1939).

not directly tax interstate commerce.[4] A tax on the privilege of making a retail sale within the state may therefore be levied,[5] as may a tax properly placed on the use of property within the state.[6] Serious problems arise, however, when a sale transaction is made partially within a state and partially without. One problem is whether the state of the purchaser may tax the *sale* of goods coming into it by way of interstate commerce.[7] Another problem, relating to the imposition of a use tax, arises because most use tax statutes contain provisions making the vendor responsible for collecting the tax and remitting it to the state in which the property sold is to be used.[8] The use tax is complementary to the sales tax and is designed primarily for the purpose of protecting local merchants from the competition of merchants doing business in states having no sales tax.[9] In theory, the tax is placed on the purchaser and is therefore a form of property tax. In practice, the ultimate burden is placed on the vendor, and various penalties against him are established in order to enforce this liability.[10] If we are to look at the "incidence of the tax and its practical operation" as the Court has said we must in determining the constitutionality of a state tax,[11] it would seem that the use tax is really a tax on the vendor and that, in order to justify it, sovereignty of the state over the vendor and the sale transaction must be established. Depending on the result which it apparently sought to reach, the Supreme Court on different occasions has said that use taxes and sales taxes are the same or dissimilar.[12] Most of the distinctions made are without substance, however. In attempting to draw the line within which the taxing jurisdiction of the purchaser's state is valid and beyond which it is void, the Court has employed and discarded a variety of criteria, subjecting itself to some caustic comment en route.[13] In various de-

[4] Robbins v. Shelby County, 120 U.S. 489, 7 S.Ct. 592 (1887); Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 59 S.Ct. 325 (1939); J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 58 S.Ct. 913 (1938).

[5] Woodruff v. Parham, 8 Wall. (75 U.S.) 123 (1868); Brown v. Houston, 114 U.S. 622, 5 S.Ct. 1091 (1885); New York ex rel. Hatch v. Reardon, 204 U.S. 152, 27 S.Ct. 188 (1907).

[6] Henneford v. Silas Mason Co., 300 U.S. 577, 57 S.Ct. 524 (1937); Southern Pacific Co. v. Gallagher, 306 U.S. 167, 59 S.Ct. 389 (1939); Pacific Telephone & Telegraph Co. v. Gallagher, 306 U.S. 182, 59 S.Ct. 396 (1939).

[7] McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 S.Ct. 388 (1940); McLeod v. J. E. Dilworth Co., 322 U.S. 327, 64 S.Ct. 1023 (1944).

[8] Maryland Code Ann. (Flack, 1951) art. 81, §371.

[9] Criz, "The Use Tax: History, Administration, and Economic Effects," 78 PUB. ADM. SERV. 1 at 2 (1941); Henneford v. Silas Mason, note 6 supra, at 581.

[10] Maryland Code Ann. (Flack, 1951) art. 81, §375, makes the vendor personally liable for failure to collect. Iowa Code Ann. (1949) §423.12 makes the tax a debt owed by the retailer to the state, and calls for the revocation of a foreign corporation's permit to do business for failure to pay.

[11] International Harvester Co. v. Wisconsin Dept. of Taxation, 322 U.S. 435 at 441, 64 S.Ct. 1060 (1944); McGoldrick v. Berwind-White Coal Mining Co., note 7 supra, dissenting opinion at pp. 60, 61.

[12] McLeod v. J. E. Dilworth Co., note 7 supra, at 330; McGoldrick v. Berwind-White Coal Mining Co., note 7 supra, at 49.

[13] 57 HARV. L. REV. 1086 (1944).

cisions the Court has said that a state may impose a sales tax where there is delivery within the taxing state in conjunction with substantial local activity,[14] but may not where there is nothing more than solicitation and delivery,[15] although it may impose a use tax on the vendor in the latter situation.[16] It has stated that a use tax may be imposed on strictly interstate sales if the vendor also does a related intrastate business,[17] but that an occupation tax on the privilege of engaging in retail sales may not be assessed under the same circumstances.[18] The opinion in the principal case was a victory for Justice Jackson, climaxing a ten year fight begun with his dissent in *General Trading Co. v. State Tax Commissioner*,[19] in which the Court held that a use tax may be enforced against a vendor who merely solicits orders within the taxing state. It brings some order into one area of this problem by limiting the power of a state to tax an out-state vendor by calling a tax really based on a sale transaction a use tax.

It would seem that a true use tax applied to and collected from the consumer is, and should be, perfectly valid. To make a foreign corporation a collecting agent for the state when it maintains a local retail store,[20] or a sales office,[21] or carries on "solicitation plus"[22] within the taxing state may also be valid, but a tax on a strictly interstate sale should have some stronger constitutional justification than the power to coerce compliance. The fact that a state can force a vendor to pay a tax on his interstate activity by threatening to revoke a local privilege should not be an argument in favor of the validity of the tax itself. An attempt, as in the principal case, to place tax liability on a foreign corporation whose only activity in the taxing state is the delivery of goods sold by it outside the state is clearly beyond the scope of permissible state taxing power. It is gratifying that the Court drew this line to stop an arbitrary extension of a state's sovereignty. In the light of the realistic approach of the principal case, an approach by which a use tax levied on the vendor is equated with a sales tax, it will now be in order for the Court to re-evaluate some of its

[14] McGoldrick v. Berwind-White Coal Mining Co., note 7 supra, at 49, ". . . transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title . . . ," and at 58, "Here the tax is conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption."

[15] McLeod v. J. E. Dilworth Co., note 7 supra.

[16] General Trading Co. v. State Tax Commissioner, 322 U.S. 335, 64 S.Ct. 1028 (1944). Cf. Reichman-Crosby Co. v. Stone, 204 Miss. 122, 37 S. (2d) 22 (1948).

[17] Nelson v. Sears, Roebuck & Co., 312 U.S. 359 at 364, 61 S.Ct. 586 (1941); Nelson v. Montgomery Ward & Co., 312 U.S. 373, 61 S.Ct. 593 (1941).

[18] Norton Co. v. Dept. of Revenue of Illinois, 340 U.S. 534 at 539, 71 S.Ct. 377 (1951).

[19] General Trading Co. v. State Tax Commissioner, note 16 supra.

[20] Nelson v. Sears, Roebuck & Co.; Nelson v. Montgomery Ward & Co., note 17 supra.

[21] Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62, 59 S.Ct. 376 (1939); Monamotor Oil Co. v. Johnson, 292 U.S. 86, 54 S.Ct. 575 (1934); McGoldrick v. Felt & Tarrant Mfg. Co., 309 U.S. 70, 60 S.Ct. 404 (1940).

[22] International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154 (1945).

earlier decisions in this field. As Justice Jackson said ten years ago, a state should have no "power to make a tax collector of one whom it has no power to tax."[23]

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[23] General Trading Co. v. State Tax Commissioner, note 16 supra, at 339.