Michigan Law Review

Volume 47 | Issue 1

1948

CONSTITUTIONAL LAW-STATE TAXATION OF INTERSTATE COMMERCE -VALIDITY OF APPORTIONED CAPITAL TAX ON CORPORATION ENGAGED SOLELY IN INTERSTATE COMMERCE

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CONSTITUTIONAL LAW—STATE TAXATION OF INTERSTATE COMMERCE —VALIDITY OF APPORTIONED CAPITAL TAX ON CORPORATION ENGAGED SOLELY IN INTERSTATE COMMERCE—Plaintiff gas company, a Delaware corporation, transported gas by pipe line across a section of Mississippi. Its activities in Mississippi admittedly did not constitute intrastate commerce and plaintiff had no agent for service of process in that state. Mississippi imposed a "franchise or excise" tax on all corporations present in the state, measured by applying a specified rate against the value of the capital employed within its boundaries. This tax was in addition to, and independent of, the locally imposed *ad valorem* taxes levied against plaintiff's property. Alleging the franchise tax to be invalid under the commerce clause of the Federal Constitution, plaintiff filed its petition for review before the State Tax Commission of Mississippi. In subsequent appellate proceedings, the Supreme Court of Mississippi held that the challenged levy was not a tax on the privilege of engaging in interstate commerce, but that it was valid recompense to the state for the protection afforded plaintiff's local installations.[1] On writ of certiorari, *held*, affirmed. Justice Reed, writing for the majority, found the tax to be not upon commerce but upon a taxable local event which could not be made the subject of cumulative levies by other states. Justice Rutledge concurred specially and Justice Black concurred in the judgment. Justice Frankfurter was joined in dissent by Chief Justice Vinson and by Justices Jackson and Burton. *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 68 S.Ct. 1475 (1948).

In *Ozark Pipe Line Corp. v. Monier*,[2] a franchise tax similar to the one challenged in the principal case was held invalid as applied to a foreign corporation whose local activity was found to be solely in furtherance of its interstate business. The exaction there in question having been viewed as a privilege tax, the decision that the state was trying to tax, and thus to regulate, a subject regulable only by Congress followed naturally from the conclusion that the alleged local activity was truly interstate in character.[3] In reaching a result patently the oposite of that reached in the *Ozark* case, Justice Reed in the principal case concludes that a tax upon a local segment of an interstate operation is not necessarily a tax on commerce, the critical question apparently being the manner in which the statute is interpreted by the state court.[4] So where, as here, the review comes following a finding by the state court that the tax is recompense for protection of local activities, the tax is valid if it seems a fair amount, so that commerce will not be unduly burdened,[5] and if it is nondiscriminatory. To this writer, such a rule simply means that interstate commerce may be taxed subject to certain restrictions, for it becomes readily apparent that no state court will construe a tax like the one here in question as having been based on the privilege of operating on an interstate scale. There will always be local incidents which can be made the subject of state taxation, and under a construction like that placed on this tax by the Mississippi court, such incidents can never be used as the basis for taxes by other states through which the taxpayer operates. It is interesting to note that the majority in the principal

[1] (Miss. 1947) 29 S. (2d) 268 (1947).

[2] 266 U.S. 555, 45 S.Ct. 184 (1925).

[3] Subsequent decisions limited the Ozark case chiefly on the question of what activities are to be considered so intimately connected with the interstate commerce as to be immune from state taxation. See Interstate Natural Gas Co. v. Stone, 308 U.S. 522, 60 S.Ct. 292 (1939), affirming per curiam, (C.C.A. 5th, 1939) 103 F. (2d) 544, where the circuit court held that the act of qualifying to do local business was sufficient to subject the corporation to franchise taxes, though no local business was actually performed.

[4] "The state Court construed the tax as 'an exaction . . . for protection of . . . the local activities. . . .' As we are bound by the construction of the state statute by the state court, it is idle to suggest that the tax is on 'the privilege of engaging in interstate business.' " [Principal case at 84-85.]

[5] The measure of the tax was $1.50 per thousand of capital employed in Mississippi. The amount found to be due based on approximately 135 miles of pipe-line was $3400; this was in addition to about $82,000.00 in ad valorem taxes paid by plaintiff to local governmental units in the state. On this point, the majority said, "The amount of the tax is reasonable." (Principal case at 88.) Justice Frankfurter's comment on this in the dissent was: "Of course, a State tax on interstate commerce does not become a valid one merely because it's only a little one." Principal case at 103-104.

case is composed of Justice Reed and the four justices who dissented in the recent case of *Joseph v. Weekes and Carter Co.*[6] In that case, Justice Reed wrote the opinion for the majority which announced that a tax measured by the gross receipts of the taxpayer was invalid as applied to a stevedoring company which loaded and unloaded ships engaged in interstate commerce. There, he held stevedoring to be inseparable from the interstate commerce; here, he finds ownership and maintenance of a pipe line to be an event apart from the transmission of gas. Realistically, both seem but parts of the whole.[7] Though tenuous distinctions are possible, it is submitted that the cases viewed together indicate that Justice Reed assents in principle to the cumulative burdens theory of the late Chief Justice Stone,[8] but applies the direct burden test when the tax in question is measured by gross receipts. Considering the fact that apportionment problems of peculiar complexity seem inherent in taxes measured by gross receipts from commerce, it is not entirely arbitrary that a self-apportioning tax like the one involved in the principal case be placed in a different category. Clearly the principal case indicates that at least a bare majority of the Supreme Court does not subscribe to the theory that the commerce clause creates an area of substantive immunity from state taxation of interstate commerce even though an opposite conclusion seemed valid after last year's gross receipts tax cases.[9]

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[6] 330 U.S. 422, 67 S.Ct. 815 (1947).

[7] "But the difference [between viewing this as a tax upon commerce and as a tax upon severable incidents of commerce] conceivably may be of large, indeed of controlling, importance for other cases. And, so far as this may be true, I am unable to revert to rationalizations which make merely verbal formulae without reflection of differences in substantive effects controlling in these matters." This statement is from the concurring opinion of Justice Rutledge, at 98.

[8] See Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546 (1938); Adams Mfg. Co. v. Storen, 304 U.S. 307, 58 S.Ct. 913 (1938); McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 S.Ct. 388 (1940).

[9] Freeman v. Hewitt, 329 U.S. 249, 67 S.Ct. 274 (1946); Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422, 67 S.Ct. 815 (1947). In general on this subject, see 46 MICH. L. REV. 50 (1947); Powell, "More Ado about Gross Receipts Taxes," 60 HARV. L. REV. 501, 710 (1947); Dowling, "Interstate Commerce and State Power—Revised Version," 47 COL. L. REV. 547 (1947).