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CONSTITUTIONAL LAW-STATE TAXATION OF GROSS RECEIPTS FROM INTERSTATE COMMERCE

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CONSTITUTIONAL LAW—STATE TAXATION OF GROSS RECEIPTS FROM INTERSTATE COMMERCE—A New York statute[1] imposed a tax of two per cent on the gross receipts of all utilities doing business within the state. The State Tax Commission construed this statute as applicable to the total receipts of petitioner derived from transporting passengers for hire from a point within New York to another point within the same state over a route which passed through New Jersey and Pennsylvania. The state courts affirmed the determination of the commission,[2] and the petitioner appealed. *Held,* reversed and remanded. The transportation was interstate, and an unapportioned tax on the gross receipts derived therefrom was invalid under the commerce clause, since such a tax made interstate commerce bear more than its fair share of the cost of local government. The tax would be sustained if apportioned according to the percentage of the total mileage which was traversed within the taxing state. Three justices dissented. *Central Greyhound Lines, Inc., of New York v. Mealey,* 334 U.S. 653, 68 S.Ct. 1260 (1948).

If the decision that the transportation here involved was interstate commerce can be accepted at its face value, along with the dictum that the tax would be sustained if apportioned, the principal case may help to clarify some of the confusion which has existed for the past ten years in the field of state taxation of the receipts from interstate commerce.[3] Prior to 1938 it could be said with a reasonable degree

[1] N.Y. Tax Law (McKinney 1943) § 186(a).

[2] 266 App. Div. 648, 44 N.Y.S. (2d) 652 (1943); and 296 N.Y. 18, 68 N.E. (2d) 855 (1946).

[3] The three dissenting justices (Black, Murphy and Douglas) seem to base their dissent on the ground that the commerce involved was not interstate. They say that a single transaction may involve both interstate and intrastate elements and that one or the other element will be emphasized according to how the question comes up. Certainly this is doing what the majority explicitly condemns—calling a transaction interstate or intrastate in order to reach a desired result. The holding of the majority on this point is supported by authority. Hanley v. Kansas City Southern Ry. Co., 187 U.S. 617, 23 S.Ct. 214 (1903); Western Union Telegraph Co. v. Speight, 254 U.S. 17, 41 S.Ct. 11 (1920); Missouri Pacific R. Co. v. Stroud, 267 U.S. 404, 45 S.Ct. 243 (1925);

of certainty that a state could not directly tax interstate commerce.[4] Thus state taxes on the privilege of engaging in interstate commerce[5] or on the gross receipts from such commerce[6] were uniformly held invalid. In that year the cumulative burdens test was announced by Mr. Justice Stone in the *Western Live Stock* case.[7] The doctrine, which soon gained further support in the *Adams Manufacturing Co.* case,[8] was that any tax would be sustained which was of such a nature that two or more states could not tax the same transaction so as to subject interstate commerce to multiple burdens. So long as there was no danger of cumulative burdens, it was immaterial that the tax was laid directly on interstate commerce. The idea of fair apportionment was necessarily involved in this doctrine. If a state could apportion its tax on the gross receipts from interstate commerce according to the fair share of those receipts derived from business within the state, the tax would be sustained. Some of the obvious practical difficulties concerning apportionment were eliminated in two subsequent decisions involving interstate sales. The first held that a tax on the receipts from such sales by the state of the seller was invalid.[9] The second held valid a similar tax by the state of the buyer, since there was no longer the danger of a double burden.[10] In 1946, however, in the case of *Freeman v. Hewit*,[11] soon followed by *Joseph v. Carter and Weekes*

Cornell Steamboat Co. v. United States, 321 U.S. 634, 64 S.Ct. 768 (1944). It is important to note, however, this dispute as to the exact nature of this transportation. The facts are such that the case can easily be distinguished later if the Court wishes to do so.

[4] Case of the State Freight Tax, 15 Wall. (82 U.S.) 232 (1873); Puget Sound Stevedoring Co. v. State Tax Commission, 302 U.S. 90, 58 S.Ct. 72 (1937).

[5] Puget Sound Stevedoring Co. v. State Tax Commission, supra, note 4; Robbins v. Shelby County Taxing District, 120 U.S. 489, 7 S.Ct. 592 (1887); Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196, 5 S.Ct. 826 (1885).

[6] Fisher's Blend Station v. State Tax Commission, 297 U.S. 650, 56 S.Ct. 608 (1936); Galveston, Harrisburg, and San Antonio Ry. Co. v. Texas, 210 U.S. 217, 28 S.Ct. 638 (1908); Philadelphia & Southern Mail Steamship Co. v. Pennsylvania, 122 U.S. 326, 7 S.Ct. 1118 (1887); and Ratterman v. Western Union Tel. Co., 127 U.S. 411, 8 S.Ct. 1127 (1888). The exceptions to the general rule usually fall into one of two classes. Taxes on gross receipts from interstate commerce in lieu of a property tax are valid; United States Express Co. v. Minnesota, 223 U.S. 335, 32 S.Ct. 211 (1912); Ficklen v. Taxing District of Shelby County, 145 U.S. 1, 12 S.Ct. 810 (1892); Wisconsin & Michigan Ry. Co. v. Powers, 191 U.S. 379, 24 S.Ct. 107 (1903); American Manufacturing Co. v. St. Louis, 250 U.S. 459, 39 S.Ct. 522 (1919); as are taxes laid on property after it is out of interstate commerce; i.e., use taxes, and occupation and franchise taxes measured by the gross receipts from commerce: State Tax on Railway Gross Receipts, 15 Wall. (82 U.S.) 284 (1873); Ewing v. City of Leavenworth, 226 U.S. 464, 33 S.Ct. 157 (1913); Maine v. Grand Trunk Ry., 142 U.S. 217, 12 S.Ct. 121 (1891).

[7] Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546 (1938).

[8] Adams Manufacturing Co. v. Storen, 304 U.S. 307, 58 S.Ct. 913 (1938), holding invalid the Indiana Gross Income Tax in so far as it failed to apportion receipts fairly between local and interstate commerce.

[9] Gwin, White & Prince v. Henneford, 305 U.S. 434, 59 S.Ct. 325 (1939).

[10] McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 S.Ct. 388 (1940).

[11] 329 U.S. 249, 67 S.Ct. 274 (1946).

Stevedoring Co.,[12] the majority of the Court expressly repudiated the cumulative burdens test and readopted the old rule that any tax which was a direct burden on commerce was invalid. Uncertainty was the natural result.[13] The principal case throws a somewhat diffuse light on the subject. The actual decision is that the tax as assessed is invalid. The *ratio decidendi* is twofold: the tax is laid directly on interstate commerce and is not fairly apportioned. *Freeman v. Hewit*, the *Adams Manufacturing Co.* case, and the *Joseph* case are all cited to sustain the same statement; such a grouping of authority is not illuminating. Immediately following the actual decision, however, is dictum that if properly apportioned according to the percentage of mileage traveled in New York, the tax would be sustained. This would seem to indicate that the direct burdens test is once again in ill favor with the majority and that the Court has readopted the cumulative burdens and fair apportionment theory, at least so far as gross receipts from interstate transportation are concerned.[14]

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[12] 330 U.S. 422, 67 S.Ct. 815 (1947). The Joseph case was based squarely on the Puget Sound case, cited in note 5. In both cases there was no possible danger of multiple burdens, all the activities involved being local.

[13] See, for instance, Powell, "More Ado About Gross Receipts Taxes," 60 HARV. L. REV. 501, 710 (1947); Lockhart, "Gross Receipts Taxes on Interstate Transportation and Communication," 57 HARV. L. REV. 40 (1943); and 46 MICH. L. REV. 50 (1947). Professor Lockhart wrote his article before the decision in Freeman v. Hewit and consequently predicted the dictum in the principal case correctly. Professor Powell, on the other hand, predicted just the opposite on the strength of the Freeman v. Hewit and the Joseph cases. His wrong prediction was also based upon the belief that the Galveston case, cited supra, note 6, would have to be overruled in order for the Court to sustain an apportioned tax on railroad gross receipts. The Galveston case was not discussed in the principal case, although it seems clearly inconsistent.

[14] Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 68 S.Ct. 1475 (1948), noted in 47 MICH. L. REV. 115 (1948), decided one week after the principal case, may be interpreted as giving further support to the cumulative burdens doctrine. Indeed, such was the specific ground of Mr. Justice Rutledge's separate concurring opinion, in which he cited the principal case. The tax there involved was not levied upon gross receipts, however, but was a tax laid on property used in interstate commerce by a foreign corporation. But cf., 62 HARV. L. REV. 138 (1948).