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# CONSTITUTIONAL LAW-INTERSTATE COMMERCE--VALIDITY OF STATUTE REQUIRING COLLECTION OF USE TAX BY OUT-OF-STATE VENDOR ENGAGED SOLELY IN INTERSTATE COMMERCE

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CONSTITUTIONAL LAW—INTERSTATE COMMERCE—VALIDITY OF STATUTE REQUIRING COLLECTION OF USE TAX BY OUT-OF-STATE VENDOR ENGAGED SOLELY IN INTERSTATE COMMERCE—Plaintiff, a Tennessee corporation, sued to recover taxes paid under protest pursuant to the Mississippi Use Tax Act. The act required collection by retailers "maintaining a place of business" in the state, which phrase was defined as including any retailer having any agent operating within the state.[1] Plaintiff's salesmen, nonresidents of Mississippi, solicited orders for goods within that state. Acceptance of the orders and delivery to an interstate carrier were at plaintiff's home office in Tennessee. *Held,* insofar as the act requires a nonresident vendor to collect the tax, it violates the due process clause of the Fourteenth Amendment. Two justices dissented. *Reichman-Crosby Co. v. Stone,* (Miss. 1948) 37 S. (2d) 22.

Because a sales tax on goods sold in interstate commerce is unconstitutional,[2] many states have adopted a compensating use tax to equalize the tax burden on goods sold locally. Administrative problems of collecting a use tax from the buyer necessitate collection from the seller. Generally, sellers subject to the collection provisions are out-of-state, because the statutes exempt goods upon which a sales tax has been paid, either intra-state or extra-state.[3] Enforcement of the tax collection provisions is made difficult because of the procedural rule that process can be served on a foreign corporation only if it is "doing business within the state," and the Mississippi court had held that a foreign corporation having only soliciting agents in the state is not doing such business.[4] Use taxes collected from a foreign corporation have been held constitutional where the foreign vendor performed certain acts within the taxing state, such as maintaining a permanent office,[5] renting offices for general agents,[6] engaging in intrastate business in addition to interstate activi-

[1] Miss. Gen. Laws (1942) c. 120, Miss. Code Ann. (1942) §§10146-10167.

[2] McLeod v. J. E. Dilworth, 322 U.S. 327, 64 S.Ct. 1023 (1944); 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).

[3] Powell, "New Light on Gross Receipt Taxes," 53 HARV. L. REV. 909 at 930 (1940), states that the exemption of extra-state sales taxes is not required by the commerce clause of the Federal Constitution.

[4] See note 12, infra. The leading cases are: Green v. Chicago, B. & Q. Ry., 205 U.S. 530, 27 S.Ct. 595 (1907); Int. Harvester Co. v. Kentucky, 234 U.S. 579, 34 S.Ct. 944 (1914); Philadelphia & Read. Ry. v. McKibbin, 243 U.S. 264, 37 S.Ct. 280 (1917); People's Tobacco Co. v. American Tobacco Co., 246 U.S. 79, 38 S.Ct. 233 (1918).

[5] West Publishing Co. v. Superior Ct., 20 Cal. (2d) 720, 128 P. (2d) 777 (1942).

[6] Felt & Tarrant Co. v. Gallagher, 306 U.S. 62, 59 S.Ct. 376 (1939).

ties,[7] or shipping to an agent within the state for delivery.[8] In all of these situations the tax was collected from foreign corporations "doing business within the state" according to the procedural rule. However, in *General Trading Co. v. State Tax Commission,*[9] the United States Supreme Court sustained an Iowa statute requiring collection of the use tax by a foreign vendor having only soliciting agents in the state.[10] The court in the instant case refused to follow this decision, although the facts and the statute are indistinguishable.[11] The court stated that enforcement of the act by service of process was prevented by their adherence to the above procedural rule,[12] and that enforcement by enjoining the vendor's agents from soliciting orders was prohibited as a burden on interstate commerce; therefore, if the court had no jurisdiction to enforce the tax, the legislature had no power to define collecting retailers as including foreign vendors engaged only in interstate commerce. The court further stated that the *General Trading Co.* decision was based on a holding by the Iowa court that a foreign corporation on these facts was "doing business within the state." However, the jurisdiction to serve process was not discussed in the *General Trading Co.* case, the foreign vendor having voluntarily appeared. Actually, Iowa had followed the same procedural rule as Mississippi.[13] But regardless of this, the Supreme Court's decision sustaining the Iowa statute constitutes authority for sustaining the tax in the principal case. Since the question of jurisdiction to serve process was not presented in this case (the vendor had paid the tax and was suing for a refund), it is submitted that the statute need not have been invalidated.[14] Certainly the Supreme Court has decided that

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

[8] Monamotor Oil Co. v. Johnson, 292 U.S. 86, 54 S.Ct. 575 (1934).

[9] 322 U.S. 335, 64 S.Ct. 1028 (1944), affirming 233 Iowa 877, 10 N.W. (2d) 659. The case is criticized and discussed in 57 HARV. L. REV. 1086 (1944) and 32 CAL. L. REV. 281 (1944).

[10] The decision was contrary to dicta in Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 61 S.Ct. 586 (1941), drawing a distinction between a company doing both mail order and local retail business, and one doing only mail order business.

[11] The Iowa statute defines a retailer subject to collection of the tax as any retailer having "any agent operating within this state." Iowa Code Ann. (1939) §6943.102, subd. 6. Failure to define such a retailer as subject to the tax enabled the out-of-state vendor to escape liability in Creamery Package Mfg. Co. v. State Bd. of Equalization, (Wyo. 1946) 166 P. (2d) 952, and in J. B. Simpson, Inc. v. Gundry, 297 Mich. 403, 298 N.W. 81 (1941). However the main ground for the latter decision was that the tax burdened interstate commerce, which ground would seem to be repudiated by the General Trading Co. case, note 9, supra.

[12] Saxony Mills v. Wagner, 94 Miss. 233, 47 S. 899 (1908); Lee v. Memphis Pub. Co., 195 Miss. 264, 14 S. (2d) 351 (1943); Knower v. Baldwin, 195 Miss. 166, 15 S. (2d) 47 (1943).

[13] American Asphalt Roof Corp. v. Shankland, 205 Iowa 862, 219 N.W. 28 (1928); Burnham Mfg. Co. v. Queen Stove Works, 214 Iowa 112, 241 N.W. 405 (1932); Elk River Coal & Lbr. Co. v. Funk, 222 Iowa 1222, 271 N.W. 204 (1937).

[14] Another state court has sustained the same type of tax statute on these facts; Johnston v. Gill, Comr. of Revenue, 224 N.C. 638, 32 S.E. (2d) 30 (1944).

a state has the right to impose the duty to collect the tax.[15] Whether or not the Court will uphold the power to enforce collection by service of process remains to be seen. Some indication may be found in the Court's holding that a state has the power to serve process on a nonresident corporation for collection of an unemployment compensation tax on its soliciting agents' salaries.[16]

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[15] "The fact that respondent could not be reached for the tax if it were not qualified to do business in Iowa would merely be a result of the 'impotence of state power.'" Nelson v. Sears, Roebuck & Co., 312 U.S. 359 at 364, 61 S.Ct. 586 (1941).

[16] International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154 (1945). Weaker analogies are found in Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632 (1927) (holding migratory motorists subject to suit); Kane v. New Jersey, 242 U.S. 160, 37 S.Ct. 30 (1916) and Hendrick v. Maryland, 235 U.S. 610, 35 S.Ct. 140 (1915) (sustaining compulsory registration and license taxes on migratory motorists).