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# CONSTITUTIONAL LAW-COMMERCE CLAUSE-STATE TAXATION OF INTERSTATE COMMERCE

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CONSTITUTIONAL LAW—COMMERCE CLAUSE—STATE TAXATION OF INTERSTATE COMMERCE—Appellant, a Missouri corporation, was domiciled in Illinois and engaged in interstate trucking of commodities to and from Connecticut. The appellant had twenty-seven employees, office equipment, pick-up trucks and two terminals within Connecticut. Approximately one-third to one-half of appellant's business originated in Connecticut, but a very small percentage of the total mileage traveled by its trucks lay within the state. Appellant was not engaged in intrastate commerce, nor had it been authorized to transact such business. Under the Connecticut Corporation Business Tax Act of 1935[1] appellant was assessed for taxes and penalties. The statute imposed a franchise tax upon certain corporations for the privilege of carrying on business within the state. The tax was computed by taking a percentage of the entire net income of the corporation, but detailed apportionment provisions related the amount collected to that part of a corporation's business which was attributable to the taxing state. Appellant sought to enjoin collection of the tax. The state court found that the tax applied to the appellant although it was engaged exclusively in interstate business.[2] The federal district court held the enactment unconstitutional.[3] On appeal, the court of appeals reversed, holding that interstate commerce can be required to pay its share of ordinary governmental expense incurred in guaranteeing the privilege and protection which the state affords.[4] The Supreme Court reversed. *Held,* the privilege of engaging in purely interstate commerce cannot be taxed by a state in the absence of Congressional consent. *Spector Motor Service, Inc. v. O'Connor,* 340 U.S. 602, 71 S.Ct. 508 (1951).

The Supreme Court has applied several tests as to a state's power to tax interstate commerce. Originally, it denied the authority except in the exercise of police power.[5] Subsequently it permitted "indirect" taxation,[6] and later, taxation was allowed where cumulative burdens did not result.[7] In 1946 a trend

[1] Conn. Gen. Stat. (1949) §§1896-1921.

[2] Spector Motor Service, Inc. v. Walsh, 135 Conn. 37, 61 A. (2d) 89 (1948).

[3] Spector Motor Service, Inc. v. McLaughlin, (D.C. Conn. 1949) 88 F. Supp. 711

[4] Spector Motor Service, Inc. v. O'Connor, (2d Cir. 1950) 181 F. (2d) 150.

[5] See Brown v. Maryland, 12 Wheat. (25 U.S.) 419 (1827); Willson v. Black Bird Creek Marsh Co., 2 Pet. (27 U.S.) 245 (1829).

[6] See Case of the State Freight Tax, 15 Wall. (82 U.S.) 232 (1873); Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 540 (1938); and, generally: Wiley, "Justice Rutledge and State Taxation of Interstate Commerce," 1950 WASH. UNIV. L.Q. 399 at 400.

[7] E.g., Interstate Oil Pipe Line Company v. Stone, 337 U.S. 662, 69 S.Ct. 1264

toward the old "direct-indirect burden" theory[8] began and its use has become more apparent with subsequent cases.[9] Though some phases of taxation of interstate commerce by states have been consistently upheld,[10] a tax levied upon the privilege of engaging exclusively in interstate commerce, as in the principal case, has never been held valid.[11] The position of the Court in allowing precedent to govern the principal case is open to valid criticism from many angles. The instrumentalities of interstate commerce can be made to pay their own way,[12] which surely must include the expenses of protection and conveniences offered by the state. Connecticut could have levied for the use of highways or on property situated within the state and collected the same amount of tax as long as there was no discrimination.[13] The difference in names alone should not be allowed to govern. A direct tax would not seem to be bad just because it is direct, unless it is also discriminatory or involves the possibility of multiple taxation,[14] and there is little chance of retaliatory enactments to the statute in the principal case because it calls for accurate apportionment of the

(1942). See Mendelson, "Recent Developments in State Power to Regulate and Tax Inter-State Commerce," 98 UNIV. PA. L. REV. 57 (1949). See also 20 TENN L. REV. 273 (1948) and 48 MICH. L. REV. 360 (1950).

[8] See note 5 supra.

[9] See Freeman v. Hewit, 329 U.S. 249, 67 S.Ct. 274 (1946); Joseph v. Carter & Weekes Stevedoring Company, 330 U.S. 422, 67 S.Ct. 815 (1947); Hood & Sons v. DuMond, 336 U.S. 525, 69 S.Ct. 657 (1949).

[10] Reasonable, nondiscriminatory taxes for the use of highways are sanctioned. McCarroll v. Dixie Greyhound Lines, 309 U.S. 176, 60 S.Ct. 504 (1940). Ad valorem property taxes can be assessed wherever the property is found, and taxes taken in lieu of property taxes are constitutional if based on apportioned gross receipts. See Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 11 S.Ct. 546 (1891); Northwest Airlines v. Minnesota, 322 U.S. 292, 64 S.Ct. 950 (1944); Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 69 S.Ct. 432 (1949); 48 MICH. L. REV. 116 (1950). A tax for the privilege of residence within the state can be measured by net income derived from all sources without apportionment. United States Glue Co. v. Town of Oak Creek, 247 U.S. 321, 38 S.Ct. 499 (1918). Franchise taxes on net income, reasonably apportioned to the amount of income derived from interstate commerce done with the taxing state, have been upheld where the taxpayer was also engaged in intrastate commerce. Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 41 S.Ct. 45 (1920). In many cases the all important consideration seems to have been the presence and feasibility of a formula for apportionment. E.g., see Gwen, White & Prince v. Henneford, 305 U.S. 434, 59 S.Ct. 325 (1939); International Harvester v. Evatt, 329 U.S. 416, 67 S.Ct. 444 (1946).

[11] E.g., Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203, 45 S.Ct. 477 (1925); Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U.S. 218, 53 S.Ct. 373 (1933). In two recent cases statutes were upheld although they seemingly involved direct burdens on interstate commerce; but a part of the majority in each case was of the opinion that the activities being taxed were intrastate rather than interstate. See Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 68 S.Ct. 1475 (1948); Interstate Oil Pipe Line Co. v. Stone, supra note 7.

[12] Postal Telegraph Cable Co. v. City of Richmond, 249 U.S. 252, 39 S.Ct. 265 (1919); Western Live Stock v. Bureau of Revenue, supra note 6.

[13] See note 10 supra.

[14] Freeman v. Hewit, supra note 9, and Joseph v. Carter & Weekes Stevedoring Co., supra note 9, involved taxation of gross receipts, which would appear more discriminatory than the tax on net income involved in the principal case, at least according to classic definition in United States Glue Co. v. Town of Oak Creek, supra note 10.

tax.[15] Nor is there anything in the Federal Constitution which expressly requires that congressional power over commerce be exclusive, and the Court should not adhere to judicial precedent if the reasoning behind it fails.[16] But even though the tax is apportioned, the fact that the domiciliary state can tax the entire net income of appellant[17] makes this statute subject to the criticism of possible double taxation. Moreover, the practical problems of apportionment that would follow the adoption of similar statutes by other states might easily outweigh local benefit to be derived therefrom, especially since alternative taxes might provide adequate compensation.[18] The Court indicates that there is a field of commerce free from state power even though Congress has not acted,[19] and holds that the United States has the exclusive power under the Constitution to tax the privilege of engaging in interstate commerce. The Court's language represents the "direct-indirect burden" approach, fairly well crystallizing the meaning of three earlier cases which indicated that this approach was again being employed.[20] Certainly the principal case should settle the question of taxation of the privilege of engaging solely in interstate commerce. Yet the language of the Court need not necessarily alter the results of previous cases upholding state taxation, for the finding of a "local incident," though perhaps somewhat strained in some cases, has been a frequent escape from any narrowness inherent in the "direct-indirect burden" approach.[21] Thus the future test may be one of a search for some part of the interstate transaction which has sufficient local character to which state taxation can attach.[22]

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[15] The Connecticut statute was copied from a model drafted by the National Tax Association and contains detailed and ingenious provisions regarding apportionment. Moreover, thirty other states had enacted the same legislation. This type of statute had been predicted to be constitutional. See Memphis Natural Gas Co. v. Beeler, 315 U.S. 649 at 656, 62 S.Ct. 857 (1942).

[16] See Wisconsin v. J. C. Penney Co., 311 U.S. 435, 61 S.Ct. 246 (1940).

[17] See note 10 supra.

[18] See excellent discussion of principal case at lower level in 96 UNIV. PA. L. REV. 274-276 (1948).

[19] Examples of earlier cases indicating that the commerce clause is not merely an authorization to Congress to enact legislation, but by its own force creates an area of trade free from interference by the states, are Southern Pacific Railway Co. v. Arizona, 325 U.S. 761, 65 S.Ct. 1515 (1945); Morgan v. Virginia, 328 U.S. 373, 66 S.Ct. 1050 (1946).

[20] See note 9 supra.

[21] See McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 S.Ct. 388 (1940), for an example of the extent to which previous courts have gone to find that a part of the interstate transaction is a local incident and therefore taxable.

[22] In Norton Co. v. Department of Revenue of Illinois, 340 U.S. 534, 71 S.Ct. 377 (1951), the Court indicated a willingness to extend the scope of "local incident" quite far. The taxpayer, domiciled in Massachusetts, operated an outlet in Chicago only. One justice held that all shipments sent directly to the purchaser from Massachusetts were interstate commerce. Five justices held that orders made through the outlet but mailed directly from Massachusetts to purchaser were local sales and therefore subject to the sales tax. Three justices held that even where the purchaser sent his order directly to the Massachusetts office and the commodity was mailed directly to him, there was a sufficient local incident to allow taxation of the sale by Illinois.