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# TAXATION - COMMERCE CLAUSE - TAX BY SELLER STATE ON CONTRACT TO SELL INTERSTATE

Walter B. Connolly
*University of Michigan Law School*

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TAXATION — COMMERCE CLAUSE — TAX BY SELLER STATE ON CONTRACT TO SELL INTERSTATE — Appellants were partners in the securities business with offices in New York City. In the course of their business they agreed to sell shares of stock to two firms, one engaged in business in Philadelphia, the other in Washington, D. C. The securities were mailed to banks in Philadelphia

and Washington for delivery upon payment of sight drafts attached. Under the tax law of the state of New York, a tax was levied on the sale of this stock.[1] Appellants sought a refund of the tax on the ground that the statute imposed an unconstitutional burden on interstate commerce. *Held*, the statute is valid and the tax is not an unconstitutional burden on interstate commerce. Three judges dissented. *O'Kane v. State*, 283 N. Y. 439, 28 N. E. (2d) 905 (1940).

Prior to the case of *McGoldrick v. Berwind-White Coal Mining Co.*[2] there was no judicial approval of a state tax on a sale conceded to be technically interstate.[3] In this decision the United States Supreme Court recognized that there was no economic justification for distinguishing between a sales tax and either a "use" [4] or a property tax [5] on goods which had moved in interstate commerce, when the tax is imposed by the buyer state.[6] In sweeping away this formalistic distinction, the majority based its decision on the proposition that "Non-discriminatory taxation of the instrumentalities of interstate commerce is not prohibited." [7] While this proposition may be conceded, some difficulty is found in extending it to justify a tax on gross receipts by the buyer state. A tax measured by the gross receipts by its very nature is apt to be discriminatory because it exacts tribute from the commerce carried on beyond the boundaries of the taxing state and subjects such commerce to the risk of double taxation.[8] Rather than meet this objection directly, Justice Stone, speaking for the majority in the *Berwind-White* case argued that the tax was levied on a local event, which apart from its effect on commerce is subject to the state taxing power.[9] To the dissent in

[1] 59 N. Y. Consol. Laws (McKinney, Supp. 1940), § 270-a.

[2] 309 U. S. 33, 60 S. Ct. 388 (1940), commented on in 38 MICH. L. REV. 1292 (1940); 28 CAL. L. REV. 406 (1940).

[3] Powell, "New Light on Gross Receipts Taxes," 53 HARV. L. REV. 909 at 910 (1940): "The decision is the first upon full recognition and exposition to sustain such a tax."

[4] The "use" tax statutes had been previously upheld. Henneford v. Silas Mason Co., 300 U. S. 577, 57 S. Ct. 524 (1937), noted in 51 HARV. L. REV. 130 (1937); Southern Pacific Co. v. Gallagher, 306 U. S. 167, 59 S. Ct. 389 (1939); Pacific Tel. & Tel. Co. v. Gallagher, 306 U. S. 182, 59 S. Ct. 396 (1939); Monamotor Oil Co. v. Johnson, 292 U. S. 86, 54 S. Ct. 575 (1934).

[5] Property taxes have already received judicial approval. Brown v. Houston, 114 U. S. 622, 5 S. Ct. 1091 (1885); Coe v. Errol, 116 U. S. 517, 6 S. Ct. 475 (1886); American Steel & Wire Co. v. Speed, 192 U. S. 500, 24 S. Ct. 365 (1903); State of Minnesota v. Blasius, 290 U. S. 1, 54 S. Ct. 34 (1933).

[6] McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 at 52, 60 S. Ct. 388 (1940): " we can find no adequate basis for distinguishing the present tax laid on the sale or purchase of goods upon their arrival at destination at the end of an interstate journey from the tax which may be laid in like fashion on the property itself."

[7] Id., 309 U. S. 33 at 47.

[8] Gwin, White & Prince v. Henneford, 305 U. S. 434, 59 S. Ct. 325 (1939) (here there was a state tax measured by the gross receipts of the taxpayer from his business of marketing fruit shipped from the state to the places of sale in other states); Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 58 S. Ct. 546 (1937) (dictum); Adams Mfg. Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913 (1937).

[9] McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 at 58, 60 S.

that case it appeared clear that this argument could be applied to uphold a tax by the state of the seller as well as that of the buyer with the consequent discrimination against interstate commerce.[10] In the principal case, the New York court in upholding a tax by the seller state, followed the precise line of reasoning that was employed in the *Berwind-White* case. After paying verbal homage to the doctrine that interstate commerce shall not be discriminated against,[11] the New York court emasculated it by finding that "the taxable event is the making in this State of a contract to sell goods which are in this State." [12] Thus by the simple device of dividing interstate commerce into its component parts, both the buyer and the seller state can find a taxable event solely within its own borders. If the resulting trade barriers are to be removed, a more realistic approach to the question of taxation on interstate sales must be adopted. The Supreme Court may accept either of two views on this problem. The first of these is that the whole matter of interstate trade barriers should be left to Congress, with its plenary powers over interstate commerce.[13] Under this view the tax by the state of the seller would probably be upheld because the Court would refuse to consider the possibility of multiple burdens if the taxing statute was non-discriminatory on its face.[14] Granting the assumption that Congress may be better qualified to determine the proper scope of interstate commerce, yet until Congress does act it would seem that some judicial guidance is desirable.[15] The second approach open to the Court would be to admit frankly that the tax in the *Berwind-White* case was on interstate commerce, but since it was at the buyer's end, there was

Ct. 388 (1940): "the tax is conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption."

[10] Id., 309 U. S. 33 at 69: "If New York can tax the delivery, Pennsylvania can tax the shipment and New Jersey the transshipment. And the latter States, respectively, would be as much entitled to tax the gross recipts from the sales as would New York."

[11] Principal case, 283 N. Y. 439 at 448: "But however expressed, the guiding principle which limits the power of the States to tax is that the several States of the union may not discriminate against interstate commerce in favor of intrastate commerce."

[12] The Court went on to say, "This event is no more recurrent than the taxable event in Berwind-White, and hence the possibility of cumulative taxes is equally absent." Principal case, 283 N. Y. 439 at 448. This result seems contrary to Adams Mfg. Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913 (1937); Gwin, White & Prince v. Henneford, 305 U. S. 434, 59 S. Ct. 325 (1939). Both of these cases involved gross receipts taxes imposed by the state of the seller upon interstate sales.

[13] See the dissenting opinion of Justices Black, Frankfurter and Douglas in McCarroll v. Dixie Greyhound Lines, 309 U. S. 176, 60 S. Ct. 504 (1940), noted in 38 MICH. L. REV. 928 (1940); and the dissenting opinion of Justice Black in Gwin, White & Prince v. Henneford, 305 U. S. 434 at 449, 59 S. Ct. 325 (1939): "Only a comprehensive survey and investigation of the entire national economy—which Congress alone has power and facilities to make—can indicate the need for, as well as justify, restricting the taxing power of a State so as to provide against conjectured taxation by more than one State on identical income." See Lockhart, "State Tax Barriers to Interstate Trade," 53 HARV. L. REV. 1253 at 1254 (1940); 38 MICH. L. REV. 1292 at 1306 (1940); 40 COL. L. REV. 653 at 676 (1940).

[14] See note 13, supra.

[15] 38 MICH. L. REV. 1292 at 1308 (1940).

no discrimination in favor of intrastate trade.[16] With the affirmation of the validity of a tax on an interstate sale at the buyer's end, the Court could justly strike down the tax at the seller's end as subjecting interstate commerce to the risk of a cumulative burden.[17] This would seem to be the better course, for it would eliminate the necessity for the unfortunate "local taxable event" theory, while safeguarding the right of a state to make interstate commerce pay its just share of the tax burden.[18]

*Walter B. Connolly*

[16] Lockhart, "The Sales Tax in Interstate Commerce," 52 HARV. L. REV. 617 at 627 (1939): "If the sales tax imposed by the seller's state were sustained rather than that imposed by the buyer's state, equality of tax burden would not be achieved."

[17] Gwin, White & Prince v. Henneford, 305 U. S. 434, 59 S. Ct. 325 (1939); Adams Mfg. Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913 (1938); 38 MICH. L. REV. 1292 at 1303-1304 (1940).

[18] On the question of the sales tax on interstate commerce generally, see Powell, "New Light on Gross Receipts Taxes," 53 HARV. L. REV. 909 (1940);Lockhart, "State Tax Barriers to Interstate Trade," 53 HARV. L. REV. 1253 (1940); Lockhart, "The Sales Tax in Interstate Commerce," 52 HARV. L. REV. 617 (1939); 28 GEO. L. J. 970 (1940); 38 MICH. L. REV. 1292 (1940); 40 COL. L. REV. 653 (1940).