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CURRENT DEVELOPMENTS IN STATE TAXATION OF INTERSTATE COMMERCE*

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The Problem

The businessman engaged in commerce which crosses state borders faces a series of exceedingly vexing problems. Aside from the fact that the various states, acting as sovereign majesties, impose a multitude of diverse levies which may effect a particular transaction, the decisions of the courts may appear to him to be illogical and even contradictory. His frustration is compounded by the fact that his tax counsel is often forced to hedge his opinions as to the consequences of a particular act. Before discussing some current developments, including certain recent Wisconsin tax cases, this article will consider the problem in terms of the federal limitations on the taxation of interstate commerce by the states.

Judicially Imposed Federal Limitations

The *Northwestern States-Portland Cement Co.* decision¹ established that the Constitution does not bar a state from taxing on an apportioned basis the net income of foreign corporations operating solely in interstate commerce where there are sufficient activities carried on by the taxpayer to give the taxing state jurisdiction to impose its tax. The two constitutional provisions which underlie that decision and this discussion are the commerce clause in article I, section 8, and the due process clause of the fourteenth amendment.

It seems clear that one purpose of the framers of the Constitution in drafting the commerce clause was to secure free trade among the states.² This has been recognized repeatedly by the United States Supreme Court.³ Thus, at least in theory, any charge for services and facilities, including the use of state courts, is valid only if it does not

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¹ *Northwestern States Portland Cement Company v. Minnesota*; *Georgia v. Stockham Valve and Fittings, Inc.*, 358 U.S. 450 (1959).

² HAMILTON, *THE FEDERALIST*, No. 11 (1788).

³ *E.g.*, *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292 (1944).

restrict this free trade. In determining whether such a restriction does in fact result, it would seem that the emphasis should be placed on the ultimate effect of the tax under consideration.

Insofar as the due process clause is concerned, the question is whether there is sufficient nexus, or jurisdictional connection, between the taxpayer and the taxing state to enable the state to enforce its tax. Absent this connection, the tax may not be imposed. Much of the apparent confusion in the cases results from the fact that the courts have tended to use the commerce clause and due process provisions interchangeably.⁴

A determination of whether a given state tax does in fact restrict free trade and thereby infringes upon the power of Congress to regulate commerce among the several states may involve considering the ultimate economic impact of the tax, including an analysis of the effect of all other state taxes affecting the particular activity, both locally and in other jurisdictions. It may be that the burden of assembling and evaluating the necessary evidence is beyond the capacity of the taxpayer and of the courts.

Whatever the reason, the courts have tended to avoid decisions rendered squarely under the commerce clause and have often decided cases on the basis of jurisdiction. The fact that the Court is aware of the nature and difficulty of the problem it faces is indicated by language such as that of Mr. Justice Frankfurter in *Northwest Airlines, Inc. v. Minnesota*:⁵

Each new means of interstate transportation and communication has engendered controversy regarding the taxing powers of the States inter se and as between the States and the Federal Government. Such controversies and some conflict and confusion are inevitable under a federal system. They have long been the source of difficulty and dissatisfaction for us. . . .

Whatever the bases of decision in various cases, it is clear that a tax which discriminates against interstate commerce, as compared with intrastate commerce, is unconstitutional. This is true whether the tax is discriminatory on its face or in operation. As early as 1887 the Court found a tax imposed only upon solicitors operating without a regular place of business in the taxing state to be discriminatory.⁶ In a recent opinion⁷ holding that a particular state tax was discriminatory in operation and therefore unconstitutional, Mr. Chief Justice Warren ob-

⁴ *Braniff Airways Inc. v. Nebraska*, 347 U.S. 590 (1954) illustrates the problem. In that case, the majority found that the taxpayer had sufficient contact with the state for its property tax to apply, thus deciding the case on the basis of due process. On the other hand, Mr. Justice Frankfurter, in his dissent, seems to have felt that the issue should have been decided under the commerce clause in view of the danger of multiple taxation.

⁵ Note 3 *supra*, at 300.

⁶ *Robbins v. Shelby County Taxing District*, 120 U.S. 489 (1887).

⁷ *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963).

served that "equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions."⁸ The dollar-and-cents effect is basic to a determination of whether a tax is discriminatory.

If the mandate of the Constitution is that free trade among the states is not to be restricted, a further requirement should be that the same transaction may not be taxed in more than one state. However, consider the hypothetical case of a Wisconsin manufacturer having 85% of its property and manufacturing cost in Wisconsin which sells under a master contract to a purchaser in Iowa with delivery made from an Iowa warehouse. Presumably, at the present time, Wisconsin would claim the right to tax 90% of the profit and Iowa 100%, for a total of 190%.⁹ There is every reason to believe that the Court would sustain the taxes imposed even though it would appear that this is a *prima facie* case of a restrictive multiple-tax burden being imposed upon interstate commerce. This is the result because each tax is apportioned and the Court has refused to determine what constitutes a proper apportionment formula.

In one case the Court has reversed a state supreme court where an apportionment formula was challenged. In *Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*,¹⁰ a single factor formula (property) was involved and it was established by the taxpayer that on a separate accounting basis only 17% of its income was earned in the taxing state while under the one-factor formula some 80% would be subjected to tax. The Court found this to be unreasonable. It has never struck down a multiple-factor formula, often refusing even to hear the cases decided in the state courts.¹¹

The language of the Court in the *Northwestern States* case,¹² however, is of interest: "Logically it is impossible, when the tax is fairly apportioned, to have the same income taxed twice. In practical operation, however, apportionment formulas being what they are, the possibility of the contrary is not foreclosed, especially by levies in domiciliary states. But that question is not before us."¹³ Even if the Court is challenging taxpayers to present detailed economic evidence to show a burden on interstate commerce, can this challenge be met?

The basic question is whether a state may impose a tax upon interstate activities in the first place. In the *Spector Motor Service* case¹⁴

⁸ *Id.* at 70.

⁹ WIS. STAT. §71.07(2) (1961); IOWA CODE §422.33(b) (1962), Iowa Reg. §22.33(1)-9(b)(2); cf. Note, *Federal Limitations on State Taxation of Interstate Business*, 75 HARV. L. REV. 953, 966 (1962).

¹⁰ 283 U.S. 123 (1931).

¹¹ *E.g.*, *Moore Motor Freight Lines, Inc.*, *infra* note 32; *W. R. Arthur & Co. v. Wisconsin Department of Taxation*, *infra* note 33.

¹² Note 1 *supra*.

¹³ *Id.* at 462.

¹⁴ *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951).

solely in interstate commerce. The Court commented: "The State is not precluded from imposing taxes upon other activities or other aspects of this business which, unlike the privilege of doing interstate business, it was held that a state may not tax the *privilege* of doing business are subject to the sovereign power of the State."¹⁵ Presumably, if the Court had found that the privilege involved had included intrastate activities as well the result would have been different.

Where sufficient jurisdictional connection could be found, the Court has sustained taxes on property used in interstate commerce¹⁶ as well as taxes on business done within a state which are measured by net income. For many years the leading case in the latter category was *United States Glue Corp. v. Town of Oak Creek*¹⁷ in which a domestic Wisconsin corporation doing substantial business in and out of the state was found to be subject to Wisconsin's apportioned net income tax.

The *United States Glue* decision¹⁸ left open the question as to whether such a tax could be imposed only where intrastate business was involved along with interstate business. The holding in *Northwestern States*¹⁹ that solely interstate operations may be taxed, provided that the taxing state has jurisdiction, answered the question. After stating that the taxes involved were not regulations in any sense of the term, did not discriminate against nor impose undue burdens on either corporation, and that commerce should bear its fair share of the costs of the benefits it derives from within a state, the Court said "the levies are not privilege taxes based on the right to carry on business in the taxing state. The states are left to collect only through ordinary means. The tax, therefore, is 'not open to the objection that it compels the company to pay for the privilege of engaging in interstate commerce.'"²⁰ In attempting to reconcile the decision with that in the *Spector* case,²¹ it further stated that the taxes involved were based only upon the net profits earned in the taxing state, while in *Spector*²² the tax was based upon the privilege of doing business as such. A reader having difficulty with this distinction may take comfort in the dissents of Justices Whitaker and Frankfurter.²³

In finding that the states involved had jurisdiction to impose their respective taxes in *Northwestern States*,²⁴ the Court stated: "It strains reality to say, in terms of our decisions, that each of the corporations

¹⁵ *Id.* at 609.

¹⁶ *Northwest Airlines v. Minnesota*, 322 U.S. 292 (1944); *Braniff Airways v. Nebraska*, 347 U.S. 590 (1954).

¹⁷ 247 U.S. 321 (1918).

¹⁸ *Ibid.*

¹⁹ Note 1 *supra*.

²⁰ *Id.* at 462.

²¹ Note 14 *supra*.

²² *Ibid.*

²³ Note 1 *supra*, at 470.

²⁴ Note 1 *supra*.

here was not sufficiently involved in local events to forge 'some definite link, some minimum connection' sufficient to satisfy due process requirements."²⁵ The local events were the regular and systematic solicitation of orders by employees operating from local sales offices within the taxing states.

Public Law 86-272

Following this decision, and after certiorari had been denied in cases where the local events consisted of the solicitation of orders only²⁶ and promotional activities,²⁷ Congress reacted to the many hints given it by the Court,²⁸ and took a very short and cautious step toward alleviating the problem by enacting Public Law 86-272.²⁹ This statute is a narrow one, prohibiting a net income tax on income derived by a foreign corporation from interstate commerce if the only activities involved are solicitation by salesmen and/or independent contractors of orders for tangible personal property which are approved and filled outside the state, and/or solicitation of such orders for a company's customers. This has the effect of establishing a minimum jurisdictional connection, or nexus, with the taxing state. Therefore, if the local activities fall short of those involved in the *Northwestern States*³⁰ situations where local sales offices were maintained, the tax may not be imposed.

The statute has been subjected to criticism. It has been argued that there would be substantial revenue lost to the states and that uniform legislation would be preferable. It has been attacked on the ground that it provides for preferential tax immunity which discriminates against intrastate commerce.³¹ This latter objection may be countered in part by citing the impact of multiple taxation on interstate business.

In addition, the statute has been attacked as being unconstitutional. The argument may be summarized as follows: The commerce itself is completed before the tax is imposed. Therefore, it is not commerce which is being regulated but taxation. Congress may not deprive a state of a power necessary to its survival, i.e., the power to tax.

This constitutional question is involved at the time of this writing

²⁵ *Id.* at 464.

²⁶ *International Shoe Co. v. Fontenot*, 236 La. 279, 107 So. 2d 640 (1958), *cert. denied*, 359 U.S. 984 (1959).

²⁷ *Brown-Forman Distillers Corp. v. Collector of Revenue*, 234 La. 651, 101 So. 2d 70 (1958), *cert. denied*, 359 U.S. 28 (1959).

²⁸ Black, J., concurring in *Northwest Airlines, Inc. v. Minnesota*: "The differing views of members of the Court in this and related cases illustrate the difficulties inherent in the judicial formulation of general rules to meet the national problems arising from state taxation which bears in incidence upon interstate commerce. These problems it seems to me, call for Congressional investigation, consideration and action. The Constitution gives that branch of government the power to regulate commerce among the states, and until it acts I think we should enter the field with extreme caution."

²⁹ 73 Stat. 555 (1959). 86th Con., S 2524, Sept. 14, 1959 as amended.

³⁰ Note 1 *supra*.

³¹ 48 A.B.A.J. 532 (1962).

in an appeal to the Supreme Court of Louisiana from a lower court decision.³² In this case the only activity of the taxpayer was the sending of fifteen traveling salesmen into Louisiana to solicit orders. The lower court reviewed the Supreme Court decisions recognizing the power of Congress and held that the statute was a proper exercise of congressional authority. Ten other states have filed *amicus curiae* briefs.³³

The experience of tax practitioners indicates that the various state tax administrators will attempt to construe the statute narrowly. For example, it has been considered to be inapplicable where, in addition to solicitation of orders, the salesmen assisted in obtaining financing, maintaining the equipment and leasing premises for customers as part of an advertised service; and, where activities in addition to the solicitation of orders were carried on only in order to comply with state alcoholic beverage laws. In another situation a corporation engaged only in selling on a commission basis was considered by state taxing authorities to be merely rendering a "service" and therefore was not exempted by the statute.

The statute may properly be criticized as being too narrow. It provides no protection for the sale of intangibles and services, and leaves open the question as to what additional activities beyond solicitation will sustain a tax. Limited as it is, it has already cost one taxpayer the right to make use of a statutory apportionment formula.³⁴ It is obvious that, aside from the attempts to limit (or eliminate) the statute, many basic problems remain unresolved.

Recent Developments

Turning to recent developments, the Supreme Court in the spring of 1963 held that a use tax may not discriminate against out-of-state transactions.³⁵ Louisiana had attempted to impose its use tax on the full cost of specialized equipment which had been assembled outside of the state, including labor and overhead, despite the fact that its sales tax applied only to the materials element in cost. The Court refused to sanction a use tax which imposed a heavier burden than the sales tax.

A recently enacted Indiana statute is of some interest.³⁶ This imposes a tax on adjusted gross income ("taxable income" as defined in section 63 of the Internal Revenue Code with certain adjustments). Since a credit is given for Indiana gross receipts tax, the effect will be that the new tax will apply only to interstate operations. The apportionment formula included was adopted from the Uniform Division of

³² *International Shoe Co. v. Collector of Revenue*, 19th Jud. Dist. Ct. La., Jul. 12, 1963.

³³ 24 CCH STATE TAX REV. NO. 41.

³⁴ *John Ownbey Co., Inc.*, Tenn. Sup. Ct., Feb. 7, 1963.

³⁵ Note 7 *supra*.

³⁶ Adjusted Gross Income Tax Act of 1963, H.B. 1509, Ind. Laws, 1st Spec. Sess.

Income for Tax Purposes Act and includes a destination sales factor. However, sales shipped to the United States Government or to a state in which the taxpayer is not subject to tax will be apportioned to Indiana. Indiana, therefore, seems prepared to make certain that all interstate sales over which it has jurisdiction will be subject to tax somewhere.

Recent Wisconsin Decisions

In the oldest income tax state, Wisconsin, a three-factor statutory apportionment formula is provided for "persons engaged in business within and without the state."³⁷ The factors are tangible property, cost of manufacturing (which includes materials, manufacturing payroll and burden), and "the total sales made through or by offices, agencies or branches located in Wisconsin during the income year to the total net sales made everywhere during said income year."³⁸ The Wisconsin Department of Taxation is also given specific statutory authority to provide special rules governing apportionment where the statutory method does not properly assign income to the State of Wisconsin.³⁹ Unfortunately, special rulings are not made available to the public generally and are not binding upon the Department; nor are regulations promulgated which could serve as guides to department policy.

Cases in recent years involving Wisconsin motor carriers illustrate the uncertainty which results when the statutory formula is not properly applicable. In *Moore Motor Freight Lines*⁴⁰ the Department of Taxation succeeded in imposing a two-factor formula, consisting of revenue and mileage, on a Minnesota-based common carrier which conducted no Wisconsin intrastate business. The carrier had no terminals, officers or domiciled employees in Wisconsin but the court found that 73.21% of its revenue miles were over Wisconsin roads. In the absence of any specific statutory exemption for motor carriers, the court held that the activities of the taxpayer were sufficient to subject it to tax under the Wisconsin statutes. The rule in *Northwestern States*⁴¹ was controlling and permitted a fairly apportioned nondiscriminatory tax on interstate commerce as a valid means of compensating for activities carried on within the borders of the taxing state. With regard to the fairness of the apportionment formula, it is worth noting that the revenue factor was zero. The court also found that on the facts there was sufficient nexus to sustain the imposition of the tax.

The problem of determining a proper apportionment formula for a motor carrier was considered more recently in *W. R. Arthur & Co. v.*

³⁷ WIS. STAT. §71.07(2) (1961).

³⁸ WIS. STAT. §71.07(2) (c) (1961).

³⁹ WIS. STAT. §71.07(5) (1961).

⁴⁰ *Moore Motor Freight Lines, Inc. v. Wisconsin Department of Taxation*, 14 Wis. 2d 377, 111 N.W. 2d 148 (1961).

⁴¹ Note 1 *supra*.

Wisconsin Department of Taxation.⁴² This case involved an Illinois contract carrier having its offices and main terminal located in Janesville, Wisconsin. The carrier served one large Wisconsin customer located in Janesville under a contract executed in Detroit. The taxpayer apportioned its income in its Wisconsin returns to Wisconsin on the basis of revenue miles alone. Upon audit, after considering some fifteen different factors, the Department made an additional assessment based on two factors, revenue miles and payroll. The payroll factor was based on where the particular employee was headquartered, not where he actually earned his salary or wages. The taxpayer filed an application for abatement and the Department revised its formula to include three separate factors: (a) revenue miles, (b) payroll, and (c) originating revenues. This last factor was deemed to be 100% in Wisconsin, as all of the revenue was received at the office in Janesville.

The Wisconsin Board of Tax Appeals sustained the Department, relying heavily on the *Moore* case.⁴³ The Circuit Court of Dane County found that the revenue factor was arbitrary and reversed, distinguishing the *Moore* case on the ground that the issue there was not whether the apportionment formula itself was proper but whether or not the taxpayer was in fact doing business in Wisconsin and was subject to taxation.⁴⁴ The circuit court was reversed in turn by the Supreme Court of Wisconsin which found that the originating revenue or gross receipts factor was not arbitrary and did not taint the ultimate formula adopted. While the originating revenue factor standing alone might be unfair, it was not arbitrary when used in conjunction with the two other factors. An appeal to the United States Supreme Court was denied per curiam on June 10, 1963.

In *Globe-Union, Inc. v. Wisconsin Department of Taxation*⁴⁵ the taxpayer, a Delaware corporation, had its main office in Wisconsin and produced batteries and other products in a number of states including Wisconsin. A major portion of its sales were under agreements signed by the president or chairman of the board providing for future sales to the contracting customers. Generally, as customers needed additional products they were requisitioned from the nearest factory operated by the taxpayer. Billings were prepared by the shipping factory with copies forwarded to the Milwaukee office and remittances made to the Milwaukee office. Sales to noncontract customers were based on quotations prepared and approved in the Milwaukee office. For tax purposes, the taxpayer assigned sales to the producing factories in the states in which they were located. Upon audit, the Wisconsin Department of Taxation treated the sales as having been 100% made through or by offices in

⁴² CCH WIS. STATE TAX REP. ¶200-084 (Nov. 27, 1962).

⁴³ CCH WIS. STATE TAX REP. ¶200-015 (Mar. 16, 1961).

⁴⁴ CCH WIS. STATE TAX REP. ¶200-035 (Nov. 22, 1961).

⁴⁵ CCH WIS. STATE TAX REP. ¶200-110 (Jun. 4, 1963).

the State of Wisconsin. This was sustained by the Supreme Court of Wisconsin which found that "participation in the Wisconsin office in the total sales picture was crucial"⁴⁶ and that "what was done in Wisconsin was major and significant"⁴⁷ in comparison to what was done elsewhere.

Under the Wisconsin statute,⁴⁸ sales "made through or by offices" located in the state are assignable to Wisconsin. The question, therefore, was one of determining when and where a sale was "made." The taxpayer in *Globe*⁴⁹ conceded that the Wisconsin rule is that a sale is "made" at the place where orders are approved or accepted. The taxpayer argued, however, that the mere negotiation of an agreement to supply the purchasers' requirements for goods constituted "an agreement to sell" and did not constitute the "making" of the sale. It was argued that it is recognized in commercial circles that sales are usually made at the place of shipment which in this case coincided with the place of manufacture and with the place where purchase orders were received and billed. On these facts acceptance could occur only when orders were sent to the seller and it accepted them and produced the products for the buyer. All of these acts occurred at the various producing plants throughout the United States and could not be considered to have occurred in Wisconsin for tax purposes.

The Department argued that all of the sales were approved in Milwaukee and that personnel outside of the State of Wisconsin had no authority to bind the company contractually. The following quotation from the Department's brief may be illuminating: "Having assigned one-third of the business income to the selling end of a business such as Globe-Union's, the legislature had the further problem of assigning the selling income to one of several states in which the aggregate of the selling activity takes place. It considered the approval of contracts or agreements to sell to be the predominant element of the selling process, and assigned sales accordingly. In doing so the legislature was well aware that the ultimate approval of a sales agreement usually involves a great deal more than the mere signing of a piece of paper. It involves executive judgments concerning all aspects of a business, such as engineering, cost accounting, market analysis, credit, the relationship of customers to each other, and many other considerations."⁵⁰

In concluding that the role of the Wisconsin office was a major factor in all of the taxpayer's sales, the Supreme Court of Wisconsin stated: "The basic contracts were executed by the Wisconsin officers. The entire price structure, insofar as it was influenced by Globe-

⁴⁶ *Id.* at 10,367.

⁴⁷ *Ibid.*

⁴⁸ WIS. STAT. §7107(2) (c) (1961).

⁴⁹ Note 45 *supra*.

⁵⁰ Brief for Appellant, pp. 42-43, *Globe-Union, Inc. v. Wisconsin Department of Taxation*, *supra* note 45.

Union's negotiations, was the product of activities in the Wisconsin office. Cost determinations as well as engineering specifications were calculated in Wisconsin. Payments were made to Wisconsin, and the books were kept at the home office in this state."⁵¹ The court also stressed that all other negotiations or renegotiations would have been handled in Wisconsin.

At this point, one wonders how far a home office located in Wisconsin may control and determine sales policy, sales terms, and sales conditions before it reaches the point where participation of that office in the total sales picture becomes "crucial" and "major and significant" in comparison with what was done elsewhere. Note that no prices were set and neither quantities nor delivery dates were specified in the Globe-Union contracts. It is to be hoped that the case has not opened a veritable Pandora's box of problems for Wisconsin taxpayers. Up until now, the overwhelming majority of Wisconsin tax cases involving multi-state operations have been resolved without the parties having to resort to litigation. This has been due in part to the wisdom of the legislature in providing a specific statutory apportionment formula which can be applied in most cases where mercantile or manufacturing operations are involved. A taxpayer facing what may be a new era of uncertainty can derive little comfort from the hope that the Department will exercise administrative self-restraint in future applications of the statute and the decided cases to his particular situation.

The argument is sometimes made, in support of the position of the Department, that in none of the decided cases did the facts show that a taxpayer actually was taxed on more than 100% of its income. This results from differences in the laws of the various states and from the fact that a number of states have yet to adopt income tax statutes. This argument would seem to beg the basic question which is whether or not a given transaction is subjected to a restrictive multiple tax burden. Even prohibited levies such as import duties can apply only to those items which actually cross a tariff border and not to all transactions. It also overlooks the evidentiary problem previously discussed which is involved in any attempt to determine the ultimate effect of taxes imposed by the various states upon interstate commerce.

The question of whether a taxpayer was doing business within and without the state within the meaning of the Wisconsin statutes and therefore is entitled to apportionment is involved in a recent case which has not, at the time of this writing, reached the Supreme Court of Wisconsin. In *Applied Power Industries, Inc. v. Wisconsin Department of Taxation*⁵² the Circuit Court of Dane County reversed the Wisconsin Board of Tax Appeals in finding that the taxpayer was entitled

⁵¹ Note 45 *supra* at 10,367.

⁵² CCH WIS. STATE TAX REP. ¶200-117 (Aug. 22, 1963).

to apportionment. The taxpayer involved was a Wisconsin manufacturing corporation which had contracted with warehousemen in California and New York to maintain segregated inventories and to ship goods on order to customers on approved lists. Orders from other customers were to be approved in Wisconsin before shipment. The agreement stated that the warehousemen were independent contractors, not agents. Invoices were finalized and billings were prepared at the Wisconsin office. District representatives operated out of their own homes and did not solicit orders. The circuit court found that the other states involved had sufficient nexus to impose their taxes and that the activities of the taxpayer constituted the conduct of intrastate commerce within these other states.

The circuit court attempted to distinguish the *Globe-Union* case⁵³ stating: "Although these orders involved distributors on the accredited list of the petitioner, the specific orders involved were not submitted under any master contract nor did they involve any acceptance at the home office of the company in Wisconsin."⁵⁴ On the basis of the facts the court also attempted to distinguish the *Blatz* case⁵⁵ which held in part that maintaining personal property outside of the state does not of itself constitute being engaged in business without Wisconsin, where Wisconsin is the domiciliary state.

It is not the purpose of this article to hazard guesses as to the final result in cases which have not yet been heard by the highest state tribunal. It may be pertinent, however, to note that the litigation in *Applied Power Industries*⁵⁶ was begun before the Supreme Court of Wisconsin rendered its opinion in *Globe-Union*.⁵⁷ Whatever the result, for Wisconsin income tax apportionment purposes the rule of acceptance governs in determining where a sale is made.

It is not entirely certain which particular acts will be deemed to constitute acceptance under this rule. If we assume, for purposes of discussion, that the legislature did, in fact, intend to emphasize home office activities such emphasis would appear to be of questionable wisdom for a state seeking further industrial development. Since out-of-state companies would not be taxed, the effect can only be to discriminate against Wisconsin-based industries. If this view is correct, legislative reconsideration would seem to be warranted.

Conclusion

The U.S. Constitution was intended to protect commerce among the states from the imposition of burdens which would hinder free trade.

⁵³ Note 45 *supra*.

⁵⁴ Note 52 *supra*, at 10,391.

⁵⁵ *Wisconsin Department of Taxation v. Blatz Brewing Company*, CCH Wis. STATE TAX REP. ¶200-010 (Mar. 7, 1961).

⁵⁶ Note 52 *supra*.

⁵⁷ Note 45 *supra*.

In this context, the end to be achieved is the optimum allocation and use of the economic resources of the nation. In contemporary terms, the intent was to create an American common market. It succeeded fairly well in the less complex economy of one hundred years ago.

Today, however, commerce has taken forms undreamed of in 1789. The necessity for and the demand for services has forced the states to seek additional revenues from both old and new sources. They have been led to impose taxes which appear, at least in cumulative effect, to burden and restrict the free trade the Constitution was intended to protect.

Due to the complexity of the economic factors involved, and the attendant difficulty in assembling and evaluating economic evidence, the Supreme Court has tended to sustain these taxes where some reasonable method of apportionment is provided and where it is satisfied that the taxing state has jurisdiction over the taxpayer.

Properly exercising its prerogative to refuse to choose between the various formulas presented to it for evaluation, the Court has, in effect, asked Congress to act. The response has been limited and cautious. The reason for this is that Congress is a political body and the electorate has, for various reasons, failed to press in sufficient numbers for action.

It may also be appropriate for the Wisconsin legislature to consider revision, or at least clarification, of its statutory apportionment formula. In the absence of this, publication of administrative rulings issued by the Department of Taxation or the promulgation of regulations would be helpful. While it must be recognized that neither legislation nor rule-making can eliminate all problems of construction, interpretation, and application, uncertainty and in the end, litigation, are reduced where principles are stated and are communicated to the taxpaying public.