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Constitutional Law - Taxation of Interstate Vendors by State of Market

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RECENT DECISIONS

Constitutional Law.—Taxation of Interstate Vendors by State of Market — Petitioner, a Massachusetts corporation, by consent of the State of Illinois, did retail selling from its branch office and warehouse in Chicago. It carried on a variety of other activities there, the most important of which was the negotiation and forwarding of orders to be accepted or rejected by the home office. Such orders were filled by shipment f.o.b. Worcester, Massachusetts, either directly to the customer or via the Chicago office. The Chicago office did not intervene when the buyer dealt directly with Worcester. Illinois levied a business and occupation tax¹ measured by the entire gross income of this company from sales to its inhabitants. Petitioner admitted the income from its sales from locally warehoused stocks constitutionally taxable, but took exception to the inclusion of sales where acceptance of orders was at the home office and shipment was from the home office in Massachusetts, through the branch office and those in which the home office dealt directly with the purchaser, as exceeding the constitutional range of the state's taxing power. The Illinois Supreme Court sustained the entire tax on the basis that if licensed to do business in the state, a situs is acquired which makes all sales to Illinois customers taxable regardless of how made.² *Held*: Judgment reversed in part. Where a foreign corporation submits itself to the taxing power of the state, it can only avoid taxation on sales by showing the particular transactions to be completely dissociated from local sales office activity and interstate in nature. *Norton Co. vs. Department of Revenue of State of Illinois*, 71 Sup. Ct. 377 (1951).

Though occupation or privilege taxes measured by gross receipts have previously been upheld,³ the instant case is to be distinguished as one sustaining a tax by the state of market on an extraterritorial vendor. The question naturally arises as to whether the Court has enlarged the taxing powers of the state of destination, enabling it to reach directly the seller with ability to pay.

Heretofore, this fertile field of taxation was denied the states of market, since it would create risks of multiple taxation.⁴ Were the Court

¹ ILL. REV. STATS., 120.441 (1949): "A tax is imposed upon persons engaged in the business of selling tangible personal property at retail in this state. . . ."

² *Norton Co. v. Dept. of Revenue*, 405 Ill. 314, 90 N.E. (2d) 737 (1950).

³ *Western Live Stock et al. v. Bureau of Revenue et al.*, U.S. 250, 58 Sup. Ct. 546, 82 L. Ed. 823 (1938); *cf. American Mfg. Co. v. St. Louis*, 250 U.S. 459, 39 Sup. Ct. 522, 63 L. Ed. 1084 (1919).

⁴ *Western Live Stock et al. v. Bureau of Revenue et al.*, *supra*, note 3, at p. 256: "The vice characteristic of those [gross receipt taxes] which have been held invalid, is that they have placed on commerce burdens of such a nature as to be capable, in point of substance, of having imposed with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear

to allow the imposition of the tax on the vendor by the state of destination, the seller's state where the property interest passes, might also tax the company on that particular transaction, thereby creating a multiple burden to which local business would not be subjected. This contemplated risk constitutes a burden amounting to a regulation of interstate commerce, notwithstanding the generality and uniformity of tax.⁶ However, the Court will sustain occupation taxes measured by gross receipts if they be fairly apportioned to the business done within the state by a fair method of apportionment.⁷ In such cases it is held that the incidence of the tax only remotely affects interstate commerce, so that the tax on the seller measured by his gross receipts is not upon the sales themselves, but on the privilege of transacting an intrastate business.

By applying the same principles of generality, uniformity, apportionment, and a fair method of determination thereof, the Court extended in the instant case the taxing power of the "market" states to encompass the interstate vendor by resorting to the taxable event theory.⁸ If an extraterritorial seller engages in *some* local activity that may properly be termed "intrastate" and subject to the taxing power of the state, it is a local taxable event. The focal point of constitutionality then centers about apportionment, i.e., whether the interstate sales have been clearly separated from those readily attributable to the local business. The Court's attitude seems to be, in view of its decisions in the New and Fair Deal era, to bring the large interstate vendors under the taxing powers of the states and thereby mitigate the advantages they hold over small business which generally might be said to be intrastate. Therefore, where the Court can reasonably attribute the proceeds of some of the sales to the local business, as in the instant case where taxable business was mingled with that alleged not to be taxable, it may favor the state over the vendor within the constitutional standards announced. However, the Court at the same time manifested its intention to adhere to these standards by striking down the inclusion of those sales that are so clearly interstate in character

cumulative burdens not imposed on local commerce." *Accord*: *Adams Mfg. Co. v. Storen*, 304 U.S. 307, 58 Sup. Ct. 913, 82 L.Ed. 1365 (1938).

⁵*McLeod, Commissioner of Revenues of Arkansas, v. J. E. Dilworth Co.*, 322 U.S. 327, 64 Sup. Ct. 1023, 88 L.Ed. 1304 (1944). *Contra*: *McGoldrick, City Comptroller v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 60 Sup. Ct. 388, 84 L.Ed. 565 (1940).

⁶"Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state." *Robbins v. Shelby County Taxing District*, 120 U.S. 489, 497, 7 Sup. Ct. 592, 30 L.Ed. 694 (1887).

⁷*Supra*, note 3.

⁸*Brown, Robert C., State Taxation of Interstate Commerce—What Now?*, 48 MICH. L. REV. 899, 907, (1950).

that the State could not reasonably attribute their proceeds to the local business.⁹

The Court reiterated this stand when it declared unconstitutional, in its most recent decision,¹⁰ a Connecticut franchise tax measured by the company's gross income derived from business within the state as a tax on the privilege of carrying on a business that was exclusively interstate in character. Though the case is clearly distinguishable, it does emphasize that the local taxable event theory is not a cure-all¹¹ to be used by the states of destination in tapping the income of interstate corporations.

The problem comes to mind, whether the mere maintenance of a branch office for the purpose of solicitation of orders only would be such a local incident that the sales attributable to it could be taxed.

As far back as 1887, the question presented itself, whether the solicitation for an out-of-state seller, before the goods are introduced into the state, could be a basis for taxation and the Court held:

"The negotiation of sales of goods which are in another state for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce."¹²

Justice Bradley's forceful opinion could very well be the basis for sustaining this extension to centralized solicitation as an area immune from the state taxing powers, because his business and economic acumen was tailored for the progressive business practices of the morrow. However, in the field of use taxes, the states made a definite and substantial gain, when the Court upheld an Iowa statute¹³ which included in its definition of a business, regular and continuous solicitation.¹⁴ The issue has not been met, but a decision to this effect should be forthcoming in the not too distant future. From the constitutional standards as set forth at the present time by the Court on gross receipts taxes, it would seem that a branch office solely for the purpose of solicitation is not such a local activity as to come within a state's taxing power, because the sales attributable to it are exclusively in interstate commerce.

The instant case then did widen the field of taxation by the states of market, through gross receipt taxes, but in so doing, the Court

⁹ Norton Co. v. Department of Revenue of State of Illinois, *Supra*, "The only items that are so clearly interstate in character that the State could not reasonably attribute its proceeds to the local business are orders sent directly to Worcester by the customer and shipped directly to the customer from Worcester."

¹⁰ Spector Motor Service v. O'Connor, 71 Sup. Ct. 508 (1951).

¹¹ *Supra*, Note 10 (dissenting opinion).

¹² *Supra*, Note 6, at p. 497.

¹³ Iowa Code, 6943.102 (1939).

¹⁴ General Trading Co. v. State Tax Commission of Iowa, 322 U.S. 335, 64 Sup. Ct. 1028, 88 L. Ed. 1309 (1944). *Contra*: Allis-Chalmers Mfg. Co. v. Wright, State Treasurer, et al., 383 Ill. 363, 50 N.E. (2d) 509 (1939).

clarified its standards of constitutionality by manifesting their limitations, and held that these standards as propounded in the states of origin apply with equal force and effect in the states of market.

EDWARD A. DUDEK

Extradition—Extraditable Offense Under the Uniform Criminal Extradition Act—Petitioner Bledsoe, a resident of Oklahoma, was arrested in that state on a warrant honoring a demand for extradition made by the Governor of Kansas. The demand alleged that Petitioner was charged in Kansas with the statutory offense of failure to provide for the support and maintenance of his minor children, who were residing in Kansas. Petitioner brought this action in habeas corpus, alleging that (1) the Uniform Criminal Extradition Act¹ under which his extradition is sought is unconstitutional because in conflict with federal constitutional and statutory provisions relating to extradition; and (2) Petitioner has never been in the State of Kansas and has no agents in that State; he would not therefore be guilty of any crime committed in Kansas. *Held*: Writ denied. The Uniform Criminal Extradition Act is not repugnant to the Federal Constitution, and the actual presence of Petitioner within the demanding state at the time of the commission of the alleged offense is not a prerequisite for his conviction therefor. *Ex parte Bledsoe*, 227 P. 2d 680 (Okla., 1951).

The constitutionality of the Uniform Criminal Extradition Act, which has been adopted in nearly every state of the Union, is now uniformly established and no longer open to serious questioning.² The same conclusion seems to be true in Wisconsin, which adopted the Act in 1933.³

The provision of the Uniform Criminal Extradition Act applicable in the principal case reads as follows:

"Surrender of persons not fleeing from demanding State. The Governor of this State may also surrender, on demand of the Executive Authority of any other state, any person in this State

¹ 22 OKLA. STAT. 1949 Supp. Sec. 1141.1.

² *Ex parte Morgan*, 194 P.2d 800 (Cal. App. 1948); *Cassis v. Fair*, 126 W.Va. 557, 29 S.E.2d 245 (1944); *Ennist v. Baden*, 158 Fla. 141, 28 So.2d 160 (1946); *English v. Matowitz*, 148 Ohio St. 39, 72 N.E.2d 898 (1947); *Ex parte Campbell*, 147 Neb. 820, 25 N.W.2d 819 (1946); *Osborn v. Harris*, 203 P.2d 912 (Utah, 1949); *In re Harris*, 309 Mass. 180, 34 N.E.2d 504 (1941). See also 22 AM. JUR., EXTRADITION, §9 and cases there cited. The Supreme Court of the United States has never passed on the constitutionality of Sec. 6 specifically.

³ WIS. STATS. (1933) Chap. 364. The constitutionality of this Chapter has never been squarely passed upon in Wisconsin. In *Milwaukee County v. Van Den Berg*, 215 Wis. 519, 255 N.W. 65 (1934); *State ex rel. Wells v. Hanley*, 250 Wis. 374, 27 N.W.2d 373 (1947); and *State ex rel. Kohl v. Kubiak*, 255 Wis. 186, 38 N.W.2d 499 (1949), where individual sections of this chapter were construed, the court appears to assume that the act is constitutional. A similar assumption seems to be made by the Attorney General of Wisconsin in 21 O.A.G. 991, 22 O.A.G. 755, and 23 O.A.G. 757.