Constitutional Law: Tax on corporations held "privilege" or "excise" and not property tax, and not to interfere with interstate or foreign commerce or to deny equal protection of laws

H. U. Amidon

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
H. U. Amidon, Constitutional Law: Tax on corporations held "privilege" or "excise" and not property tax, and not to interfere with interstate or foreign commerce or to deny equal protection of laws, 10 Marq. L. Rev. 95 (1926).
Available at: http://scholarship.law.marquette.edu/mulr/vol10/iss2/10

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrians@marquette.edu.
two and a half months and on June 1, 1925, held the law to be unconstitutional, using the following significant language:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations. 2

This language is not limited in terms to such parents as choose to send their children to some parochial school. It may well apply to all parents in the land even those who send their children to a public school. By its decision the court has definitely checked the pretensions for a monopoly which the public school system was making so far as it sought by legislative means to wipe out competing parochial schools. It has drawn the line vertically between public and private schools. Is it too much to hope that it will follow out this decision if given an opportunity, by drawing the line horizontally in connection with schools which seek to co-operate rather than compete with the public school system? Is it not entirely reasonable to expect that it will hold that a state cannot by a compulsory education law exclude its public school children from part time religious day schools? The purpose of compulsory education acts is to obtain for the children of the country the fullest amount of a well-rounded education. That also in the fullest measure is the purpose of the religious day schools: Both systems of schools, each within its own particular sphere of action, aims to accomplish the same purpose. The religious schools merely aim to take over that part of the education of the child which the public school system cannot perform in this country. To limit a child to the public schools is to limit its education—a purpose inherently at war with the underlying policy of compulsory education acts. Certainly, a favorable decision by the supreme court would be a charter of liberty, a veritable Magna Charta for the day school movement. It would clear away every legal obstacle which under state constitutions and state decisions now obstructs its progress. It would make entirely unnecessary any tinkering with state constitutions and statutes. Even an unfavorable decision would clear the atmosphere and show the necessity for vigorous local action. In view of the tremendous advantage that would result from a favorable decision in view of the less advantage that would result from even an unfavorable decision, a speedy appeal to the United States Supreme Court of a case or cases properly shaped to embody the essential features would seem in order.

CARL ZOLLMAN

Constitutional Law: Tax on corporations held "privilege" or "excise" and not property tax, and not to interfere with interstate or foreign commerce or to deny equal protection of laws.—The subject of taxation presents to our present day courts many vital questions involving the constitutional rights of individuals and corporations. Our supreme courts are called upon at every term to pass upon the validity of legislation increasing the burden imposed by the government upon

the taxpayer. In spite of decisions exactly in point on the question, handed down by the United States Supreme Court, the Supreme Court of Michigan was called upon recently to again distinguish between a "property" and an "excise" tax as applied to the capital stock and surplus of a corporation.

The controversy (In re Detroit and Windsor Ferry Company, 205 N.W. 102, Michigan) was brought before the tribunal on a certiorari to the Corporation Tax Appeal Board to review a determination sustaining a tax levied on the petitioner's property. Public Acts, Michigan, 1921 Number 85, as amended by Public Acts, 1923 Number 233, provide in substance that corporations, organized and doing business under state laws, must pay two and one-half mills upon each dollar of its paid-up capital and surplus, excepting therefrom property or capital without the state, or capital used in interstate commerce. The Detroit and Windsor Ferry Company operates ferries to points in Canada and Michigan from Detroit, and is incorporated under the laws of Michigan. The company made the reports required by the above act and the Secretary of State computed the tax, which the board sustained. The company assailed the tax claiming the act unconstitutional under the "commerce clause," and because it denied to corporations the "equal protection of the laws" under the Fourteenth Amendment of the Federal Constitution.

In a short opinion the court disposed of both questions by stating that this was not a tax on property, but was a payment made to the state for the privilege of doing business as a corporation. The reference in the act to the capital stock and surplus is made, not for the purpose of taxing property, but to determine what is a fair price to pay in exchange for the franchise which the company enjoys. There is nothing in the law which prevents the corporation from operating its boats in foreign commerce, or from operating them as individuals and thus escaping the payment of the tax. The rule is well established that a state may not use its taxing powers to regulate or burden interstate commerce, but there are many decisions which uphold state excise taxes which are remotely based on the proceeds of interstate commerce in the process of determining the amount of the fund.

The rule has been so well stated by Mr. Justice Clark in Hump Hairpin Co. v. Emmerson, 258 U.S. 290; 66 L. Ed. 622, that the liberty to repeat it is taken here:

The turning point of these decisions is whether in its incidence the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only inci-

---

1 Sec. 8 Art. I United States Constitution.
2 United States Express Co. v. Minnesota, 223 U.S. 335; 56 L.Ed. 459, in which a tax against a non-resident express company based on gross receipts derived from traffic within the state was held not a burden on interstate commerce. International Paper Co. v. Massachusetts, 246 U.S. 135; 62 L.Ed. 624.
dentally or remotely so that the tax is not in reality a burden, although in form it may touch and in fact distantly affect it.

This rule regarding interstate commerce applies with equal force to foreign commerce, but, as the court pointed out, none of the rules were of any help to the corporation for the tax was not upon commerce, but a privilege tax imposed as an incident of the right to exist as a corporation, and perform the functions of corporations by means of a paid-up capital and surplus.

From the foregoing it would seem that there is no limit to the power of a state to tax a corporation for the privilege of existing. Back of this lies the doctrine of corporate existence as a child of the state, and the fact that corporations exist only in contemplation of law. At first glance, the case of a foreign corporation doing business within the taxing state would seem to warrant a variation from the rule. But again the courts overcome the obstacle by classifying the tax as a "privilege" instead of a property tax, but limit the basis upon which the tax is to be determined to the amount of business done in the taxing state.\(^4\)

A summation of all these cases results in the following clearly defined rules governing the power of the state to tax corporations on the basis of their paid-up capital stock and surplus.

1. No state may use its taxing powers to regulate or burden interstate commerce.

2. Taxes on capital stock are divided into two classes:
   a) Those wherein the capital stock is the direct subject of the tax (clearly property taxes).
   b) Those wherein the capital stock is used as a standard for determining the amount of fair excise to be laid upon the corporation ("privilege" or "excise" taxes).

3. A tax under group (a) of rule 2 would be a burden to interstate commerce and would be void.

4. A tax under group (b) of rule 2 is valid provided that the tax is assessed on the basis of the capital stock and surplus in the taxing state,\(^5\) or on the basis of the amount of business done by a foreign corporation in the taxing state.\(^6\)

From a study of these rules one can readily see that the legislatures should have but little difficulty in passing laws which would impose valid taxes against corporations doing business in their respective states. A careful study of the rules will enable them to draft the proposed legislation to conform to the principles outlined by the courts. If this procedure is followed, successful legislation along this line will result. Perhaps the courts have employed some fiction in deciding the questions herein involved. At least the judiciary appears to realize that the cost of government, of which the courts form an important part, is on the increase, and that the better policy is to approve of all reasonable taxing bills if it is possible to show that they do not violate any constitutional guaranty.

H. U. AMIDON

\(^5\) International Paper Co. v. Massachusetts, 246 U.S. 135; 62 L.Ed. 624.
\(^6\) United States Express Co. v. Minnesota, 223 U.S. 335; 56 L.Ed. 459.