

Louisiana Law Review

Volume 26 | Number 2

The 1965 Bailey Lectures

Personal Jurisdiction Symposium

February 1966

Constitutional Law - State Taxation of Gross Receipts

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Repository Citation

Lawrence L. Jones, *Constitutional Law - State Taxation of Gross Receipts*, 26 La. L. Rev. (1966)

Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol26/iss2/17>

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fore, as in the case of interspousal immunity, the statute should act only as a *procedural bar*.

Cary G. deBessonet

CONSTITUTIONAL LAW — STATE TAXATION OF GROSS RECEIPTS

General Motors (GM), a Delaware corporation, manufactured automobiles and parts entirely outside the State of Washington and sold them at wholesale to dealers within the state. The corporation's business was conducted through the Chevrolet, Pontiac, and Oldsmobile automotive divisions and GM Parts division. These divisions, although not separately incorporated, operated independently of each other. All the Washington sales business of the automotive divisions was conducted under the general supervision of the western "zone offices" located at Portland, Oregon. In the case of the Pontiac and Oldsmobile divisions, the instate Washington Sales organization consisted of representatives ("district managers") who provided the direct contact with the dealers. Each district manager participated in the selection of dealers in his district and assisted the dealers in working out their sales programs. No offices were maintained for the district managers; each one worked out of his own home and made frequent visits to the dealers in his district. The Chevrolet sales organization was similar except that a "branch office" was maintained at Seattle out of which a majority of the Chevrolet representatives operated: this office was also under the Portland zone office. All orders for automobiles were sent directly to the Portland offices where they were accepted for shipment f.o.b. the factories, none of which were in Oregon or Washington. The General Motors Parts Division supplied dealers with parts of Chevrolet, Pontiac, and Oldsmobile automobiles. For this purpose, warehouses were maintained in Seattle and Portland, the more commonly used parts being kept on hand at the Seattle warehouse. No parts division representatives visited dealers.

The State of Washington imposed a gross receipts tax "for the act or privilege of engaging in business activities" within the state.¹ Among the businesses taxed were manufacturing and

1. WASH. REV. CODE ANN. 82.04.220 (1962): "There is levied and shall be collected from every person a tax for the act or privilege of engaging in business

selling at wholesale; the tax was one-quarter of one percent of the gross proceeds. To prevent the tax from pyramiding on Washington businesses, it was provided that a Washington business engaged in both manufacturing and selling at wholesale should be exempt from the manufacturer's tax to the extent that his products were subject to the wholesaler's tax.²

The state tax authorities asserted that GM was liable for the wholesaler's tax (computed without apportionment) on all sales of cars and parts to Washington dealers. Their sales fell into the following categories:

- (1) Sales of cars to dealers serviced by representatives working out of their homes.
- (2) Sales of cars (Chevrolet) to dealers serviced by representatives working out of the Seattle branch office.
- (3) Sales of parts from the Portland warehouse.
- (4) Sales of parts from the Seattle warehouse.

activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

Id. 82.04.240: "Upon every person . . . engaging within this state in business as a manufacturer; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including by-products, manufactured, multiplied by the rate of one quarter of one percent.

"The measure of the tax is the value of the products, including by-products, so manufactured regardless of the place of sale or the fact that deliveries may be made to points outside the state.

Id. 82.04.270: "(1) Upon every person . . . engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of one-quarter of one percent.

Id. 82.04.060: "'Sale, at wholesale' or 'wholesale sale' means any sale of tangible personal property which is not a sale at retail and means any charge made for labor and services rendered for persons who are not consumers, in respect to real or personal property, if such charge is expressly defined as a retail sale by RCW 82.04.050 when rendered to or for consumers"

Id. 82.04.070: "'gross proceeds of sales' means the value proceeding or accruing from the sale of tangible personal property and/or for services rendered, without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any deduction on account of losses."

2. *Id.* 82.04.440: "Every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230-82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in: *Provided*, That persons taxable under RCW 82.04.250 or 82.04.270 shall not be taxable under RCW 82.04.230, 82.04.240, or subsection (2) or (3) of RCW 82.04.260 with respect to extracting or manufacturing of the products so sold, and that persons taxable under RCW 82.04.240 shall not be taxable under RCW 82.04.230"

The Washington Superior Court held that the presence of a branch office in the state rendered some of the transactions of the Chevrolet and parts divisions subject to the tax, but, as to the remainder, held that the application of the tax statute would be repugnant to the commerce and due process clauses of the United States Constitution. On appeal, the Supreme Court of Washington reversed, holding that all of the appellant's transactions were subject to the tax on the ground that the tax bore a reasonable relation to the corporation's activities within the state.³ Upon appeal, four Justices dissenting, the United States Supreme Court affirmed. *Held*, Washington tax levied without apportionment on gross receipts from wholesale sales to Washington dealers of motor vehicles, parts, and accessories manufactured outside Washington by corporate taxpayer bore a reasonable relation to taxpayer's activities in Washington, so that the tax did not offend the commerce and due process clauses of the United States Constitution. *General Motors v. State of Washington*, 377 U.S. 436 (1964).

State taxation of interstate commerce is an area of law broad in scope and difficult in interpretation. Discussion here is limited to the Supreme Court's treatment of gross receipts, sales, and use taxes because these taxes directly affect the price of goods and, when applied to an interstate business, may affect its competitive position.

The cases in this area have dealt principally with the restrictions upon state action imposed by the commerce clause. But in dealing with these interstate commerce problems, the Supreme Court has not been able to separate completely interstate commerce problems from due process problems. To understand the decision in the present case, it will be necessary to discuss how the Court has handled both the commerce and due process clauses in cases involving state taxation of gross receipts, sales, and use.

The purpose of the commerce clause is to promote free trade among the states. To effectuate this purpose the Constitution granted Congress the power to regulate interstate commerce.⁴ Nevertheless, the states in the exercise of their legitimate police, tax, and general regulatory powers have affected interstate com-

3. *General Motors v. State*, 60 Wash. 2d 862, 376 P.2d 843 (1962).

4. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

merce. Since Congress has never attempted to resolve the conflicts between the exercise of these state powers and the free flow of interstate commerce,⁵ the task has fallen upon the courts to determine when the exercise of state power has interfered with or burdened interstate commerce.

The Court first approached the problem in terms of whether a particular tax was a direct or an indirect burden upon interstate commerce. Only indirect burdens were considered constitutionally permissible. Under this approach, gross receipts taxes were invalidated by the courts as placing a direct burden on interstate commerce.⁶ Following the same criterion other taxes such as a net income tax levied against an interstate corporation were upheld as being indirect burdens.⁷

More recently the Court has shifted from the "direct-indirect" approach, without completely abandoning it,⁸ and has begun talking in terms of "multiple burdens."⁹ Under this approach the Court determines whether there is a possibility that more than one state could tax the same activity of the interstate business. If an activity taxed in one state could also be taxed in another, an unapportioned tax on this activity by any state would be struck down as being a possible multiple burden on interstate commerce. In the first case in which it spoke of multiple burdens, the Supreme Court upheld a state gross receipts tax on the privilege of preparing, printing, and publishing a magazine sold in interstate commerce.¹⁰ Shortly thereafter, the same court struck down a gross receipts tax on the sales of a manufacturer who sold his goods in interstate commerce.¹¹ The basis for this second decision was that other states might levy a tax on the same sales, thus creating the possibility of a double tax burden; this had not been possible

5. The sole exception is 73 Stat. 555 (1959), 15 U.S.C. § 381 (1963), in which Congress forbid the states or subdivisions thereof to place a net income tax upon income derived from a state where the only local activity was the solicitation of orders.

6. *Philadelphia & So. S.S. Co. v. Pennsylvania*, 122 U.S. 326 (1887).

7. *United States Glue Co. v. Town of Oak Creek*, 247 U.S. 321 (1918).

8. *Freeman v. Hewitt*, 329 U.S. 249 (1946).

9. *Western Livestock v. Bureau of Revenue*, 303 U.S. 250 (1938).

10. *Ibid.* In *Western Livestock* the court upheld a privilege tax on the business of publishing a trade journal measured as 2% of the price at which the advertising was sold. Although the magazine after being published moved in interstate commerce, the court held the business of preparing, printing, and publishing magazines is a local and distinct function apart from its circulation. Further, the court held that the tax was in such "form and substance" as not to be capable of being repeated by other states.

11. *Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938).

in the first case since the activities subjected to the tax—preparing, printing, and publishing a magazine—were exclusively within the taxing state. The Court indicated in the second case that the possibility of a double burden could have been avoided if the taxing state had apportioned the tax to include only the activities occurring in that state. The tax involved had been levied by the state in which the sale had been made (“seller state”), where the goods sold were to be delivered in another state (“market state”). A similar tax was invalidated by the Supreme Court the following year.¹² The basis for these decisions was that, under the multiple burden criterion, activity affecting the interstate transaction would be taking place in other states, allowing possible taxation by those other states.

It soon became clear that the Court would not recognize that the same possibility of multiple burdens existed where a tax was imposed on interstate commerce by the state of market, when a two percent tax upon the delivery of possession by an interstate seller was allowed.¹³ In that case the court spoke in terms of local incidents, a concept which has become very important in the handling of commerce clause problems. Under the “local incidents” approach the inquiry is whether there was some local activity or incident upon which a state could levy a tax. The courts have developed limits concerning what will be considered a proper incident; a state may not tax an interstate business whose only contact with the taxing state is solicitation by traveling salesmen,¹⁴ or which makes only an occasional delivery to a customer within the taxing state.¹⁵

At the same time the Court was developing the local incident approach to sales and gross receipts taxes, it also began to approve state requirements that interstate business must collect use taxes imposed upon interstate transactions.¹⁶ These use taxes were approved in succeeding cases¹⁷ without much definite limitation until the Supreme Court established the rule that in order to require an interstate seller to collect the local use taxes there must be sufficient “nexus” between the seller

12. *Gwin, White & Prince v. Henneyford*, 305 U.S. 434 (1939).

13. *McGoldrich v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940).

14. *McLeod v. Dilworth*, 322 U.S. 327 (1944).

15. *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489 (1887).

16. *Henneyford v. Silius Mason Co.*, 300 U.S. 577 (1937).

17. *General Trading Co. v. Tax Commission*, 322 U.S. 335 (1944); *Nelson v. Sears Roebuck & Co.*, 312 U.S. 359 (1941).

and the collecting state.¹⁸ Thus, as was true in sales and gross receipts taxes, the collection of use taxes by an interstate seller was dependent upon the existence of local incidents. The courts did not apply the same standard of local incidents to use taxes as it did to sales and gross receipts taxes; for example, "continuous solicitation" by salesmen within the state even when they are independent agents has been held to be a sufficient "nexus."¹⁹

The "incident" language has not been applied solely when the Court handled state taxation of interstate commerce under the commerce clause; the "local incidents" test is also important in determining due process questions. Throughout the history of state taxation of interstate commerce, there have been a great number of cases decided on due process grounds rather than on the basis of the commerce clause. The due process clause requires that the limitation on the states' power to tax is to be ascertained by reference to the right this particular state has to tax the interstate business in question rather than by reference to the ultimate effect such taxation might have upon interstate commerce.

Whether a state tax violates the due process clause depends upon whether the tax bears some fiscal relation to the protection, opportunities, and benefits given by the taxing state, in other words, "whether the state has given anything for which it can ask a return."²⁰ Under this standard the Court has upheld a tax upon the payment of dividends²¹ and a state unemployment compensation fund tax.²² On the other hand, it has been held a violation of due process for a state to levy a corporation tax based upon the value of the corporation's property within the state where only a fraction of its income was derived from business done therein.²³ It has also been held that a foreign corporation is not subject to a retailers' occupation tax where the only contact with the state was promotion, delivery of bids, transfer of title, and delivery of the merchandise.²⁴

18. *Miller Bros. v. Maryland*, 347 U.S. 340 (1954).

19. *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960).

20. *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444 (1940).

21. *Ibid.*

22. *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945).

23. *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123 (1931).

24. *Automatic Voting Machine Corp. v. Daly*, 409 Ill. 438, 100 N.E.2d 591 (1951).

The due process clause does not preclude a state from placing an excise tax on the proportion of the fair value of the capital stock employed within the state even though it is engaged in an interstate business²⁵ nor does it preclude a state from imposing a franchise tax based upon capital invested within the state by an interstate corporation doing no local business, but depending on the state for the protection of its property.²⁶ The Court has also held that where a state seeks to tax gross receipts from interstate transactions consummated within its borders, its power to do so cannot be withheld on constitutional grounds when it treats wholly local transactions the same way.²⁷ Finally, in *Norton v. Department of Revenue*,²⁸ the most recent case upon which the Court relied, it came to a decision on due process grounds, although giving some consideration to the interstate commerce clause, which upheld an Illinois occupation tax on retailers based on gross receipts as applied to sales that were in any manner locally facilitated.

In the instant case, the majority began by recognizing the general proposition that states may not tax the privilege of engaging in interstate commerce. However, relying on dicta in *Spector Motor Service, Inc. v. O'Connor*,²⁹ they found that the proposition was not applicable here. The Court found that, as in *Spector*, Washington was merely attempting to tax the local activities of GM and, according to criteria adopted in the *Norton* case, the burden of proof is on the taxpayer to show that its activities within the taxing state are not such incidents as the state can tax. Further, the Court found that in this case it is not necessary that there be any office in the state through which the local sales are channeled, thus refuting an idea emanating from previous cases that such a local office was necessary.³⁰

25. *Atlantic Lbr. Co. v. Commissioner of Corp. & Taxation*, 298 U.S. 553 (1936).

26. *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80 (1948).

27. *International Harvester Co. v. Department of Treasury*, 322 U.S. 340 (1940).

28. 340 U.S. 534 (1951).

29. 340 U.S. 602 (1951). The dictum was to the effect that an in-state activity may be a sufficient local incident upon which a tax may be based. Therefore, such taxes may be imposed although their payment may come out of the funds derived from interstate business, provided the taxes are imposed in such a way as to be reasonably related to the powers of the state and are non-discriminatory.

30. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959); *Field Enterprises, Inc. v. Washington*, 47 Wash. 2d 852, 289 P.2d 1010 (1955), *aff'd*, 352 U.S. 806 (1956).

The Court felt that even in the absence of formal offices the corporation effectively used the district managers working out of their homes to serve the local purposes of the corporation. The Court concluded that the bundle of corporate activities in which General Motors was engaged in the State of Washington were sufficient local incidents to form the basis of taxation.

The Court admitted that an unapportioned gross receipts tax is necessarily suspect; but where there is "some definite link, some minimum connection, between a state and the person, property, or transaction it seeks to tax,"³¹ it may be constitutionally permissible. Additionally, the Court found on the facts presented that in this case, as in *Norton*, the corporation had so mingled its admittedly taxable business with the business it alleges was nontaxable that the state court's decision was within the realm of permissible judgment.³²

The Court then approached the question of multiple taxation. GM claimed that some of its products were subject to a city gross receipts tax in St. Louis and thus to dual taxation.³³ Relying on a previous decision,³⁴ the Court laid aside the question as "not now before us" because the taxpayer did not satisfy the burden of proving the state's tax burdened interstate commerce.³⁵ The Court found that GM had not demonstrated there was a definite burden upon interstate commerce in a constitutional sense; GM had not proved that the St. Louis tax was upon the identical interstate shipments used by Washington to measure its tax, or further, that Oregon levied any tax on the wholesale sales in question.

It is submitted that the majority opinion in the present case was a proper one in its result and its basis in the due process clause. Those dissenting do so on the theory that the tax is un-

31. 377 U.S. 436, 448 (1964).

32. *Ibid.* The Court went further to state that "although mere entry into a state does not take from a corporation the right to continue to do an interstate business with tax immunity, it does not follow that the corporation can channel its operations through a maze of local connections as does General Motors, and take advantage of its gain on domesticity, and still maintain that same degree of immunity."

33. See *American Mfg. Co. v. St. Louis*, 250 U.S. 459 (1919), which upheld the city gross receipts tax subsequently applied to General Motors.

34. *Northwest Airlines v. Minnesota*, 322 U.S. 292 (1945).

35. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), which stated the rule that "in this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense." *Id.* at 463.

constitutional because it violates the commerce clause requirement of unhampered free trade among the states.³⁶

The majority passed over the interstate commerce question as not before them because GM had failed to prove any definite "multiple burden" upon the identical interstate shipments by which Washington measured its tax. This enunciation by the Court seems to depart from previous holdings³⁷ which invalidated state taxes where there was a "danger" or "risk" of multiple taxation. It must be pointed out that the taxes which the Court has struck down as posing a "danger" or "risk" of multiple taxation were imposed by a seller state³⁸ rather than the state of market. The difference lies in the fact that when a seller state imposes a tax on goods to be shipped into another state, it is in effect shifting the burden of the tax on to the citizens of the market state. However, where the tax is imposed by the market state, as in the present case, the burden of the tax will be on the citizens of the taxing market state. Doubtless, it is as a result of this distinction that the Court has applied the "risk" or "danger" test whenever the tax was imposed by the seller state while imposing upon the taxpayer the burden of proving injury in a constitutional sense whenever the tax is imposed by the market state. It is submitted that the reason for this distinction is that when the tax is imposed by the seller state the purchaser in another state has no control over the tax; on the other hand, when the tax is levied by the state of market the purchaser has a remedy in the state political machinery.

In attempting to base its decision upon the due process clause the Supreme Court examined the activities of GM within the State of Washington and determined that this bundle of corporate activities generated the wholesale sales which were taxed.³⁹ It further determined that the tax need not be apportioned as the corporation failed to prove that these local activities were not the decisive factors in producing the taxed sales. In making these determinations the Court was simply applying

36. See Justice Brennan's dissent, 377 U.S. at 450; and Justice Goldberg's dissent, *id.* at 457.

37. *Freeman v. Hewit*, 329 U.S. 249 (1946); *Gwin, White & Prince v. Henneyford*, 305 U.S. 434 (1939).

38. See cases cited note 37 *supra*; see also text accompanying note 12 *supra*.

39. See the Washington Supreme Court's application of the tax in question in *Field Enterprises, Inc. v. Washington*, 47 Wash. 2d 852, 289 P.2d 1010 (1955), *aff'd*, 352 U.S. 806 (1956).

the standard enunciated in *Norton* to the factual situations in this case.

Mr. Justice Goldberg in his dissenting opinion states that the Court went beyond its holding in the *Norton* decision. He indicated that *Norton* would require immunity for all the Pontiac and Oldsmobile sales and also for those sales of parts and Chevrolets which were not connected with a Seattle warehouse or office. But this argument ignores the fact that GM, through its activities in Washington, has just as permanently established itself in the state, as it would have through establishing a local office as in the *Norton* case. It is also Justice Goldberg's belief that the activities of GM's representatives were comparable to the activities of itinerant drummers or traveling salesmen which have been held immune from state taxation.⁴⁰ It is submitted that this argument ignores the distinguishing facts that the "district managers" were permanently established in the state and were engaged in a broad range of activities to aid in the stimulation of GM sales.

The Court in deciding this case properly directed its inquiry toward determining whether the bundle of in-state activity of the taxpayer which produced the sales was a sufficient connection with Washington to support the tax. The Court should have gone further, however, and related the tax to the protection, opportunities, and benefits given by the state levying the tax. But until a final determination by Congress concerning what state taxation of interstate commerce will be permissible, the Supreme Court must decide the constitutionality of state taxation of interstate commerce on a case-by-case basis. In this case the Court was justified in upholding the tax.

Lawrence L. Jones

CRIMINAL LAW — IMPOSSIBLE ATTEMPTS

A thief, captured with a stolen overcoat, cooperated with Oklahoma police in entrapping the defendant by delivering the coat to him. There was no question as to the defendant's intent

40. For cases relied on by Justice Goldberg, see *McLeod v. J. E. Dilworth*, 322 U.S. 327 (1944); *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489 (1887).