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Constitutional Law—State Application of Privilege Tax to Carrier in Interstate and Intrastate Commerce.—Oregon-Nevada-California Fast Freight, Inc. v Stewart

Robert F. Sylvia

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responsible for the defective product causing injury, was held not subject to Maryland State Court jurisdiction. It would therefore seem apparent that this former defendant would not qualify under any existing test, as subject to the jurisdiction of the Minnesota Court. Yet by the kind of strict application of the statute which occurred with respect to Montanin, Jones & Laughlin would likewise be held subject to the jurisdiction of the Minnesota court.

Should the theory of the *Atkins* decision remain undisturbed, there is the danger that a formal statutory definition of "doing business" would replace the substance requirement of "minimum contacts." A corporate manufacturer would be subject to suit anywhere that a consumer might carry his product, or whence it might wend its way by resale, as long as a similar statute were provided. This would hardly be within the traditional notions of "fair play and substantial justice" since no consideration would be given to the extent of the corporate activity, the systematic or continuous nature of such activity, the points of contact of the activity within the state, or the *parens patriae* interest of the state in the dangerous nature of the activity akin to the non-resident motorist cases. Instead this decision would eliminate, in a tort action, the necessity for the evaluation proposed in *International Shoe,* and narrow the test to the single factor of injury within the forum state. Removal of the restrictions imposed in *Hanson v. Denckla*[23] and other cases,[24] by the Supreme Court of the United States must precede the affirmation of this decision, since it is hardly within the purview of a state to alter so sweepingly the Constitutional tests for jurisdiction.

CARROLL E. DUBUC

Constitutional Law—State Application of Privilege Tax to Carrier in Interstate and Intrastate Commerce.—*Oregon-Nevada-California Fast Freight, Inc. v. Stewart.*[1]—The taxpayer was an interstate motor carrier with its main office in California, but with terminals in Oregon, which it leased. Taxpayer engaged primarily in interstate commerce but did have some intrastate operations in Oregon. An Oregon statute imposed an excise tax for the privilege of carrying on or doing business in the state of Oregon.[2] The tax assessed was under an apportionment formula which compared the total miles traveled in Oregon by the taxpayer to the total mileage traveled by taxpayer in its entire operation.[3] The resulting fraction was applied to the carrier's net income to determine the amount of the tax. The defendant tax commissioner assessed a tax under the statute; the taxpayer paid under protest and then commenced suit for a refund. The taxpayer con-

[23] Supra note 8.
[24] Supra note 4.

[1] 353 P.2d 541 (Ore. 1960).
[2] Ore. Rev. Stat. § 317.070 [amended by c. 607 § 3, c. 709 § 1(3), (1957); c. 631 § 2 (1959)].
[3] Ore. Rev. Stat. § 317.180 (Repealed), now replaced by § 314.280 (1959).

ceded that if the same tax was labeled an income tax, it would have been constitutional; and the State conceded that if taxpayer's business was entirely interstate, the tax couldn't have been assessed.[4] The lower court found the tax to be invalid and on appeal the Supreme Court of Oregon reversed. The Court left the parties where it found them in that it did not decide the exact nature of the tax since neither party chose to press the issue further. HELD: The tax was constitutional because the apportionment formula was not invalid even though it included taxpayer's interstate miles traveled in Oregon, because taxpayer failed to show any burden on interstate commerce by the apportionment as applied.

The fact that the taxpayer could concede that, if the tax was labeled an income tax, he would have to pay it, exposes an anomaly in the law. If taxpayer's admission is to be taken at face value, he concedes that except for the technicality of the label the tax bears, he has no cause of action. The reasons for this admission and possible solutions to the dilemma posed thereby, constitute a perplexing problem for student and practitioner.

The Supreme Court of the United States has upheld state taxes on the net income of a foreign corporation derived from interstate commerce when such income is properly apportioned.[5] The same Court has upheld ad valorem property taxes on the property of a corporation engaged in interstate commerce.[6] Taxes based on gross receipts caused more difficulty since they could be levied whether or not a corporation showed a profit; yet use taxes based on properly apportioned gross receipts have been upheld[7] as have apportioned taxes levied on gross receipts in lieu of property taxes.[8] Corporate franchise taxes have been upheld when measured by apportioned net income[9] or by value of capital within the state.[10]

A privilege tax, the type levied in this case, was discussed in the landmark case of *Spector Motor Service, Inc. v. O'Connor*.[11] This tax was construed to be a privilege tax by the Supreme Court of Connecticut in a declaratory judgment proceeding. A divided United States Supreme Court held that since Spector was engaged solely in interstate activity the tax was invalid as a direct burden on interstate commerce. The wording of the majority opinion in the *Spector Case* coupled with the interpretation of Mr. Justice Clark in his dissent[12] lend credence to the theory that had

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

5 Northwestern States Portland Cement Co. v. Minn., 358 U.S. 450 (1958). The reasonableness of the apportionment formula there involved was not contested by the parties.

6 Ott v. Mississippi Valley Barge Line Co., 336 U.S. 155 (1949).

7 Canton R.R. Co. v. Rogan, 340 U.S. 511 (1950); Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653 (1947).

8 Railway Express Agency v. Virginia, 358 U.S. 434 (1959).

9 Butler Bros. v. McColgan, 315 U.S. 501 (1942).

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

11 340 U.S. 602 (1951).

12 340 U.S. 610 (1951) (dissenting opinion).

Spector been engaged in any intrastate commerce whatsoever, the tax would have been upheld.[13]

If the above interpretation of the *Spector Case* is accepted, the present tax would seem to be valid even though a privilege tax, because the taxpayer is engaged in some intrastate operations. In the light of the decisions noted, however, it seems strange that the label should make a difference. When first devised, the labels served to determine what type of tax was being levied, but as the years have passed, the labels have become the end rather than the means to reach the end. A formalistic approach has been followed which ignores substance and accepts the name of the tax as conclusive of its effect. The tax levied in the instant case while called a privilege tax was measured by net income and was subject to only the normal methods of collection. If the collection of the tax was made a condition precedent to doing interstate business in Oregon, thus raising a form of tariff barrier at the state boundary, it would be a true privilege tax, and therefore, clearly an unconstitutional burden on interstate commerce. The tax in substance, however, appeared merely to reach taxpayer's net income attributable to Oregon, as does the normal state corporation income tax which has previously been held valid.[14]

The actual substance of the tax should be considered controlling, and if the tax is a burden on interstate commerce, in fact, as opposed to in name only, or if it discriminates against interstate commerce, it should be invalid.[15]

While the best possible cure for the present dilemma of labels is either a clarifying decision by the United States Supreme Court or Congressional action, little has been forthcoming. The issue was not pressed in the instant case, and certiorari was denied; therefore, we cannot hope for a solution through it. Congress has ventured into the field once by enacting Public Law 86-272.[16] In its substantive sense it merely forbids the collection of a state income tax from a foreign corporation engaged solely in interstate commerce within the taxing state, if only solicitation of orders was carried on within the state and such orders resulted in the filling, processing, accepting or rejecting of the order outside the state. However, it does create a committee which will study the problem of state income taxes levied on concerns in interstate commerce and enter a report of proposed legislation on or before July 1, 1962.

For the present, the states, it appears, must be certain to label a tax correctly, for even if it serves to reach an incident of commerce which may be taxed, it must approach this incident from a correct constitutional channel, both insofar as substance is concerned, and also with regard to label.

ROBERT F. SYLVIA

[13] See Matson Navigation Co. v. State Board of Equalization of California, 297 U.S. 441 (1936), a prior case which supports this view.

[14] Supra note 5.

[15] See Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389 (1951), where a discriminatory tax was struck down.

[16] 73 Stat. 555 (1959), 15 U.S.C. §§ 381-84 (Supp. 1959).