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Constitutional Law—Use Taxes—Collection from Extrastate Vendors.-- Scripto, Inc. v. Carson

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Constitutional Law—Use Taxes—Collection from Extrastate Vendors.— ***Scripto, Inc. v. Carson.***[1]—Plaintiff, a Georgia corporation, which had not qualified to do business in Florida, and which had no office or other place of business there, made sales of goods exclusively[2] through orders solicited in that state pursuant to a contract with Florida wholesalers.[3] The contract provided that the wholesalers had no authority to make collections for the corporation, and further that the parties intended to create the relationship of independent contractor. All orders were sent directly to the corporation in Georgia for acceptance or refusal and the wholesalers were to receive a commission for all orders accepted. Plaintiff brought suit to enjoin a threatened attachment of certain accounts receivable of plaintiff for the satisfaction of a claim which had been assessed against the plaintiff by the Florida Comptroller pursuant to a Florida statute[4] making a vendor secondarily liable for failure to collect use taxes imposed upon the vendee as primary obligee. The Supreme Court of Florida sustained a judgment entered against the corporation.[5] On appeal, the Supreme Court of the United States affirmed. HELD: There is a sufficient nexus between the corporation and Florida to justify the requirement that the corporation serve as the state's tax collector.

That a state has the power to invoke a use tax on goods bought from out-of-state vendors is now well settled.[6] The main issue with respect to

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1 362 U.S. 207 (1960).

2 Scripto employed one salesman in Florida. However, the Florida courts found that his presence was not relevant to the determination of the case.

3 The wholesalers handled Scripto products in conjunction with other manufacturers' products.

4 Fla. Stat. § 212.06 (1959). The pertinent provisions of this statute are:

"(1) The aforesaid tax at the rate of three per cent of the retail sales price, as of the moment of sale, or three per cent of the cost price as of the moment of purchase, as the case may be, shall be collectible from all dealers herein defined on the sale at retail, the use, the consumption, the distribution and the storage for use of consumption in this state, of tangible personal property."

"(2) . . . (g) 'Dealer' also means and includes every person who solicits business either by representatives or by the distribution of catalogs or other advertising matter and by reason thereof receives and accepts orders from consumers in the state, and such dealer shall collect the tax imposed by this chapter from the purchaser and no action either in law or in equity on a sale or transaction as provided by the terms of this chapter may be made in this state by any such dealer unless it be affirmatively shown that the provisions of this chapter have been fully complied with."

5 105 So. 2d 775 (Fla. 1958).

6 A use tax is a tax on the privilege of using a product. It is a tax on the enjoyment of that which was purchased and as such the product and taxable event are deemed out of the flow of interstate commerce—therefore, subject to state taxation. Compare General Trading Co. v. State Tax Commission, 322 U.S. 335 (1944) with McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944). Both cases were handed down the same day and the majority opinion in each was written by Mr. Justice Frankfurter. For other cases upholding the validity of use taxes see, Nelson v. Montgomery Ward & Co., 321 U.S. 373 (1941); Nelson v. Sears Roebuck & Co., 312 U.S. 359 (1941); Pacific Tel. & Tel. Co. v. Gallagher, 306 U.S. 182 (1939); Southern Pacific Co. v.

making an extrastate vendor a tax collector is whether or not there is sufficient contact between the taxing state and the corporation as will give the state a jurisdictional basis for such imposition. There must be some definite link, some minimum connection between a state and the foreign corporation it seeks to make its tax collector,[7] if the Due Process clause of the Fourteenth Amendment is to be satisfied.

In *General Trading Co. v. State Tax Commission*[8] an extrastate corporation, having no operations in the taxing state other than the solicitation of orders by its own traveling salesmen, was held liable for the amount of a use tax ordinarily imposed on the vendee but demandable from the vendor as a collector for the public treasury. Active solicitation in the taxing state by the out-of-state corporation's salesmen was deemed sufficient to supply the necessary nexus. On the other hand, when Maryland had seized a Delaware seller's truck as a means of realizing use taxes not collected by the corporation, the Supreme Court in *Miller Bros. v. Maryland*,[9] held Maryland's seizure invalid as a violation of due process. In that case the foreign corporation did no active soliciting of orders and no accepting of orders by mail or telephone. Numerous residents of Maryland went to Delaware to purchase goods at appellant's place of business. Occasionally, the corporation delivered the goods which were so purchased. It was on one of these occasions that the truck was seized. The Supreme Court held that although the Maryland residents are subject to the Maryland use tax on goods purchased in Delaware and used in Maryland, there was no jurisdictional basis for Maryland's requiring this Delaware corporation to collect the use tax. Without active solicitation by the foreign corporation in Maryland there was not a sufficient nexus between the two to subject the corporation to this burden.

The *Scripto* case is a sort of hybrid falling in between *General Trading* and *Miller Bros.* Scripto attempted to circumvent liability based upon the principles as set out in the *General Trading* case by designating the wholesalers as independent contractors. Apparently, Scripto felt that the Court would draw the line at *General Trading* and hold that anything less than active solicitation of orders by employee-salesmen would not subject an out-of-state vendor to liability for failure to collect use taxes on goods it sold. The Court met this argument head-on by stating that even though the salesmen are not regular employees of Scripto devoting full time to the company, the labeling of them as independent contractors is constitutionally irrelevant.[10] Furthermore, the Court held that it is immaterial that the

Gallagher, 306 U.S. 167 (1939); Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62 (1939); Henneford v. Silas Mason Co., 300 U.S. 577 (1937).

[7] Miller Bros. v. Maryland, 347 U.S. 340 (1954); Scripto, Inc. v. Carson, supra note 1.

[8] 322 U.S. 335 (1944).

[9] Supra note 7.

[10] 362 U.S. at 211.

"The formal shift in the contractual tagging of the salesman as 'independent' neither results in changing his local function of solicitation nor bears upon its

wholesalers handled products other than Scripto's and thus were agents for several principals.[11] The sales and activities of the Florida wholesalers were deemed to be a sufficient emanation of the corporation in Florida to justify Florida's requirement that Scripto be its tax collector.

In the absence of any Congressional legislation[12] prohibiting a state from requiring an out-of-state vendor to be its tax collector in situations where the contact between the two is slim, the Court must determine in each case whether the minimum contact has been made so as not to be violative of due process.[13] The test is "simply the nature and extent of the activities"[14] of the corporation in the taxing state. The activities of Scripto through the Florida wholesalers were regular, systematic and productive of a substantial flow of goods from Scripto into Florida. The Court was correct in not allowing these activities to be clouded by the tagging of the Florida wholesalers as independent contractors.

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Contracts—Conflict of Laws—Severability of Arbitration Clause.—*Commonwealth Oil Refining Co. v. Lummus Co.*[1]—The Lummus Company is engaged in designing and constructing oil refineries. On the basis of certain cost and profitability estimates by Lummus, the Commonwealth Co. contracted in New York with Lummus in 1954 for the construction of an oil refinery and again in 1956 for expansion of the

effectiveness in securing a substantial flow of goods into Florida. . . . To permit such formal 'contractual shifts' to make a constitutional difference would open the gates to a stampede of tax avoidance."

[11] Id. at 211.

[12] Congress can, of course, under its power to regulate commerce, enact legislation which would deny a state the power to require a corporation engaged exclusively in interstate commerce to become the state's tax collector when the only nexus between the two is the active solicitation of sales by the corporation's agents. Legislation to this effect was introduced in both Houses of Congress after the Scripto decision was handed down. H.R. 12, 235, S. 3549, 86th Cong., 2d Sess. (1960).

[13] Although the amount of contact necessary to subject a foreign corporation to the jurisdiction of the state for a valid "in personam" judgment in causes of action arising out of the activities of the corporation within the state may not be co-extensive with the minimum contact necessary to permit a state to require the foreign vendor to be its tax collector, a close parallel between the two might be drawn. This is especially so where the cause of action in the "in personam" suit is not based upon a tort involving a dangerous instrumentality. Young v. Masci, 289 U.S. 253 (1933); Hess v. Pawloski, 274 U.S. 352 (1927). The test as promulgated in International Shoe Inc. v. Washington, 326 U.S. 310 (1945), for subjecting a foreign corporation to an "in personam" judgment is whether or not there is a certain minimum contact between the state and the corporation so that "traditional notions of fair play and substantial justice" are not offended if the corporation is to be required to defend a suit in the state where the cause of action arose. This test, in substance, is also applied to situations wherein a court must determine whether the Fourteenth Amendment has been violated when a state attempts to make an extrastate corporation its tax collector.

[14] 362 U.S. at 212.

[1] 280 F.2d 915 (1st Cir. 1960).