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TAXATION - INTERSTATE COMMERCE - USE TAX ON GASOLINE

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TAXATION — INTERSTATE COMMERCE — USE TAX ON GASOLINE — A statute provided that it was unlawful to operate an automobile over the state highway without paying a certain tax on the sale or use of gasoline.[1] Plaintiff operated a common carrier between two cities which were not in the state, the route taken by the carrier, however, running through the state. Plaintiff habitually brought gasoline into the state in the tanks of its motor carriers, and in this suit it sought to enjoin collection of the tax, alleging that as applied to its business the statute was unconstitutional because the tax thus imposed was an unreasonable burden on interstate commerce. *Held*, that since the highest court in the state had previously interpreted this tax to be one levied as compensation for the use of the state highways,[2] and since this court was bound by that interpretation, the tax was not invalid as a burden on interstate commerce. *Dixie Greyhound Lines, Inc. c. McCarroll*, (D. C. Ark. 1938) 22 F. Supp. 985.

The states have discovered that the compensating or use tax is a satisfactory means of supplementing the sales taxes that have become common in many states,[3] the value of the tax resting not only on the fact that in itself it is productive of revenue, but also in that its existence diverts many transactions into intrastate trade that would in the usual course of events become interstate in order to circumvent the sales tax. This result obtains because, while a state may not constitutionally tax interstate purchases by its inhabitants,[4] there seems to be no objection to levying a compensating tax on the property obtained by such purchases after it comes into the state,[5] and the imposition of the tax has the effect of exacting the same revenue from the transaction as if the sales tax had been paid in the first place. The interstate feature becomes more pronounced, however, when the goods are neither purchased in the state nor brought into its

[1] Ark. Dig. Stat. (Pope, 1937), § § 11260-11269.

[2] Sparling v. Refunding Board, 189 Ark. 189, 71 S. W. (2d) 182 (1934).

[3] Warren and Schlesinger, "Sales and Use Taxes: Interstate Commerce Pays Its Way," 38 COL. L. REV. 49 (1938).

[4] Sonneborn Bros. v. Cureton, 262 U. S. 506, 43 S. Ct. 643 (1923). Determination of the kinds of purchases which will be considered interstate for this purpose is a hard problem, and one complicated by recent cases. In the case of Wiloil Corp. v. Pennsylvania, 294 U. S. 169, 55 S. Ct. 358 (1935), for instance, the Supreme Court advances a somewhat different concept than the one which had formerly been generally accepted as to the taxability of sales between residents of the same state when the vendor sends out of the state for the goods. The limits to which the reasoning will be extended are difficult to predict. At least we know that the mere fact that goods were shipped to the buyer from outside the state in fulfilling the contract of purchase will not necessarily impart an interstate character to the transaction. See Warren and Schlesinger, "Sales and Use Taxes: Interstate Commerce Pays Its Way," 38 COL. L. REV. 49 at 57 (1938).

[5] Henneford v. Silas Mason Co., 300 U. S. 577, 57 S. Ct. 524 (1937), noted in 35 MICH. L. REV. 1385 (1937), 51 HARV. L. REV. 130 (1937), and 10 SO. CAL. L. REV. 516 (1937).

"The leading case on the power of a state to tax goods having their origin in another state is Woodruff v. Parham. . . . The course of decision thenceforth has been oriented by the guiding principle that although no tax which discriminates in any manner against goods of sister states because of their origin will be upheld, a non-discriminatory tax, imposed after their arrival in the state, whether in the original package or not, is constitutional." 51 HARV. L. REV. 130 at 131 (1937).

limits for the purpose of using or enjoying them there, but rather are brought in as an incident to carrying on commerce between that state and others. The stumbling block to state taxation here is that in *Helson v. Kentucky*,[6] the Supreme Court has ruled a privilege tax on the use of property in interstate commerce to be invalid. This decision has been modified in that it does not now apply to cases where the goods are stored in the taxing state as a preliminary step to employment in interstate commerce,[7] but it is supposed that when the goods remain in the stream of interstate commerce the decision has all of its original force. Interstate motor carriers often carry sufficient fuel to enable them to cross more than one state without refilling the tanks, and as they do not maintain storage depots within the state it is apparent that even under the exception noted above the state would be in no position to demand revenue from them.[8] An exception to the taxability of interstate commerce exists when the tax is designed to compensate the state for the use of its highways, however, and the states are not forced to allow use of their highways by interstate carriers without getting some return.[9] Attempt has been made before to circumvent the *Helson* case by applying this doctrine, but the attempt was unsuccessful because the Supreme Court construed the tax as one on the privilege of engaging in interstate business rather than for compensation.[10] In the present case the court was forced to conclude that the tax was a compensatory charge for the use of the highways because that was the interpretation put on the statute by the state court,[11] and by a well-established rule federal courts are bound to follow state courts' interpretations of local statutes.[12] The state court had pointed out in support of its decision that in fact the revenue derived from the tax went for construction and maintenance of the highways.[13] While a state is thus allowed

[6] Helson v. Kentucky, 279 U. S. 245, 49 S. Ct. 279 (1929); Bingamin v. Golden Eagle Western Lines, 297 U. S. 626, 56 S. Ct. 624 (1936). Clearly a state tax on the privilege of engaging in interstate commerce would not be valid. Harman v. Chicago, 147 U. S. 396, 13 S. Ct. 306 (1893). Whether a decision like that in Helson v. Kentucky will be reached, then, depends on the interpretation put on the taxing act.

[7] Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249, 53 S. Ct. 345 (1933), discussed in 36 MICH. L. REV. 1031 at 1032-1033 (1938); Edelman v. Boeing Air Transport Co., 289 U. S. 249, 53 S. Ct. 591 (1933). These cases, together with others in the field, are discussed in Kauper, "State Taxation of Interstate Motor Carriers," 32 MICH. L. REV. 1 at 25 ff., 171, 351 (1933-34).

[8] The tax in the principal case is of the type held invalid in Helson v. Kentucky, 279 U. S. 245, 49 S. Ct. 279 (1929). There being no storage in the state, the exception to the Helson case which was made in Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249, 53 S. Ct. 345 (1933), cannot be claimed.

[9] Hendrick v. Maryland, 235 U. S. 610, 35 S. Ct. 140 (1915); Kane v. New Jersey, 242 U. S. 160, 37 S. Ct. 30 (1916); Interstate Buses Corp. v. Blodgett, 276 U. S. 245, 48 S. Ct. 230 (1928); Hicklin v. Coney, 290 U. S. 169, 54 S. Ct. 142 (1933), affirming State ex rel. Coney v. Hicklin, 168 S. C. 440, 167 S. E. 674 (1932).

[10] Bingamin v. Golden Eagle Western Lines, 297 U. S. 626, 56 S. Ct. 624 (1936).

[11] Sparling v. Refunding Board, 189 Ark. 189, 71 S. W. (2d) 182 (1934).

[12] 27 R. C. L. 44, § 50 (1920).

[13] Sparling v. Refunding Board, 189 Ark. 189, 71 S. W. (2d) 182 (1934).

to tax interstate motor carriers whether fuel is bought within the state or not, it is not amiss to point out that the decision extends no further than this. A use tax on gasoline will still be invalid as applied to interstate air, water, and rail carriers who bring in the fuel as an incident to their interstate operation, if they do not store such fuel in the state. It also is not amiss to point out that no tax, regardless of its nature, is constitutional if it discriminates against interstate commerce. Therefore, in order to reap the benefits of this decision the use tax must exact no greater rate from the interstate trade than is levied by its domestic complement, the sales tax.[14] *M. D. Blackwell*

[14] Gregg Dyeing Co. v. Query, 286 U. S. 472, 52 S. Ct. 631 (1932), noted in 31 MICH. L. REV. 275 (1932). See Warren and Schlesinger, "Sales and Use Taxes: Interstate Commerce Pays Its Way," 38 COL. L. REV. 49 (1938).