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CONSTITUTIONAL LAW - VALIDITY OF A COMPENSATING USE TAX - COMMERCE CLAUSE

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CONSTITUTIONAL LAW — VALIDITY OF A COMPENSATING USE TAX — COMMERCE CLAUSE — Plaintiffs, appellees in this court, while engaged in the construction of a federal dam, brought into the state machinery purchased at retail in other states. The Washington Tax Commission demanded payment of a use tax on the machinery so purchased as required by the 1935 tax statutes.[1] The plaintiffs refused to comply with the commission's order and received an injunction in the federal district court. The Washington legislature, under the heading "Compensating Tax," levied a two per cent excise on the use of all personal property purchased at retail after the effective date, the tax to be

[1] Wash. Sess. Laws (1935), c. 180, tit. 4, 9 Wash. Rev. Stat. (Remington Supp. 1935), §§ 8370-31 to 8370-35. This was supplementary to the sales tax which was passed concurrently. Wash. Sess. Laws (1935), c. 180, tit. 3, 9 Wash. Rev. Stat. (Remington Supp. 1935), §§ 8370-16 to 8370-30.

measured by the purchase price. It was enacted in conjunction with the state sales tax and did not apply to articles which already had been subject to a tax equal to or in excess of the current impost "whether under the laws of this state or of some other state of the United States." *Held*, this was a tax upon the privilege of use after commerce was at an end. Nor was the tax so measured or conditioned as to discriminate against interstate commerce. The sale concluded in foreign states merely furnished a convenient basis for measuring the value of the use. *Henneford v. Silas Mason Co.*, (U. S. 1937) 57 S. Ct. 524.

Taxation of sales has raised many novel problems concerning the application of the interstate commerce clause.[2] The critical question is, how can the various states with a sales tax maintain this means of securing additional revenues to meet increased expenditures and still not have the tax operate to the disadvantage of the local merchants by furnishing a subsidy to interstate commerce?[3] It sometimes becomes profitable for the resident of a state having a sales tax to bring his purchase under the immunity of the commerce clause.[4] Various proposals have been made whereby parity between interstate and intrastate sales may be attained.[5] The Washington compensating tax from the standpoint of expediency furnishes the best solution.[6] The plaintiffs' attacks on the constitutionality of the statute resolve themselves into three major contentions. The first contends that this is a direct tax upon the operations of interstate commerce. In that this is a tax on the goods after they have come to rest, the Court found many authorities to sustain the position that the tax was not upon the operations of interstate commerce.[7] It refused to make any arbitrary distinctions between a tax on an attribute of property, the privilege of enjoyment,

[2] By construction of Art. I, sec. 8, clause 3 of the United States Constitution, states are forbidden from taxing transactions in interstate commerce.

[3] See Lowndes, "State Taxation of Interstate Sales," 7 MISS. L. J. 223 (1935); Perkins, "The Sales Tax and Transactions in Interstate Commerce," 12 N. C. L. REV. 99 (1933); Shoup and Haimoff, "The Sales Tax," 34 COL. L. REV. 809 at 828 (1934); Traynor, "The California Use Tax," 24 CAL. L. REV. 175 (1936), "More serious, however, is the permanent impairment of local business, which is at best only partially counterbalanced by increased orders from other states." The Court refers to the drainage on the state revenues.

[4] See references in note 3, supra.

[5] See Shoup and Haimoff, "The Sales Tax," 34 COL. L. REV. 809 at 827 et seq. (1934); Johnson, "State Sales Taxes and the Commerce Clause," 24 CAL. L. REV. 155 at 170-171 (1935), "1. Congress might itself tax interstate sales. . . . 2. Congress might consent to non-discriminatory state taxation. . . . 3. The Supreme Court might take it upon itself to answer the broad questions of policy presented and present a remedy." For a discussion of the problems connected with the proposal that there be federal legislation to remove the immunity of the interstate commerce in this connection, see Lowndes, "State Taxation of Interstate Sales," 7 MISS. L. J. 223 at 233 (1935). See note 3, supra. Also see Perkins, "The Sales Tax and Transactions in Interstate Commerce," 12 N. C. L. REV. 99 at 106 et seq. (1933).

[6] See 45 YALE L. J. 708 at 713 (1936); Johnson, "State Sales Taxes and the Commerce Clause," 24 CAL. L. REV. 155 at 171 (1934); Lowndes, "State Taxation of Interstate Sales," 7 MISS. L. J. 223 at 233 (1935).

[7] Wiloil Corp. v. Pennsylvania, 294 U. S. 169 at 175, 55 S. Ct. 358 (1935). See also the opinion of the state court in Commonwealth v. Wiloil Corp., 316 Pa.

and a tax on the property as such.[8] However, the crux of the case is that portion of the Court's opinion which refutes the argument of the plaintiffs that this tax is invalid as a restriction on interstate commerce. The Court is found with the difficult task of differentiating between this statute and the New York minimum price law in *Baldwin v. G. A. F. Seelig, Inc.*[9] A distinction was made on the basis that the New York statute attempted to fix prices in Vermont, whereas the statute in question allowed merchants in other states to sell at any price that they desired.[10] But it is submitted that this distinction disregards that portion of the *Baldwin* case which indicated a hostility to any measure that tended to restrict interstate commerce.[11] The Court, considering all parts of the two statutes, sales tax and use tax, as an integrated whole,[12] concludes that the object was to put all purchasers, either in state or out of state, on an equal plane. This interpretation of the commerce clause protects interstate sales from discrimination rather than from any state legislation which would tend to place a burden on interstate commerce.[13] The Court, objectively interpreting the statute, refused to look into the motives that prompted the tax.[14] A tax will not be held invalid merely because it accomplishes other objectives which in themselves are beyond the scope of state legislative power. Quaere, would the

33, 173 A. 404 (1934); American Steel & Wire Co. v. Speed, 192 U. S. 500, 24 S. Ct. 365 (1904); Woodruff v. Parham, 8 Wall. (75 U. S.) 123 at 137 (1868); Hinson v. Lott, 8 Wall. (75 U. S.) 148 (1868).

[8] Bowman v. Continental Oil Co., 256 U. S. 642, 41 S. Ct. 606 at 608 (1921); Hart Refineries v. Harmon, 278 U. S. 499, 49 S. Ct. 188 (1929); Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249, 53 S. Ct. 345 (1933); Edelman v. Boeing Air Transport Co., 289 U. S. 249, 53 S. Ct. 591 (1933); Monamotor Oil Co. v. Johnson, 292 U. S. 86, 54 S. Ct. 575 (1934); Eastern Air Transport Inc. v. South Carolina Tax Comm., 285 U. S. 147, 52 S. Ct. 340 (1932).

[9] 294 U. S. 511, 55 S. Ct. 497 (1935) (New York law prohibiting sale in New York of milk bought from producers in other states at less than New York minimum price held unconstitutional).

[10] The Washington Supreme Court in Vancouver Oil Co. v. Henneford, 183 Wash. 317 at 323, 49 P. (2d) 14 (1935), attempted to distinguish the cases on the ground that the New York milk control act applied to articles before they came to rest. But the dissent concluded that Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511, 55 S. Ct. 497 (1935), was a precedent. See also the district court opinion in the principal case, (D. C. Wash. 1936) 15 F. Supp. 958, holding the act unconstitutional on the basis of Baldwin v. Seelig.

[11] See Silas Mason Co. v. Henneford, (D. C. Wash. 1936) F. Supp. 958.

[12] Gregg Dyeing Co. v. Query, 286 U. S. 472 at 480, 52 S. Ct. 631 (1932); Hebert v. Louisiana, 272 U. S. 312 at 317, 47 S. Ct. 103 (1926); General American Tank Car Co. v. Day, 270 U. S. 367 at 370, 373, 46 S. Ct. 234 (1925); Hinson v. Lott, 8 Wall. (75 U. S.) 148 (1868).

[13] See Perkins, "The Sales Tax and Transactions in Interstate Commerce," 12 N. C. L. REV. 99 at 106 et seq. (1933). Also see 45 YALE L. J. 708 at 713 (1936); Traynor, "The California Use Tax," 24 CAL. L. REV. 175 (1936).

[14] Magnano Co. v. Hamilton, 292 U. S. 40 at 44, 54 S. Ct. 599 (1933) (tax on oleomargarine upheld although the tax would destroy the industry); Fox v. Standard Oil Co., 294 U. S. 87 at 100, 55 S. Ct. 333 (1935). Cf. Hammer v. Dagenhart, 247 U. S. 251, 38 S. Ct. 529, 3 A. L. R. 649 at 658 (1918).

same line of reasoning [15] have been pursued if the tax were discriminatory? The third argument advanced by plaintiffs was that the statute, looked upon as a whole, is a tax on a purchase in another state and not upon its use in Washington. Holding that it was a problem of administration, the Court refused to look into its expediency.[16] Despite the resulting burden on interstate commerce, the Court will be loathe to pronounce invalid state legislation which merely achieves parity between interstate and intrastate operations.

William J. Isaacson

[15] The same line of reasoning is exhibited in Steward Machine Co. v. Davis, (U. S. 1937) 81 L. Ed. 779, upholding the Social Security Act. Cf. United States v. Butler, 297 U. S. 1, 56 S. Ct. 312 (1936) (A.A.A. was held invalid).

[16] See 4 COOLEY, TAXATION, 4th ed., § 1692 (1924); Bells Gap R. R. v. Pennsylvania, 134 U. S. 232 at 237, 10 S. Ct. 533 (1890); Ohio Oil Co. v. Conway, 281 U. S. 146 at 159, 50 S. Ct. 310 (1930).