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TAXATION - STATE OCCUPATION TAX ON INTRASTATE BUSINESS OF CORPORATIONS DOING BOTH INTRASTATE AND INTERSTATE BUSINESS - BURDEN ON INTERSTATE COMMERCE

TAXATION — STATE OCCUPATION TAX ON INTRASTATE BUSINESS OF CORPORATIONS DOING BOTH INTRASTATE AND INTERSTATE BUSINESS — BURDEN ON INTERSTATE COMMERCE — The state of Washington imposed an occupation tax on practically all businesses within the state based on gross income from intrastate business. The Pacific Telephone and Telegraph Company sought to enjoin, and the state sued the Great Northern and the Northern Pacific Railway Companies for, the collection of this tax. Both the telephone company and the railways relied on the alleged rule of law that an occupation tax laid upon the local business of a foreign corporation engaged in both intrastate and interstate business is necessarily void unless the corporation is free in law and in fact to withdraw from the local business without discontinuing its interstate business. The Washington court assumed that practical considerations and governing law would not permit withdrawal from local business without withdrawal from interstate business as well, but denied the existence of the alleged rule of law and upheld the tax. The Supreme Court *held* that the tax was constitutional and that an occupation tax contributing to the operating deficit in the local business of a concern engaged in both intrastate and interstate business was not necessarily invalid, particularly if there was no desire on the part of the taxpayer to withdraw from such local business, for to hold the tax invalid the taxpayer must definitely demonstrate that the practical consequence of the tax is to impose an undue burden on interstate commerce. *Pacific Telephone & Telegraph Co. v. Tax Commission,* (U. S. 1936) 56 S. Ct. 522.

A state cannot constitutionally impose a privilege tax upon a business exclusively foreign [1] or interstate,[2] although the tax is measured by the pro-

[1] Di Santo v. Pennsylvania, 273 U. S. 34, 47 S. Ct. 267 (1927); Crew-Leverick Co. v. Pennsylvania, 245 U. S. 292, 38 S. Ct. 126 (1917).

[2] Real Silk Hosiery Mills v. Portland, 268 U. S. 325, 45 S. Ct. 525 (1925);

portion of capital shares attributable to transactions within the state.[3] Nor can it tax indiscriminately a business whose intrastate and interstate operations are inseparable.[4] But a state may impose a privilege tax upon the doing of local business, although the concern is engaged in both intrastate and interstate business.[5] Such a tax may not be measured by the total capital stock,[6] but may be measured by such proportion thereof as represents the actual business done within the state.[7] The tax may not be based on the gross income from both intrastate and interstate business,[8] but may be based on the total net income of a domestic concern,[9] or on the intrastate portion of gross [10] or net [11] income of either a domestic or a foreign concern. The tax in the principal case was based upon gross income justly proportioned to the amount of business done within the state, but its burden contributed to a net operating loss for the intrastate business of the concerns in question (which had to be made up, of course, from interstate revenues), and this with the assumption made by the courts that the concerns could not abandon their intrastate business without also abandoning their interstate business would seem to run counter

Station WBT v. Poulnot, (D. C. S. C. 1931) 46 F. (2d) 671; Powell, "Contemporary Commerce Clause Controversies over State Taxation," 76 UNIV. PA. L. REV. 773 at 788 (1928); Powell, "Indirect Encroachment on Federal Authority by the Taxing Powers of the States, II," 31 HARV. L. REV. 572 at 575 (1918); 42 YALE L. J. 1096 (1933).

[3] Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 45 S. Ct. 477 (1925).

[4] Sprout v. South Bend, 277 U. S. 163, 48 S. Ct. 502 (1928); Bowman v. Continental Oil Co., 256 U. S. 642, 41 S. Ct. 606 (1921).

[5] 1 COOLEY, TAXATION, 4th ed., § 392 (1924); 82 UNIV. PA. L. REV. 396 (1934).

[6] Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 30 S. Ct. 190 (1910); Looney v. Crane Co., 245 U. S. 178, 38 S. Ct. 85 (1917); Cudahy Packing Co. v. Hinkle, 278 U. S. 460, 49 S. Ct. 204 (1929), although the maximum fee which could be exacted was limited. On this compare Baltic Mining Co. v. Massachusetts, 231 U. S. 68, 34 S. Ct. 15 (1913); International Paper Co. v. Massachusetts, 246 U. S. 135, 38 S. Ct. 292 (1918).

[7] Western Cartridge Co. v. Emerson, 281 U. S. 511, 50 S. Ct. 383 (1930); International Shoe Co. v. Shartel, 279 U. S. 429, 49 S. Ct. 380 (1929); Southern Realty Corp. v. McCallum, (C. C. A. 5th, 1933) 65 F. (2d) 934, cert. den. 290 U. S. 692, 54 S. Ct. 127 (1933).

[8] Meyer v. Wells, Fargo & Co., 223 U. S. 298, 32 S. Ct. 218 (1912); Galveston, H. & S. A. Ry. v. Texas, 210 U. S. 217, 28 S. Ct. 638 (1908).

[9] United States Glue Co. v. Oak Creek, 247 U. S. 321, 38 S. Ct. 499 (1918); Powell, "Indirect Encroachment on Federal Authority By the Taxing Powers of the States, VII," 32 HARV. L. REV. 634 (1919); note, 75 L. Ed. 879 at 882 (1931).

[10] Pullman Co. v. Richardson, 261 U. S. 330, 43 S. Ct. 366 (1923); East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, 51 S. Ct. 499 (1931); Ohio Tax Cases, 232 U. S. 576, 34 S. Ct. 372 (1914).

[11] Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 41 S. Ct. 45 (1920); Bass, Ratcliff & Gretton v. State Tax Commission, 266 U. S. 271, 45 S. Ct. 82 (1924); and see Hans Rees' Sons v. North Carolina ex rel. Maxwell, 283 U. S. 123, 51 S. Ct. 385 (1931), and note in 75 L. Ed. 879. See also Rottschaefer, "State

to the dictum in *Pullman Co. v. Adams* [12] and *Postal Telegraph-Cable Co. v. Richmond*,[13] unless under these circumstances it can be said that these concerns are free to renounce their local business.[14] The question is thus raised at what point a state unduly burdens interstate commerce in imposing a nondiscriminatory privilege tax based on a valid proportion of gross income. It is settled, on the one hand, that a common carrier cannot be compelled to run his entire business at a loss,[15] or without reasonable prospect of future profit,[16] and Congress may interfere to prevent state regulation of intrastate commerce which might prejudice interstate commerce.[17] But, on the other hand, a concern doing intrastate and interstate commerce "cannot complain of being taxed for the privilege of doing a local business [run at a loss] which it is free to renounce"; [14] and when such a business begins local operations after the enactment of an occupation tax which contributes to a net loss in its local business, it cannot complain although it is not free to renounce such business; [18] and finally the principal case holds that a concern doing intrastate and interstate business may not complain where a subsequently enacted occupation tax contributes to a net loss in its local business although it may not withdraw from its local business without also withdrawing from its interstate business, at least if there was no desire to withdraw from the local business. And in every case, since the tax is indirect, the issue is whether as a matter of practicality there is a substantial burden on interstate commerce, and the burden of proof is on the taxpayer.[19]

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Jurisdiction of Income for Tax Purposes," 44 HARV. L. REV. 1075 at 1080 et seq. (1931).

[12] 189 U. S. 420 at 421, 23 S. Ct. 494 (1903), "It [the railroad company] contended that these facts would show that the business within the State was merely a burden on its commerce between the States, while at the same time, it argued, it was compelled to assume that burden by § 195 of the state constitution. . . . If the clause of the state constitution referred to were held to impose the obligation supposed and to be valid, we assume without discussion that the tax would be invalid."

[13] 249 U. S. 252, 39 S. Ct. 265 (1919).

[14] Pullman Co. v. Adams, 189 U. S. 420 at 422, 23 S. Ct. 494 (1903); Osborne v. Florida, 164 U. S. 650, 17 S. Ct. 214 (1897).

[15] Brooks-Scanlon Co. v. Railroad Comm., 251 U. S. 396, 40 S. Ct. 183 (1920).

[16] Bullock v. Florida ex rel. Railroad Comm., 254 U. S. 513, 41 S. Ct. 193 (1920); Railroad Comm. v. Eastern Texas R. R., 264 U. S. 79, 44 S. Ct. 247 (1923).

[17] Colorado v. United States, 271 U. S. 153, 46 S. Ct. 452 (1926).

[18] Postal Telegraph-Cable Co. v. Fremont, 255 U. S. 124, 41 S. Ct. 279 (1920).

[19] Gregg Dyeing Co. v. Query, 286 U. S. 472 at 481, 52 S. Ct. 631 (1932); Interstate Busses Corp. v. Blodgett, 276 U. S. 245 at 251, 48 S. Ct. 230 (1928); 42 YALE L. J. 963 at 964 (1933). And there is some feeling that state taxation must be treated as distinct from state regulation. Powell, "Contemporary Commerce Clause Controversies Over State Taxation," 76 UNIV. PA. L. REV. 958 at 959 (1928); Powell, "Indirect Encroachment on Federal Authority by the Taxing Powers of the States VI," 32 HARV. L. REV. 374 at 397 et seq. (1919); dissent of Justice Brandeis in Ozark Pipe Line Corp. v. Monier, 266 U. S. 555 at 567, 45 S. Ct. 184 (1925), and in Cudahy Packing Co. v. Hinkle, 278 U. S. 460 at 467, 49 S. Ct. 204 (1929); 43 YALE L. J. 337 at 339 (1933); 42 YALE L. J. 1096 (1933).