Constitutional Law - Due Process - Collection of State Use Tax From Nonresident Vendor

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CONSTITUTIONAL LAW — DUE PROCESS — COLLECTION OF STATE USE TAX FROM NONRESIDENT VENDOR — Plaintiff, a Georgia corporation not qualified to do business in Florida, solicited orders for merchandise from Florida residents through independent brokers who forwarded the orders to plaintiff’s Georgia office for acceptance. Plaintiff did not maintain any place of business in Florida nor have any regular employee or agent there. In a suit to enjoin the enforcement of a distress warrant issued upon plaintiff’s failure to collect the Florida use tax, the chancellor denied relief and the Florida Supreme Court affirmed. On appeal to the United States Supreme Court, held, affirmed, one Justice dissenting. Enforcement of the statute requiring collection of the use tax by plaintiff did not violate due process because plaintiff’s solicitation of orders, although through independent contractors, formed a sufficient contact with the state. Scripto, Inc. v. Carson, 362 U.S. 207 (1960).

1 Plaintiff contracted with ten independent brokers who also sold the products of other manufacturers. Scripto, Inc. v. Carson, 105 So. 2d 775, 778 (Fla. 1958).

2 Plaintiff employed one salesman in Florida, but he handled a different line of products than the one involved in the principal case. The Florida courts found his presence was not relevant to the determination whether the plaintiff was included within the terms of the statute. Principal case at 207 n.2 (1960). Compare Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941).


4 Scripto, Inc. v. Carson, supra note 1.

5 Justice Whittaker dissented.
The use tax is designed to prevent evasion of a state sales tax by residents completing normally taxable purchases in states where no sales tax is imposed and the home state's sales tax cannot be constitutionally enforced. If the use tax is collected from the person using the property within the taxing state, its constitutionality can no longer successfully be challenged. However, a small amount of tax owed by numerous purchasers presents a difficult and costly collection problem. Therefore, many states have enacted statutes requiring vendors to serve as tax collectors. Although application of these statutes to nonresident vendors may violate the due process clause of the fourteenth amendment, the due process requirement will be fulfilled if there is a sufficient connection between the vendor and the taxing state. In this area, there has been a gradual reduction in the contacts required for due process. First, the Court upheld a California use tax statute when applied to a nonresident vendor who maintained a sales office and sales agents within the state. Later, Iowa was permitted to require collection of its use tax on mail order sales by a nonresident vendor who operated within the state retail stores which were not related to the mail order business. Subsequently, in General Trading Co. v. State Tax Comm'n, the Court held that mere solicitation by an agent of a nonresident vendor was sufficient activity to satisfy the due process requirement. However, in Miller Bros. Co. v. Maryland, the state was not permitted to enforce its use tax collection statute where the nonresident vendor's local activities were limited to deliveries with its own equipment and indirect solicitation through the local effects of general advertising. Any doubts which Miller Bros. may have raised concerning

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10 Miller Bros. Co. v. Maryland, supra note 9. See also Kust, supra note 7, at 1303-09.
11 CAL. REv. & TAX CODE § 6203.
13 IOWA CODE §§ 423.1, .9 (1958).
15 322 U.S. 335 (1944); compare International Shoe Co. v. Washington, 326 U.S. 310 (1945) in which on similar facts a state was held to have jurisdiction over a foreign corporation for purposes of suit.
16 Justice Frankfurter treated the due process question in General Trading at 338: "[T]o make the distributor the tax collector for the State is a familiar and sanctioned device." This view solicited a vigorous dissent by Justice Jackson who wrote at 340: "I can think of nothing in or out of the Constitution which warrants this effort to reach beyond the State's own border to make out-of-state merchants tax collectors because they engage in interstate commerce with the State's citizens." See also Powell, Sales and Use Taxes: Collection From Absentee Vendors, 57 Harv. L. Rev. 1086, 1093 (1944).
18 Md. ANN. CODE art. 81, §§ 372 (h), 376 (1957).
19 Delaware newspapers and radio stations which carried Miller Bros. Co. advertising
the strength of the General Trading Co. decision have surely been removed
by the principal case, which extends state power on fewer contacts than
present in General Trading. In Scripoto the Court emphasized the mere
presence of the solicitation activity rather than the technical relationship
between vendor and solicitor in order to prevent "a stampede of tax avoidance"20 based upon formal contractual shifts. Miller Bros. was
distinguished: "Miller had no solicitors in Maryland; there was no 'exploitation
of the consumer market'. . . . Marylanders went to Delaware to make
purchases - Miller did not go to Maryland for sales."21 Thus, it would
appear that sufficient contact may be established by any personal solicita-
tion within the taxing state, but not by such activities as delivery22 which
only serve to perform a completed sale agreement. The Court has not
considered whether solicitation through the use of catalogues23 and adver-
tising24 directed to the residents of the taxing state will provide a sufficient
contact. Although in Miller Bros. the limited advertising activity which
reached Maryland residents was held to be insufficient, it is probable that
a more extensive advertising program directed to those residents would give
the state power to enforce the collection of the use tax.

Prompted by the need for additional revenue, many states have at-
ttempted to exploit to constitutional limits the power to require collection
of the use tax. In apparent sympathy with the state financial problem, the
Court has allowed a broad extension of state power which has resulted in
substantial uncertainty for nonresident vendors. Uniformity and cer-
tainty might be achieved by a proposed bill25 whereby Congress would
establish minimum standards of activity for application of the use tax

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occasionally reached Maryland residents. Direct mail advertising was sent to Maryland
residents who were former customers.

355 U.S. 220 (1957), where the Court held that jurisdiction for suit could be based upon
the ownership of a single contract with a state resident, and International Shoe Co. v.
Washington, supra note 15. These cases indicate a parallel development in the area of
jurisdiction for purposes of suit.

21 Principal case at 212.

22 However, California has indicated that a nonresident vendor will be required
to collect its use tax if he makes substantial deliveries with his own trucks to points within
the state. Sales Tax Counsel Ruling, October 16, 1957, CCH STATE TAX CAS. REP. CAL.
§ 63-004.

23 The following statutes indicate that some states have decided that distribution of

24 The following statutes indicate that some states have decided that advertising within

25 H.R. 12235, S. 3549, 86th Cong., 2d Sess. (1960). This bill is proposed as an
response to the decision in Northwestern States Portland Cement Co. v. Minnesota, 358