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CONSTITUTIONAL LAW-COMMERCE CLAUSE-STATE TAXATION OF INTERSTATE COMMERCE

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CONSTITUTIONAL LAW—COMMERCE CLAUSE—STATE TAXATION OF INTERSTATE COMMERCE—Appellant express company, a Delaware corporation, did only interstate business within the state of Virginia. Virginia levied a state tax on intangible personal property and money owned by express companies doing business within the state, and set off their real estate and tangible personal property for local levies. In addition to the property tax, the Virginia statute provided for an "annual license tax . . . for the privilege of doing business in this State."[1] The tax was "equal to two and three-twentieths per centum upon the gross receipts . . . earned in this State on business passing through, into or out of this State." As applied to the appellant, the state supreme court found this was a valid property tax, measured by gross income and laid on the intangible value of the company's goodwill or going-concern status.[2] On appeal to the United States Supreme Court, *held,* reversed, four justices dissenting. The tax is invalid as a privilege tax on an exclusively interstate business. *Railway Express Agency, Inc. v. Virginia,* 347 U.S. 359, 74 S.Ct. 558 (1954).

In *Spector Motor Service, Inc. v. O'Connor*[3] the Supreme Court ruled that a state tax on a foreign corporation for the privilege of engaging in wholly interstate transportation within the state is invalid under the commerce clause of the Constitution. The principal case presents one significant difference from *Spector.* There the state court itself characterized the tax as an excise on the privilege of doing business in the state; in the instant case the state court maintained that the tax was an intangible property tax measured by gross

[1] Va. Code (1950) §58-547.

[2] Railway Express Agency, Inc. v. Commonwealth of Virginia, 194 Va. 757, 75 S.E. (2d) 61 (1953).

[3] 340 U.S. 602, 71 S.Ct. 508 (1951). The case concerned an apportioned net income tax.

receipts. It is well established that an apportioned gross receipts tax on an interstate carrier is valid if in lieu of other taxes on the carrier's property in a state.[4] Furthermore, in assessing the value of tangible property a state may take account of its augmented value as part of a going concern and treat that as separate intangible property of the taxpayer.[5] However, in the principal case the Court pointed out that if the tax levied by Virginia on the appellant at the gross receipts rate was treated as having been levied at the rate provided for intangible personalty, there would have to be ascribed to the intangible going-concern worth of the property a value over one hundred times that of the tangible property. This was such an "extreme attribution," concluded the Court, that it called for rejection of the state court's characterization of the levy as a property tax.[6] This probably does not mean that Virginia could use the same gross receipts yardstick merely by adjusting the rate on intangible personalty so as to give a more acceptable ratio between the evaluations of intangible and tangible property. For despite its emphasis on the mathematics involved in this case, the majority went on to register its broader disapproval of a "property" tax that would be imposed even in the absence of physical property, and to assert that gross receipts are not a sound measure of going-concern value since they fail to indicate the profitableness of a business.[7]

In the past the Supreme Court has seemed more sympathetic toward state taxing policies. This was especially true between 1938 and 1946, when the Court was relying on the pragmatic test that a nondiscriminatory tax is valid unless it imposes the risk of cumulative exactions by several states.[8] Against this background of periodically shifting judicial attitudes the sharp dissent in the principal case assumes heightened importance. With Chief Justice Warren siding with the three dissenters[9] to *Spector*, four members of the Court are now ready to uphold a nondiscriminatory, fairly apportioned, and nonexcessive state

[4] United States Express Co. v. Minnesota, 223 U.S. 335, 32 S.Ct. 211 (1912); Cudahy Packing Co. v. Minnesota, 246 U.S. 450, 38 S.Ct. 373 (1918). A local franchise tax has been upheld when measured by apportioned gross receipts derived from both interstate and local transportation, even though tangible property is assessed separately. Maine v. Grand Trunk Ry. Co., 142 U.S. 217, 12 S.Ct. 121, 163 (1891). See also Canton R. Co. v. Rogan, 340 U.S. 511, 71 S.Ct. 447 (1951). Cf. Galveston, H. & S.A. Ry. Co. v. Texas, 210 U.S. 217, 28 S.Ct. 638 (1908) (gross receipts tax invalid where there was another tax on going-concern value).

[5] Adams Express Co. v. Ohio State Auditor, 165 U.S. 194, 17 S.Ct. 305 (1897), reh. den. 166 U.S. 185, 17 S.Ct. 604 (1897); Cudahy Packing Co. v. Minnesota, note 4 supra.

[6] Principal case at 366. The dissent would have accepted the state court's interpretation, thus distinguishing Spector. But of course the name given a tax by the state courts or legislatures is not conclusive on the Supreme Court. See Galveston, H. & S.A. Ry. Co. v. Texas, note 4 supra, at 227.

[7] Traditionally, the Court has considered gross receipts taxes more of a "direct" burden on interstate commerce than net income taxes. See, e.g., United States Glue Co. v. Town of Oak Creek, 247 U.S. 321 at 328-329, 38 S.Ct. 499 (1918). But going-concern value was measured by gross receipts in Cudahy Packing Co. v. Minnesota, note 4 supra.

[8] Compare Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546 (1938), with Freeman v. Hewit, 329 U.S. 249, 67 S.Ct. 274 (1946).

[9] Justices Black, Clark, and Douglas.

tax on a corporation engaged exclusively in interstate commerce, if the corporation is using the facilities of the taxing state.[10] This position is grounded on the theory that even interstate commerce must pay its share for a state's services, and that the validity of a given tax should turn on a consideration of economic factors rather than formalistic distinctions between "direct" and "indirect" burdens.[11] The present majority is no doubt influenced by an understandable reluctance to undertake the delicate task of gauging the economic impact of every tax on commerce.[12] However, the Court's experience in balancing local and national interests in the analogous field of state regulation of commerce[13] would seem to militate against the soundness of the majority's fears. It may be, as has been suggested, that the whole problem is one for which only Congress can provide a truly satisfactory solution.[14] But so long as the Court must continue to handle the matter under the commerce clause, it might do well to concern itself less with labels and more with economic realities.[15]

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[10] See Memphis Natural Gas Co. v. Beeler, 315 U.S. 649 at 656, 62 S.Ct. 857 (1942); Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662 at 666, 69 S.Ct. 1264 (1949).

[11] See Brown, "State Taxation of Interstate Commerce—What Now?" 48 MICH. L. REV. 899 at 915-916 (1950); Barrett, "'Substance' vs. 'Form' in the Application of the Commerce Clause to State Taxation," 101 UNIV. PA. L. REV. 740 at 749 (1953).

[12] See Justice Frankfurter, speaking for the Court in Freeman v. Hewit, note 8 supra, at 256.

[13] See, e.g., Southern Pacific Co. v. Arizona, 325 U.S. 761, 65 S.Ct. 1515 (1945); Dean Milk Co. v. City of Madison, 340 U.S. 349, 71 S.Ct. 295 (1951).

[14] See HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE 275 et seq. (1953); Dowling, "Interstate Commerce and State Power—Revised Version," 47 COL. L. REV. 547 at 558 (1947).

[15] The precariousness of the majority's stand is further indicated by the fact that if the present appellant had been doing an iota of intrastate business in Virginia, Virginia's tax would undoubtedly have been upheld. Principal case at 368; Canton R. Co. v. Rogan, note 4 supra.