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Taxation and Interstate Commerce

Raymond Albert Hinerman
West Virginia University College of Law

the officer handling the advances. Under the present rule the only safe course for a corporate lender would be to make a complete investigation before each advance is made. Stealey, *supra.*

Until legislation changes the present status of the law in West Virginia as to mortgages for future advances, the mortgagee will remain subjected to existing risks.

James Truman Cooper

Taxation and Interstate Commerce

P, the State Tax Commissioner, instituted a declaratory judgment proceeding in order to determine whether taxes paid by *D,* a West Virginia corporation, had been unlawfully collected. *D* had been acting as a merchandise broker pursuant to a franchise arrangement under which *D* had been granted the right to represent exclusively certain food processors located outside West Virginia. All of *D's* business activities of soliciting, securing and preparing merchandise orders took place in West Virginia. After such orders had been secured, they were sent to the food processors who reserved the right to accept or reject the orders and, upon acceptance, filled the orders and arranged for delivery of the merchandise by common carrier F.O.B. point of shipment to the purchasers in West Virginia. The billing was sent directly to the purchaser by the processor, and payment was made directly to the processor. The circuit court directed *P* to refund the taxes because the collection contravened the commerce clause. U.S. CONST. art. I, § 8. *Held,* reversed. The imposition of a state gross earnings tax on the commissions paid by nonresident sellers to the manufacturer's representative for its services in soliciting, obtaining and transmitting orders within the state was not a violation of the commerce clause. *State ex rel. Battle v. B. D. Bailey & Sons,* 146 S.E.2d 686 (W. Va. 1966).

The principal case presents two basic constitutional factors which have been before the courts many times. (1) One basic principle is that in the federal system the authority of a state is limited to its own geographical territory, and therefore, it may not tax persons, things or events not within its own boundaries. *New York Lake Erie & W.R.R. v. Pennsylvania,* 153 U.S. 628 (1894).

(2) The other constitutional factor is the familiar but confusing one of "interstate commerce." U.S. CONST. art. I, § 8. With reference to interstate commerce, the United States Supreme Court could have decided either the grant to Congress was exclusive or the power was concurrent so that the states could regulate and tax in any manner not forbidden by Congress. Instead, the case by case approach has been followed. The rules have been laid down, but it has been difficult to follow them in all cases.

The constitutional grant to Congress of the power to regulate interstate commerce operates to limit and restrict the taxing power of the states in so far as such commerce is involved or affected. The limits of the power of a state to levy taxes which affect interstate commerce are not capable of exact definition. Nearly every tax imposed by a state affects interstate commerce, and whether a tax affects such commerce to an unconstitutional extent is largely a question of degree based on the facts of each case.

There are, of course, some general propositions which are easily stated, but, in many cases, not so easily applied. As a general proposition, it may be stated that a tax which so seriously affects interstate commerce as to impede or interfere with it is an unconstitutional regulation of commerce. *Hinson v. Lott*, 75 U.S. (8 Wall.) 387 (1868). It is also well established that a tax which discriminates against interstate commerce is unconstitutional—the classic discrimination test. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940). On the other hand, it has been said that it is not the purpose of the commerce clause to relieve those engaged in interstate commerce from their fair share of state tax burdens. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). Merely being nondiscriminatory is not sufficient to save a tax from being declared invalid if it directly burdens interstate commerce. *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292 (1917). The fact that the imposition of a state tax adds to the cost of interstate commerce is not alone sufficient to invalidate the tax as an interference with that commerce. *McGoldrick v. Berwind-White Coal Mining Co., supra.* The multiple burdens test is yet another well established general proposition, *i.e.*, whether interestate commerce is unconstitutionally subjected to repeated exactions of the same nature from other states. *Gwin v. Henneford*, 305 U.S. 434 (1939).

The court in the principal case, in view of these general propositions, was confronted with the following problems: (1) Was the taxpayer's business in interstate commerce? (2) If the business activity was in interstate commerce, was the tax imposed precluded or rendered unlawful by the commerce clause?

The majority of the court decided that the activity was not one of interstate commerce since it was performed wholly within West Virginia. In arriving at their decision, they followed the well accepted rule that every reasonable construction must be given to attempt to sustain the constitutionality of a statute, and any reasonable doubt must be resolved in favor of the constitutionality of the legislation in question. *Eureka Pipe Line Co. v. Hallanan,* 87 W. Va. 396, 105 S.E. 506 (1921).

Though the court in the principal case could find no West Virginia case as precedent, three recent decisions involving several aspects of taxation of interstate were discussed. *Gambino v. Jackson,* 145 S.E.2d 124 (W.Va. 1966); *State ex rel. Battle v. Baltimore & O.R.R.,* 143 S.E.2d 331 (W. Va. 1965); *Nuckols v. Athey,* 138 S.E.2d 344 (W. Va. 1964). The court said that these cases sustain the proposition that the shipments in the principal case constituted shipments in interstate commerce, but the shipments involved only the buyer and seller and the taxpayer was not directly involved in such interstate transactions.

The court distinguished the case of *Arslain v. Alderson,* 126 W. Va. 880, 30 S.E.2d 533 (1944), from *Harper v. Alderson,* 126 W. Va. 707, 30 S.E. 2d 521 (1944). In the *Arslain* case the taxpayer operated a dry cleaning business in West Virginia. As part of the business, the taxpayer transported the personal property of Ohio customers to the taxpayer's plant in West Virginia. Services were performed on the chattels, and they were returned to the Ohio customers. The court said this activity was not interstate commerce regardless of the interstate transportation of the articles of personal propery on which the services were performed. The *Harper* case involved a taxpayer whose principal place of business was in West Virginia. The taxpayer provided linen service to customers in Ohio and West Virginia. The linens were rented and delivered to the customers; later they were collected by the taxpayer and laundered in West Virginia. The court said this was interstate commerce.

The court distinguished the cases on the basis that the performance of services within the state was not interstate commerce, but the interstate transportation or shipment of property was interstate commerce. The court concluded the taxpayer in the principal case merely engaged in the performance of services wholly within West Virginia as distinguished from the interstate transportation or shipment of property and therefore had not engaged in interstate commerce.

Judge Haymond in a strong dissent disapproved of the majority opinion in nearly every respect and relied on among other cases, *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489 (1887). "The negotiations of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce."

The divergence of the positions shows that the problem of state and local taxation of interstate business is a broad one and one which may not be definitely settled in the near future. The taxing jurisdictions involved are not only the states but also all of the subordinate units of government: counties, municipalities, townships, school districts and many others.

The types of business involved are not only the classic examples of pure interstate commerce—interstate transportation and communication and interstate sales of tangible goods—but also businesses which, though not engaged directly in interstate commerce, importantly affect interstate commerce.

Shortly after the Supreme Court's decision in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), Congress began to study the problem and as a result passed legislation attempting to limit the taxing power of the states in regard to interstate commerce. 15 U.S.C. § 381 (1963). However, the statute may affect the state's taxing power only to a limited extent. 11 JOURNAL OF TAXATION 279-281 (1959); 46 VA. L. REV. 297, 300-301 (1960).

Thus, even with the concerted efforts of the legislative and judicial branches of the government, it is safe to assume tht there will continue to be problems in this particular area of the law. In order to maintain the essential balances in state and federal government operations and services, it will be necessary for Congress and the courts to shape a workable pattern of taxation which will provide the needed revenue for the states and yet not unduly burden interstate commerce.

Raymond Albert Hinerman

Workmen's Compensation—Average Weekly Wages

P had been employed by the National Cash Register Company as a machine-maintenance man at an average weekly wage of sixty-eight dollars. Three nights a week he drove a taxicab for *D* at an average weekly wage of twenty-eight dollars. After *P* had worked five weeks for *D*, a passenger shot *P* rendering him totally and permanently disabled. The issue presented was whether an employee who holds two separate jobs and who is injured in one of them may have his workmen's compensation based on his average weekly wages from both employments, or whether it must relate only to the wages earned in the job on which the employee was injured. The commissioners and lower court found it would be manifestly unfair to the employee to take only the earnings from the part-time job to establish the average weekly wage. To do so would establish his average weekly wage at approximately one-third of his actual earnings at the time. *Held*, error and remanded. The North Carolina Workmen's Compensation Act stated that average weekly wages shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury. The employer for whom he was working must pay the weekly compensation benefit. It would be unfair to *D* to have *P's* average weekly wage computed by combining his earnings from two employments. To do so would require *D* to pay more in compensation than he ever paid *P* in wages. *Barnhardt v. Yellow Cab Co.*, 146 S.E. 2d 479 (N.C. 1966).

Whether an employee, who holds two separate jobs and is injured in one of them, may have his compensation based on his average weekly wages from both of the jobs is controlled by statutes in the several states. A few states have very liberal statutes allowing earnings from all concurrent employments to be combined in forming the wage basis of an injured employee. On the other hand, many states have conservative statutes which allow only the earnings from the employment in which the employee was injured to be used as the basis for computing his average weekly wage.