GREENOUGH et al. v. TAX ASSESSORS OF CITY OF NEWPORT et al.

331 U.S. 486 (67 S.Ct. 1400, 91 L.Ed. 1621)

GREENOUGH et al. v. TAX ASSESSORS OF CITY OF NEWPORT et al.

No. 461.

Argued: March 7, 1947.

Decided: June 9, 1947.

- **opinion**, REED [HTML]
- **concurrence**, FRANKFURTER [HTML]
- **dissent**, JACKSON [HTML]
- **dissent**, RUTLEDGE [HTML]

Rehearing Denied Oct. 13, 1947. See 68 S.Ct. 28.

Appeal from the Superior Court of the County of Newport, State of Rhode Island.

Messrs. William Greenough, of New York City, and William R. Harvey, of Newport, R.I., for appellants.

Mr. John C. Burke, of Newport, R.I., for appellees.

Argument of Counsel from page 487 intentionally omitted

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Mr. Justice REED delivered the opinion of the Court.

Appellants are testamentary trustees of George H. Wrren, who died a resident of New York. His will was duly probated in that state and letters testamentary issued to appellants as executors. A duly authenticated copy of said will was filed and recorded in Rhode Island and there letters testamentary were also issued. Letters of trusteeship were granted to appellants by a surrogate's court in New York. None were needed or asked for or granted by Rhode Island. At all times pertinent to this appeal, appellants, as trustees under the will, held intangible personalty for the benefit of Constance W. Warren for her life and then to certain as yet undetermined future beneficiaries.

The evidences of the intangible property in the estate of George H. Warren and in the trust in question were at all times in New York. The life beneficiary and one of the trustees are residents of New York. The other trustee resides in Rhode Island. During the period in question, he did not, however, exercise his powers, as trustee, in Rhode Island.

A personal property tax of $50 was assessed by the City of Newport, Rhode Island, against the resident trustee upon one-half of the value of the corpus of the trust. The applicable assessment statute for ad valorem taxes appears in the margin. [1] At the time of this assessment, the property consisted of 500 shares of the capital stock of Standard Oil Company of New Jersey. The tax was paid by the trustees and this suit instituted, under appropriate state procedure, in the Superior Court of the County of Newport to recover the tax from the city. The Superior Court by decision denied the petition. A bill of exceptions was prosecuted by these petitioners to the Supreme Court of Rhode Island which overruled the exceptions and remitted the case to the superior court. [2] Thereupon judgment was entered for the appellees and an appeal allowed to this Court. All questions of state procedure and of the applicability of the state statute to the resident trustee in the circumstances of this case were foreclosed for us by the rulings of the Supreme Court of Rhode Island. [3]

The appellants' contention throughout has been that the Rhode Island statute, under which the assessment was made, if applicable to the resident trustee, was unconstitutional under the due process clause of the Fourteenth Amendment to the Constitution of the United States. Their objection in the state courts and here is that Rhode Island cannot tax the resident trustee's proportionate part of these trust intangibles merely because that trustee resides in Rhode Island. Such a tax, they urge, is unconstitutional under the due process clause because it exacts payment measured by the value of property wholly beyond the reach of Rhode Island's power and to which that state does not give protection or benefit. Appellants specifically disclaim reliance upon the argument that the Rhode Island tax exposes them to the danger of other ad valorem taxes in another state. [4] The same concession was made in the Supreme Court of Rhode Island. [5] We therefore restrict our discussion and determination to the issue presented by appellants' insistence that Rhode Island cannot constitutionally collect this tax because the state rendered no equivalent for its exaction in protection of or benefit to the trust fund.

For the purpose of the taxation of those residents within her borders, Rhode Island has sovereign power unembarrassed by any restriction except those that emerge from the Constitution. Whether that power is exercised wisely or unwisely is the problem of each state. It may well be that sound fiscal policy would be promoted by a tax upon trust intangibles levied only by the state that is the seat of a testamentary trust. [6] Or, it may be that the actual domicile of the trustee should be preferred for a single tax. Utilization by the states of modern reciprocal statutory tax provisions may more fairly distribute tax benefits and burdens, although the danger of competitive inducements for obtaining a settlor's favor are obvious. [7] But our question here is whether or not a provision of the Constitution forbids this tax. Neither the expediency of the levy nor its economic effect on the economy of the taxing state is for our consideration. [8] We are dealing with the totality of a state's authority in the exercise of its revenue raising powers.

The Fourteenth Amendment has been held to place a limit on a state's power to lay an ad valorem tax on its residents. [9] Previous decisions of this Court have held that mere power over a resident does not permit a state to exact from him a property tax on his tangible property permanently located outside the jurisdiction of the taxing state. [10] Such an exaction, the cases teach, would violate the due process clause of the Fourteenth Amendment, because no benefit or protection, adequate to support a tax exaction, is furnished by the state of residence. [11] The domiciliary state of the owner of tangibles permanently located in another state, however, may require its resident to contribute to the government under which he lives by an income tax in which the income from the out-of-state property is an item of the taxpayer's gross income. It is immaterial, in such a case, that the property producting the income is located in another state. People of State of New York ex rel. Cohn v. Graves, 300 U.S. 308, 57 S.Ct. 466, 81 L.Ed. 666, 108 A.L.R. 721. And, where the tangible property of a corporation has no taxable situs outside the domiciliary state, that state may tax the tangibles because the corporation exists under the law of its domicile. Southern Pacific Co. v. Commonwealth of Kentucky, 222 U.S. 63, 32 S.Ct. 13, 56 L.Ed. 96. [12]

The precedents, holding it unconstitutional for a state to tax tangibles of a resident that are permanently beyond its boundaries, have not been applied to intangibles where the documents of owner interest are beyond the confines of the taxing jurisdiction or where the choses in action are mere promises of a nonresident without documents. [13] One reason that state taxation of a resident on his intangibles is justified is that when the taxpayer's wealth is represented by intangibles, the tax gatherer has difficulty in locating them and there is uncertainty as to which taxing district affords benefits or protection to the actual property that the intangibles represent. There may be no 'papers.' If the assessment is not made at the residence of the owner, intangibles may be overlooked easily by other assessors of taxes. A state is dependent upon its citizens for revenue. Wealth has long been accepted as a fair measure of a tax assessment. As a practical mode of collecting revenue, the states unrestricted by the federal Constitution have been accustomed to assess property taxes upon intangibles 'wherever held or deposited,' belonging to their citizens and regardless of the location of the debtor. [14] So long as a state chooses to tax the value of intangibles as a part of a taxpayer's wealth, the location of the evidences of ownership is immaterial. If the location of the documents was controlling, their transfer to another jurisdiction would defeat the tax of the domiciliary state. As a matter of fact, there is more reason for the domiciliary state of the owner of the intangibles than for any other taxing jurisdiction to collect a property tax on the intangibles. Since the intangibles themselves have no real situs, the domicile of the owner is the nearest approximation, although other taxing jurisdictions may also have power to tax the same intangibles. [15] Normally the intangibles are subject to the immediate control of the owner. This close relationship between the intangibles and the owner furnishes an adequate basis for the tax on the owner by the state of his residence as against any attack for violation of the Fourteenth Amendment. The state of the owner's residence supplies the owner with the benefits and protection inherent in the existence of an organized government. He may choose to expand his activities beyond its borders but the state of his residence is his base of operations. It is the place where he exercises certain privileges of citizenship and enjoys the protection of his domiciliary government. Does a similar relationship exist between a trustee and the intangibles of a trust?

The trustee of today moves freely from state to state. The settlor's residence may be one state, the seat of a trust another state and the trustee or trustees may live in still another jurisdiction or may constantly change their residence. [16] The official life of a trustee is, of course, different from his personal. A trust, this Court has said, is 'an abstraction.' In federal income tax purposes it is sometimes dealt with as though it had a separate existence. Anderson v. Wilson, 289 U.S. 20, 27, 53 S.Ct. 417, 420, 77 L.Ed. 1004. This is because Congress has seen fit so to deal with the trust. This entity, the trust, from another point of view consists of separate interests, the equitable interest in the res of the beneficiary [17] and the legal interest of the trustee. The legal interest of the trustee in the res is a distinct right. It enables a settlor to protect his beneficiaries from the burdens of ownership, while the beneficiary retained the right, through equity, to compel the legal owner to act in accordance with his trust obligations. The trustee as the owner of this legal interest in the res may incur obligatins in the administration of the trust enforceable against him, personally. [18] Nothing else appearing, the trustee is personally liable at law for contracts for the trust. [19] This is the rule in Rhode Island. [20] Specific performance may be decreed against him. [21] Of course, the trustee when acting within his powers for the trust is entitled to exoneration or reimbursement [22] and the trust res may be pursued in equity by the creditor for payment. [23]

The Supreme Court of Rhode Island considered the argument that the laws of the state afforded no benefit or protection to the resident trustee. Although nothing appeared as to any specific benefit or protection which the trustee had actually received, it concluded that the state was 'ready, willing and capable' of furnishing either 'if requested.' A resident trustee of a foreign trust would be entitled to the same advantages from Rhode Island laws as would any natural person there resident. Greenough v. Tax Assessors of City of Newport, supra, 71 R.I. 488, 47 A.2d 631. There may be matters of trust administration which can be litigated only in the courts of the state that is the seat of the trust. For example, in the case of a testamentary trust, the appointment of trustees, settlement, termination and distribution under the provisions of the trust are to be carried out, normally, in the courts of decedent's domicile. See Harrison v. Commissioner of Corporations and Taxation, 272 Mass. 422, 427, 172 N.E. 605, 71 A.L.R. 677. But when testamentary trustees reside outside of the jurisdiction of the courts of the state of the seat of the trust, third parties dealing with the trustee on trust matters or beneficiaries may need to proceed directly against the trustee as an individual for matters arising out of his relation to the trust. Or the resident trustee may need the benefit of the Rhode Island law to enforce trust claims against a Rhode Island resident. As the trustee is a citizen of Rhode Island, the federal courts would not be open to the trustee for such causes of action where the federal jurisdiction depended upon diversity. The citizenship of the trustee and not the seat of the trust or the residence of the beneficiary is the controlling factor. [24] The trustee is suable like any other obligor. There is no provision of the federal Constitution which forbids suits in state courts against a resident trustee of a trust created under the laws of a sister state. Consequently, we must conclude that

Rhode Island does offer benefit and protection through its law to the resident trustee as the owner of intangibles. And, while it may logically be urged that these benefits and protection are no more than is offered a resident owner of land or chattels, permanently out of the state, the same reasons, hereinbefore stated, 67 S.Ct. 1403, apply that permit state property taxation of a resident owner of intangibles which denying a state power to tax similarly the resident's out-of-state realty.

No precedent from this Court called to our attention indicates that the federal Constitution contains provisions that forbid taxation by a state of intangibles in the hands of a resident testamentary trustee. In Brooke v. City of Norfolk, 277 U.S. 27, 48 S.Ct. 422, 72 L.Ed. 767, the state property tax there invalidated, evidently as violative of the Fourteenth Amendment, was assessed to a life beneficiary, on a res, composed of intangibles, when both the testator and the trustee were residents of another state where the trust was administered. Safe Deposit and Trust Company of Baltimore, Md., v. Commonwealth of Virginia, 280 U.S. 83, 50 S.Ct. 59, 74 L.Ed. 180, 67 A.L.R. 386, held invalid a state's tax on a trust's intangibles, actually in the hands of the nonresident trustee and not subject to the control of the equitable owner, because it was an attempt to tax the trust res, intangibles actually in the hands of a nonresident trustee. This was said to conflict with the Fourteenth Amendment as a tax on a thing beyond the jurisdiction of the taxing state. [25] See also Graves v. Schmidlapp, 315 U.S. 657, 663, 62 S.Ct. 870, 874, 86 L.Ed. 1097, 141 A.L.R. 948, where the sovereign power of taxation was held to extend to a state resident who by will disposed of intangibles held by him as trustee with power of testamentary disposition under a nonresident trust. Nothing in these cases leads to the conclusion that a state may not tax intangibles in the hands of a resident trustee of an out-of-state trust. [26]

State courts construe their statutes according to their understanding of state policy and apply them to such situations as their interpretation of the statutory language requires. In so adjudging, they are the final judicial authority upon the meaning of their state law. It is only in circumstances where their judgments collide with rights secured by the federal Constitution that we have power to protect or enforce the federal rights. In adjudging the taxability under state law of a resident trustee's ownership of intangibles, without reliance upon the residence of settlor or beneficiary or the location of the intangibles, various conclusions have been reached under state law and without regard to the Constitution of the United States. They are pertinent to our problem only as illustrations of the different viewpoints of state law. [27]

Nor do we think it constitutionally significant that the Rhode Island trustee is not the sole trustee of the New York trust. The assessment, as the statute in question required, was only upon his proportionate interest, as a trustee, in the res. Whatever may have been the character of his title to the intangibles [28] or the limitations on his sole administrative power over the trust, [29] the resident trustee was the possessor of an interest in the intangibles, sufficient, as we have explained, to support a proportional tax for the benefit and protection afforded to that interest by Rhode Island. [30]

Affirmed.

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Mr. Justice FRANKFURTER, concurring.

In view of the dissents elicited by the Court's opinion, I should like to state why I join it.

Rhode Island taxes its permanent residents in proportion to the value of their property. The State imposes the tax whether its residents own property outright or own it, legally speaking, in a fiduciary capacity. It is not questioned that the intangible assets in controversy could be included in the measure of the tax against the person of this trustee if he owned them outright. The doctrine that the power of taxation does not extend to chattels permanently situated outside a State though the owner was within it, Union Refrigerator Transit Co. v. Commonwealth of Kentucky, 199 U.S. 194, 26 S.Ct. 36, 50 L.Ed. 150, 4 Ann.Cas. 493; Frick v. Commonwealth of Pennsylvania, 268 U.S. 473, 45 S.Ct. 603, 69 L.Ed. 1058, 42 A.L.R. 316, is inapplicable. The tax is challenged, as wanting in 'due process,' because the Rhode Island resident is merely trustee of these intangibles and the pieces of paper that evidence them are kept outside the State.

Rhode Island's system of taxing its residents—subjecting them to the same measure for ascertaining their ability to pay whether they hold property for themselves or for others—long antedated the Fourteenth Amendment. Rhode Island has imposed this tax, 'it may be presumed, for the general advantages of living within the jurisdiction.' Fidelity & Columbia Trust Co. v. City of Louisville, 245 U.S. 54, 58, 38 S.Ct. 40, 62 L.Ed. 145, L.R.A.1918C, 124. It can hardly be deemed irrational to say, as Rhode Island apparently has said for a hundred years, that those advantages may be roughly measured, for fiscal purposes, by the wealth which a person controls, whatever his ultimate beneficial interest in the property. 'The Fourteenth Amendment , itself a historical product, did not destroy history for the States and substitute mechanical compartments of law all exactly alike.' Jackman v. Rosenbaum Co., 260 U.S. 22, 31, 43 S.Ct. 9, 67 L.Ed. 107.

In any event, Rhode Island could in terms tax its residents for acting as trustees, and determine the amount of the tax as though a trustee owned his trust estate outright. Rhode Island has, in effect, done so by treating all Rhode Island residents alike in relation to their property holdings, regardless of their beneficial interests. That is the practical operation of the statute. It is that which controls constitutionality, and not the form in which a State has cast a tax. Lawrence v. State Tax Commission, 286 U.S. 276, 280, 52 S.Ct. 556, 557, 76 L.Ed. 1102, 87 A.L.R. 374; State of Wisconsin v. J. C. Penney Co., 311 U.S. 435, 443 et seq., 61 S.Ct. 246, 249, 85 L.Ed. 267, 130 A.L.R. 1229. Whether a Rhode Island trustee can go against his trust estate for the amount of the tax which Rhode Island exacts from him is of no concern to Rhode Island. Rhode Island's power to tax its residents is not contingent upon it. A trusteeship is a free undertaking.

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Mr. Justice JACKSON, dissenting.

If Rhode Island had laid a tax on one of its citizens individually, I should think it unassailable even if the basis for taxing him was that he held this trusteeship, and perhaps the tax on him could be measured by the value of the trust estate. In that case the state would tax only its own citizen. One is pretty much at the mercy of his own state as to the events or relationship for which it will tax him. If it wants to make the holding of a trusteeship taxable, I know of no federal grounds of objection. But that is not what is being done, nor what this decision authorizes.

If Rhode Island had taxed the individual, he might have sought reimbursement from the estate. Whether the estate was chargeable would be left to determination by the courts of the state supervising the trust. They might consider the nature of the tax to be a personal charge, as an income tax would doubtless be. Or they might find it to be an expense of administration, such as a transfer tax, and properly to be borne by the fund. But here no such decision is left to the courts which control the fund—the tax is laid on the trustee as such—the estate is the taxpayer.

Rhode Island claims the power to tax the estate solely because one of its trustees resides in that state. No property is in Rhode Island and its courts are not supervising administration of the trust. The estate is wholly located in New York and the trustees derive their authority, powers and title from its courts and to them must account.

I had not supposed that a trust fund became taxable in every state in which one of its trustees may reside. Of course, in this instance it is proposed to tax only one-half of the estate as only one of the two trustees is resident in Rhode Island. But this seems to be an act of grace if there is a right to tax at all. The trustee has no power over, or title to, any fraction of the trust property that he does not have over all of it. If mere residence of a trustee is such a conductor of state authority that through him it reaches the estate, I see no reason why it should stop at a part, nor indeed why a trustee subject to the taxing power of several states, Cf. State of Texas v. State of Florida, 306 U.S. 398, 59 S.Ct. 563, 830, 83 L.Ed. 817, 121 A.L.R. 1179, may not also subject the trust fund to several state taxes by merely moving about.

The decision is a hard blow to the practice of naming individual trustees. It seems to me that there is no power in the state to lay the tax on the trust funds, despite unquestionable authority to tax its own citizen-trustee individually.

Mr. Justice MURPHY joins in this opinion.

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Mr. Justice RUTLEDGE with whom THE CHIEF JUSTICE concurs, dissenting.

I am in agreement with the views expressed by Mr. Justice JACKSON, except that I intimte no opin ion concerning whether Rhode Island could lay a tax upon one of its residents for the privilege of acting as one of two or more trustees, when the state's only connection with the trust arises from the fact of his residence. This is not such a case.

Whether or not due process under the Fourteenth Amendment forbids state taxation of acts, transactions, events or property is essentially a practical matter and one of degree, depending upon the existence of sufficient factual connections, having economic and legal effects, between the taxing state and the subject of the tax. I do not think the mere fact that one of a number of trustees resides in a state, without more, is a sufficiently substantial connection to justify a levy by that state upon the trust corpus, by an ad valorem tax either fractional or on the entirety of the res.

It may become necessary for claimants, beneficiaries or others to sue the trustee in Rhode Island or perhaps for him to join with other trustees in suing third persons there about trust matters. To that extent benefit and protection may be conferred upon the trust. But those needs may arise in connection with any sort of business or activity, trust or other, located and conducted outside the state as largely as this trust's affairs. I had not supposed that merely keeping open the state's courts to such claims would furnish a sufficient basis for bringing within its taxing grasp all property affected by the claims' assertion. That the trust res here consists of intangibles does not seem to me a sufficiently substantial factor, in the circumstances presented, to justify so wide a reach of the state's taxing arm.

Mobilia sequuntur personam has its appropriate uses for sustaining the states' taxing powers affecting residents and their extrastate interests. But when it is applied to the split ownership of a trust, not only as between trustee and beneficiary but also as among several trustees, to bring the trust res within the several states' powers of taxation, merely by virtue of the residence in each of one trustee and nothing more, the fiction I think is carried too far. Something more than affording a domiciliary basis for service of process, coupled with the split and qualified representative ownership of such a trustee, should be required to sustain the state's power to tax the trust res, whether for all or only a fraction of its value.

Finally, whatever might be true of a single trustee or of several residing in a single state, I should doubt the thesis that the interest of one of two or more trustees in a trust is more substantial than that of a beneficiary or receives greater protection or benefit from the state of his residence. And if the beneficiary's residence alone is insufficient to sustain a state's power to tax the corpus of the trust, cf. Brooke v. City of Norfolk, 277 U.S. 27, 48 S.Ct. 422, 72 L.Ed. 767, [1] it would seem that the mere residence of one of a number of trustees hardly would supply a firmer foundation.

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General Laws of Rhode Island 1938, c. 30, § 9:

'Fifth. Intangible personal property held in trust by any executor, administrator, or trustee, whether under an express or implied trust, the income of which is to be paid to any other person, shall be taxed to such executor, administrator, or trustee in the town where such other person resides; but if such other person resides out of the state, then in the town where the executor, administrator, or trustee resides; and if there be more than one such execuor, administrator, or trustee, then in equal proportions to each of such executors, administrators, and trustees in the towns where they respectively reside.'

2

General Laws of Rhode Island 1938, c. 31, § 14; c. 545, § 6, as amended by c. 941, Public Laws of Rhode Island 1940; Greenough v. Tax Assessors of City of Newport, 71 R.I. 477, 47 A.2d 625.

3

Chase Securities Corporation v. Donaldson, 325 U.S. 304, 311, 65 S.Ct. 1137, 1141, 89 L.Ed. 1628; see Huddleston v. Dwyer, 322 U.S. 232, 237, 64 S.Ct. 1015, 1018, 88 L.Ed. 1246; American Federation of Labor v. Watson, 327 U.S. 582, 595, 66 S.Ct. 761, 767, 90 L.Ed. 873.

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See McKinney's Consolidated Laws of New York, c. 60, Tax Law, §§ 3, 350(7), 365, 369, 377. Fidelity & Columbia Trust Co. v. City of Louisville, 245 U.S. 54, 38 S.Ct. 40, 62 L.Ed. 145, L.R.A.1918C, 124. Compare Blackstone v. Miller, 188 U.S. 189, 23 S.Ct. 277, 47 L.Ed. 439; Curry v. McCanless, 307 U.S. 357, 363, 59 S.Ct. 900, 903, 83 L.Ed. 1339, 123 A.L.R. 162; Graves v. Elliott, 307 U.S. 383, 59 S.Ct. 913, 83 L.Ed. 1356; Graves v. Schmidlapp, 315 U.S. 657, 62 S.Ct. 870, 86 L.Ed. 1097, 141 A.L.R. 948; State Tax Commission of Utah v. Aldrich, 316 U.S. 174, 177, 62 S.Ct. 1008, 1010, 86 L.Ed. 1358, 139 A.L.R. 1436, with Farmers Loan & Trust Co. v. State of Minnesota, 280 U.S. 204, 50 S.Ct. 98, 74 L.Ed. 371, 65 A.L.R. 1000; First National Bank of Boston, Me., v. State of Maine, 284 U.S. 312, 52 S.Ct. 174, 76 L.Ed. 313, 77 A.L.R. 1401.

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Greenough v. Tax Assessors, of City of Newport, 71 R.I. 477, 488, 47 A.2d 625.

6

Compare Harrison v. Commissioner of Corporations and Taxation, 272 Mass. 422, 172 N.E. 605, 71 A.L.R. 677.

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Compare Mr. Justice Holmes' dissent, Baldwin v. Missouri, 281 U.. 586, 50 S.Ct. 436, 74 L.Ed. 1056, 72 A.L.R. 1303.

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State Tax Commission of Utah v. Aldrich, 316 U.S. 174, 181, 62 S.Ct. 1008, 1011, 86 L.Ed. 1358, 139 A.L.R. 1436.

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See Lawrence v. State Tax Commission, 286 U.S. 276, 279, 52 S.Ct. 556, 557, 76 L.Ed. 1102, 87 A.L.R. 374. Art. I, § 10, cl. 2 and 3, contain limitations on a state's power to levy import or export or tonnage duties.

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Union Refrigerator Transit Co. v. Commonwealth of Kentucky, 199 U.S. 194, 202, 26 S.Ct. 36, 37, 50 L.Ed. 150, 4 Ann.Cas. 493; Frick v. Commonwealth of Pennsylvania, 268 U.S. 473, 488, 45 S.Ct. 603, 604, 69 L.Ed. 1058, 42 A.L.R. 316; Cream of Wheat Co. v. Grand Forks County, N.D., 253 U.S. 325, 328, 329, 40 S.Ct. 558, 559, 64 L.Ed. 931; Curry v. McCanless, 307 U.S. 357, 363—365, and note 3, 59 S.Ct. 900, 903, 904, 83 L.Ed. 1339, 123 A.L.R. 162; see State of Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444, 61 S.Ct. 246, 249, 85 L.Ed. 267, 130 A.L.R. 1229; State Tax Commission v. Aldrich, 316 U.S. 174, 178, 62 S.Ct. 1008, 1010, 86 L.Ed. 1358, 139 A.L.R. 1436.

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Even where our cases have spoken of power over the person as though it alone might be a sufficient justification for ad valorem taxation of a resident on tangibles outside the taxing jurisdiction, the language was used in instances where there were other bases for the tax. State Tax on Foreign-Held Bonds, 15 Wall. 300, 319, 21 L.Ed. 179; Southern Pacific Co. v. Commonwealth of Kentucky, 222 U.S. 63, 76, 32 S.Ct. 13, 18, 56 L.Ed. 96; Pearson v. McGraw, 308 U.S. 313, 318, 60 S.Ct. 211, 213, 84 L.Ed. 293.

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See discussion in Northwest Airlines v. Minnesota, 322 U.S. 292, 64 S.Ct. 950, 88 L.Ed. 1283, 153 A.L.R. 245.

13

Kirtland v. Hotchkiss, 100 U.S. 491, 25 L.Ed. 558; Fidelity & Columbia Trust Co. v. City of Louisville, 245 U.S. 54, 38 S.Ct. 40, 62 L.Ed. 145, L.R.A.1918C, 124; compare Blodgett v. Silberman, 277 U.S. 1, 8—12, 48 S.Ct. 410, 72 L.Ed. 749; Maguire v. Trefry, 253 U.S. 12, 40 S.Ct. 417, 64 L.Ed. 739; Curry v. McCanless, 307 U.S. 357, 365—368, 59 S.Ct. 900, 904—906, 83 L.Ed. 1339, 123 A.L.R. 162; State of Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444, 61 S.Ct. 246, 249, 85 L.Ed. 267, 130 A.L.R. 1229; State Tax Commission of Utah v. Aldrich, 316 U.S. 174, 180, 62 S.Ct. 1008, 1011, 86 L.Ed. 1358, 139 A.L.R. 1436.

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Kirtland v. Hotchkiss, 100 U.S. 491, 25 L.Ed. 558. Compare People of State of New York ex rel. Cohn v. Graves, 300 U.S. 308, 57 S.Ct. 466, 81 L.Ed. 666, 108 A.L.R. 721.

15

See Curry v. McCanless, 307 U.S. 357, 365—368, 59 S.Ct. 900, 904—906, 83 L.Ed. 1339, 123 A.L.R. 162; Wheeling Steel Corp. v. Fox, 298 U.S. 193, 56 S.Ct. 773, 80 L.Ed. 1143. Certain evidences of indebtedness have been held sufficient in themselves to justify a state's imposition of a succession tax upon their nonresident owner. Wheeler v. Comptroller of State of New York, 233 U.S. 434, 34 S.Ct. 607, 58 L.Ed. 1030.

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See Hutchison v. Ross, 262 N.Y. 381, 393, 187 N.E. 65, 89 A.L.R. 1007.

17

Brown v. Fletcher, 235 U.S. 589, 598—600, 35 S.Ct. 154, 157, 59 L.Ed. 374; Blair v. Commissioner of Internal Revenue, 300 U.S. 5, 13, 57 S.Ct. 330, 333, 81 L.Ed. 465.

18

Scott, Trusts (1939) 487, 1469 et seq.; Williston, Contracts (1936) § 312; 1 Bogert, Trusts and Trustees (1935), § 146.

19

Duvall v. Craig, 2 Wheat. 45, 56, 4 L.Ed. 180; Taylor v. Davis, 110 U.S. 330, 335, 4 S.Ct. 147, 150, 28 L.Ed. 163: 'A trustee may be defined generally as a person in whom some estate interest or power in or affecting property is vested for the benefit of another. When an agent contracts in the name of his principal, the principal contracts, and is bound, but the agent is not. When a trustee contracts as such, unless he is bound, no one is bound, for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the trustee. As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by the contracts he makes as trustee, even when designating himself as such.'

Lazenby v. Codman, D.C., 28 F.Supp. 949; Prudential Ins. Co. of America v. Land Estates, D.C., 31 F.Supp. 845; Peyser v. American Security & Trust Co., 70 App.D.C. 349, 107 F.2d 625.

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Roger Williams Nat. Bank v. Groton Manufacturing Co., 16 R.I. 504, 17 A. 170.

21

Warren v. Goodloe's Ex'r, 230 Ky. 514, 520, 20 S.W.2d 278.

22

Scott, Trusts, § 244 et seq. and § 268.

23

Scott, Trusts, § 267 et seq. See Ballentine v. Eaton, 297 Mass. 389, 8 N.E.2d 808; O'Brien v. Jackson, 167 N.Y. 31, 60 N.E. 238.

24

Bullard v. City of Cisco, 290 U.S. 179, 190, 54 S.Ct. 177, 181, 78 L.Ed. 254, 93 A.L.R. 141. See Memphis Street R. Co. v. Moore, 243 U.S. 299, 37 S.Ct. 273, 61 L.Ed. 733.

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The power of a state to tax the equitable interest of a beneficiary in such circumstances was not presented. Id., 280 U.S. at pages 92 and 95, 50 S.Ct. at pages 60 and 61, 74 L.Ed. 180, 67 A.L.R. 386,

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Goodsite v. Lane, 6 Cir., 139 F. 593, 2 Ann.Cas. 849, holds that a state property tax on a trustee's intangibles for the sole reason that he resides in the taxing state in invalid. It would seem this was so decided because of the Fourteenth Amendment. We do not think this case gives proper recognition to the state's power to tax the owner of the legal title to the res.

27

The state statute taxing property to trustee validly applies to the resident trustee: Welch v. City of Boston, 221 Mass. 155, 109 N.E. 174, Ann.Cas.1917D, 946; Harvard Trust Co. v. Commissioner of Corporations and Taxation, 284 Mass. 225, 20, 187 N.E . 596; Mackay v. San Francisco, 128 Cal. 678, 61 P. 382; Millsaps v. City of Jackson, 78 Miss. 537, 30 So. 756; McLellan v. City of Concord, 78 N.H. 89, 97 A. 552; State of Florida v. Beardsley, 77 Fla. 803, 82 So. 794.

The state tax statute is inapplicable to the resident trustee: In re Dorrance's Estate, 333 Pa. 162, 3 A.2d 682, 127 A.L.R. 366; Commonwealth v. Peebles, 134 Ky. 121, 135, 119 S.W. 774, 23 L.R.A.,N.S., 1130, 20 Ann.Cas. 724; People ex rel. City and County of Darrow v. Coleman, 119 N.Y. 137, 23 N.E. 488, 7 L.R.A. 407; Rnad v. Town of Pittsfield, 70 N.H. 530, 49 A. 88. Newsomb v. Paige, 224 Mass. 516, 113 N.E. 458, and Harrison v. Commissioner, 272 Mass. 422, 428, 429, 172 N.E. 605, 71 A.L.R. 677, declined taxation on the ground of comity and thus distinguished Welch v. City of Boston, supra.

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Scott, Trusts, §§ 88.1, 103; 1 Bogert, Trusts and Trustees, § 145.

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Scott, Trusts, § 194; Brennan v. Willson, 71 N.Y. 502; Fritz v. City Trust Co., 72 App.Div. 532, 76 N.Y.S 625, affirmed 173 N.Y. 622, 66 N.E. 1109; In re Campbell's Estate, 171 Misc. 750, 13 N.Y.S.2d 773.

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The state courts have reached varying conclusions under their statutes: See People ex rel. Beaman v. Feitner, 168 N.Y. 360, 61 N.E. 280; Mackay v. City and County of San Francisco, 128 Cal. 678, 61 P. 382; McLellan v. City of Concord, 78 N.H. 89, 97 A. 552; In re Dorrance's Estate, 333 Pa. 162, 3 A.2d 682, 127 A.L.R. 366; Newcomb v. Paige, 224 Mass. 516, 113 N.E. 458; Harrison v. Commissioner, 272 Mass. 422, 430, 431, 172 N.E. 605, 71 A.L.R. 677.

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But cf. Holmes, J., dissenting in Safe Deposit & Trust Co. of Baltimore, Md., v. Commonwealth of Virginia, 280 U.S. 83, 96, 50 S.Ct. 59, 62, 74 L.Ed. 180, 67 A.L.R. 386.

KeyCite Yellow Flag - Negative Treatment
Distinguished by Auerbach v. Assessment Appeals Bd. No. 2 for County of Los Angeles, Cal.App. 2 Dist., October 30, 2008

72 S.Ct. 309
Supreme Court of the United States

STANDARD OIL CO.
v.
PECK, Tax Commissioner, State of Ohio, et al.

No. 184.
|
Argued Jan. 3, 4, 1952.
|
Decided Feb. 4, 1952.

The Tax Commissioner of Ohio levied an ad valorem personal property tax on vessels belonging to the Standard Oil Company and used by it in transporting oil on the Ohio and Mississippi Rivers and the Oil Company appealed to the Board of Tax Appeals opposed by John W. Peck, Tax Commissioner, State of Ohio, and others. The portion of Board's decision sustaining such assessments was affirmed by the Supreme Court of Ohio, 155 Ohio St. 61, 98 N.E.2d 8, and the Standard Oil Company appealed. The Supreme Court, Mr. Justice Douglas, held that such vessels, which were almost continuously outside Ohio during taxable year and neither picked up nor discharged cargo in Ohio, were taxable by the several states in which they operated on an apportionment basis and were not subject to ad valorem tax on their full value in Ohio, though owned by corporation domiciled in Ohio and registered in Cincinnati, Ohio, as their home port.

Reversed.

Mr. Justice Minton and Mr. Justice Black dissented.

West Headnotes (3)

[1] **Commerce** Property employed in commerce, in general
Constitutional Law Property Taxes

Ad valorem taxes levied by various states on vessels moving in interstate operations along inland waterways must be fairly apportioned to the commerce carried on within the taxing state pursuant to the formula applicable to other interstate enterprises. U.S.C.A.Const. Amend. 14.

53 Cases that cite this headnote

[2] **Commerce** Property employed in commerce, in general
Constitutional Law Property Taxes
The rule permitting taxation of personal property used in interstate operations by two or more states on an apportionment basis precludes taxation of all of such property by the state of the domicile. U.S.C.A.Const. Amend. 14.

14 Cases that cite this headnote

[3] **Taxation** Express and other transportation companies
Where vessels used in transporting oil along Ohio and Mississippi Rivers, though owned by a corporation domiciled in Ohio and registered in Cincinnati, Ohio, as their home port, were almost continuously outside Ohio during taxable year, neither picked up nor discharged cargo in Ohio and stopped there only occasionally for fuel or repairs, such vessels, being taxable by the several states in which they operated on an apportionment basis, were not subject to ad valorem tax on their full value in Ohio. Gen.Code Ohio, §§ 5325, 5328; U.S.C.A.Const. Amend. 14.

26 Cases that cite this headnote

Attorneys and Law Firms

****309** Messrs. ***382** Isador Grossman, Rufus S. Day, Jr., Cleveland, Ohio, for appellant.

Mr. Isadore Topper, Columbus, Ohio, for appellees.

Opinion

Mr. Justice DOUGLAS delivered the opinion of the Court.

Appellant, an Ohio corporation, owns boats and barges which it employs for the transportation of oil along the ***383** Mississippi and Ohio Rivers. The vessels neither pick up oil nor discharge it in Ohio. The main terminals are in Tennessee, Indiana, Kentucky, and Louisiana. The maximum river mileage traversed by the boats and barges on any trip though waters bordering Ohio was 17 1/2 miles. These 17 1/2 miles were in the section of the Ohio River which had to be traversed to reach Bromley, Kentucky. While this stretch of water bordered Ohio, it was not necessarily within Ohio. The vessels were registered in Cincinnati, Ohio, but only stopped in Ohio for occasional fuel or repairs. These stops were made at Cincinnati; but none of them involved loading or unloading cargo.

The Tax Commissioner of Ohio, acting under ss 5325 and 5328 of the Ohio General Code, levied an ad valorem personal property tax on all of these vessels. The Board of Tax Appeals affirmed (with an exception not material here), and the Supreme Court of Ohio sustained the Board, 155 Ohio St. 61, 98 N.E.2d 8, over the objection that the tax violated the Due Process Clause of the Fourteenth Amendment. The ****310** case is here on appeal. 28 U.S.C. s 1257(2), 28 U.S.C.A. s 1257(2).

[1] Under the earlier view governing the taxability of vessels moving in the inland waters, City of St. Louis v. Wiggins Ferry Co., 11 Wall. 423, 20 L.Ed. 192; Ayer & Lord Tie Co. v. Kentucky, 202 U.S. 409, 26 S.Ct. 679, 50 L.Ed. 1082; cf. Old Dominion S.S. Co. v. Commonwealth of Virginia, 198 U.S. 299, 25 S.Ct. 686, 49 L.Ed. 1059, Ohio, the state of the domicile, would have a strong claim to the whole of the tax that has been levied. But the rationale of those cases was rejected in Ott v. Mississippi Barge Line Co., 336 U.S. 169, 69 S.Ct. 432, 93 L.Ed. 585, where we held that vessels moving in interstate operations along the inland waters were taxable by the same standards as those which Pullman's Palace Car Co. v. Commonwealth of Pennsylvania, 141 U.S. 18, 11 S.Ct. 876, 35 L.Ed. 613, first applied to railroad cars in interestate commerce. The formula approved was one which fairly apportioned the tax to the commerce carried on within the state. In that way we ***384** placed inland water transportation on the same constitutional footing as other interstate enterprises.

[2] [3] The Ott case involved a tax by Louisiana on vessels of a foreign corporation operating in Louisiana waters. Louisiana sought to tax only that portion of the value of the vessels represented by the ratio between the total number of miles in Louisiana and the total number of miles in the entire operation. The present case is sought to be distinguished on the ground that Ohio is the domiciliary state and therefore may tax the whole value even though the boats and barges operate outside Ohio. New York Central & H.R.R. Co. v. Miller, 202 U.S. 584, 26 S.Ct. 714, 50 L.Ed. 1155, sustained a tax by the domiciliary state on all the rolling stock of a railroad. But in that case it did not appear that 'any specific cars or any average of cars' was so continuously in another state as to be taxable there. 202 U.S. at page 597, 26 S.Ct. at page 717. Northwest Airlines, Inc. v. State of Minnesota, 322 U.S. 292, 64 S.Ct. 950, 88 L.Ed. 1283, allowed the domiciliary state to tax the entire fleet of airplanes operating interstate; but in that case, as in the Miller case, it was not shown that 'a defined part of the domiciliary corpus' had acquired a taxable situs elsewhere. 322 U.S. at page 295, 64 S.Ct. at page 952, 88 L.Ed. 1283. Those cases, though exceptional on their facts, illustrate the reach of the taxing power of the state of the domicile as contrasted to that of the other states. But they have no application here since most, if not all, of the barges and boats which Ohio has

taxed were almost continuously outside Ohio during the taxable year. No one vessel may have been continuously in another state during the taxable year. But we do know that most, if not all, of them were operating in other waters and therefore under Ott v. Mississippi Barge Line Co., supra, could be taxed by the several states on an apportionment basis. The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. See ***385** Union Refrigerator Transit Co v. Commonwealth of Kentucky, 199 U.S. 194, 26 S.Ct. 36, 50 L.Ed. 150. Otherwise there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations.

Reversed.

Mr. Justice BLACK dissents.

Mr. Justice MINTON, dissenting.

I assume for the purposes of this dissent that none of the vessels in question were within Ohio during the tax year, and that they were taxed to their full value by Ohio. The record shows that the vessels were all registered in Cincinnati, Ohio, as the home port, and that Ohio is the domicile of the owner. Ohio claims the right to tax these vessels because they have not acquired a tax situs elsewhere than their home port and domicile.

Seagoing vessels have always been taxable at the domicile of the owner. ****311** Southern Pacific Co. v. Commonwealth of Kentucky, 222 U.S. 63, 32 S.Ct. 13, 56 L.Ed. 96; Morgan v. Parham, 16 Wall. 471, 21 L.Ed. 302; Hays v. Pacific Mail S.S. Co., 17 How, 596, 15 L.Ed. 254. This same rule has been applied to vessels engaged in commerce between the different states. Transportation Co. v. Wheeling, 99 U.S. 273, 25 L.Ed. 412; City of St. Louis v. Wiggins Ferry Co., 11 Wall. 423, 20 L.Ed. 192. The only exception to the rule until today was that where vessels had acquired a situs for taxation in some other state, that other state might tax them. Old Dominion S.S. Co. v. Commonwealth of Virginia, 198 U.S. 299, 25 S.Ct. 686, 49 L.Ed. 1059. In Ayer & Lord Tie Co. v. Commonwealth of Kentucky, 202 U.S. 409, 421, 26 S.Ct. 679, 682, 50 L.Ed. 1082, this Court said:

'The general rule has long been settled as to vessels plying between the ports of different states, engaged in the coastwise trade, that the domicil of the owner is the situs of a vessel for the purpose of taxation, wholly irrespective of the place of enrollment, subject, however, to the exception that where a vessel ***386** engaged in interstate commerce has acquired an actual situs in a state other than the place of the domicil of the owner, it may there be taxed because within the jurisdiction of the taxing authority.'

In the case at hand, the vessels had not acquired a situs for taxation in any other state. They were at large in the Ohio and Mississippi Rivers, touching ports therein from time to time. There was no showing as to how much time any of the vessels spent in any state. Indeed, the time spent in any state by the vessels plying the Mississippi River could not be shown with any accuracy, as the states on each side own to the middle of the stream.[1] The navigation channel might be on either side of the center line or right on the center line. Who is to say what state the vessels were in?

The doctrine of apportionment applied in Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 69 S.Ct. 432, 93 L.Ed. 585, is not in point. In that case the domiciliary state had not sought to tax the vessels. The tax was approved in the Ott case only on the assurance of the Louisiana Attorney General that the taxing statute 'was intended to cover and actually covers here, an average portion of property permanently within the State—and by permanently is meant throughout the taxing year.' Id., 336 U.S. at 175, 69 S.Ct. at page 435. Without such assurance there would have been no basis for applying the apportionment rule. New York Central & H.R.R. Co. v. Miller, 202 U.S. 584, 26 S.Ct. 714, 50 L.Ed. 1155; Pullman's Palace Car Co. v. Commonwealth of Pennsylvania, 141 U.S. 18, 26, 11 S.Ct. 876, 879, 35 L.Ed. 613; Union Refrigerator Transit Co. v. Commonwealth of Kentucky, 199 U.S. 194, 206, 26 S.Ct. 36, 38, 50 L.Ed. 150.

The record in this case is silent as to whether any proportion of the vessels were in any one state for the whole ***387** of a taxable year. The record does show that no other state collected taxes on the vessels for the years in question or any other year. Until this case, it has not been the law that the state of the owner's domicile is prohibited from taxing under such circumstances.

Southern Pacific Co. v. Kentucky, supra, is a case in point. There the owner of the vessels was a Kentucky corporation which operated between various coastal ports. None of the vessels were ever near Kentucky, but Kentucky was allowed to tax them because it was the state of the owner's domicile. The vessels were in and out of other states' ports, just as the instant vessels were in and out of other states' ports; but the mere possibility that some other state might attempt to levy an apportioned tax on the vessels was not permitted to destory Kentucky's power to tax. The crucial fact was that the vessels were not shown to have acquired a tax situs elsewhere.

****312** As recently as 1944 this Court would seem to have added vitality to the doctrine which should govern this case. Minnesota had taxed an airline on the full value of its airplanes, including those used in interstate commerce. Mr. Justice Frankfurter, announcing the judgment of the Court upholding the tax, stated: 'The fact that Northwest paid personal property taxes for the year 1939 upon 'some proportion of its full value' of its airplane fleet in some other States does not abridge the power of taxation of Minnesota as the home State of the fleet in the circumstances of the present case. The taxability of any part of this fleet by any other State than Minnesota, in view of the taxability of the entire fleet by that State, is not now before us. It * * * is not shown here that a defined part of the domiciliary corpus has acquired a permanent location, i.e., a taxing situs, elsewhere.' Northwest Airlines v. State of Minnesota, 322 U.S. 292, 295, 64 S.Ct. 950, 952, 88 L.Ed. 1283. ***388** The fear of 'double taxation' was much more real in that case than in the instant case; yet the Minnesota tax was sustained because there was no showing that a taxing situs had been acquired elsewhere. The question of what some other state might od is no more before the Court in this case than it was in the Northwest case.

The majority today seeks to distinguish the earlier cases by magnifying the relevance of the continuous absence of the vessels from the domiciliary state. But the operative fact of the earlier cases was the absence or presence of another taxing situs. Where no other taxing situs was shown to exist, the state of the domicile was permitted to tax, irrespective of the amount of time the vessels were present in that state. Southern Pacific Co. v. Commonwealth of Kentucky, supra.

As it is admittedly not shown on this record that these vessels have acquired a tax situs elsewhere, Ohio should be permitted to tax them as the state of the owner's domicile. I would affirm.

All Citations

342 U.S. 382, 72 S.Ct. 309, 96 L.Ed. 427, 26 A.L.R.2d 1371, 1952 A.M.C. 442, 63 Ohio Law Abs. 559, 47 O.O. 81

Footnotes

1 Douglas, Boundaries, Areas, Geographic Centers, and Altitudes of the United States and the Several States, 2d Ed. (U.S. Dept. of Interior, Geological Survey Bull. 817).

KeyCite Yellow Flag - Negative Treatment
Distinguished by City of Valdez v. Polar Tankers, Inc., Alaska, April 25, 2008

82 S.Ct. 1297
Supreme Court of the United States

CENTRAL RAILROAD COMPANY OF PENNSYLVANIA, Appellant,
v.
COMMONWEALTH OF PENNSYLVANIA.

No. 400.
|
Argued March 20, 1962.
|
Decided June 25, 1962.

Proceeding on Pennsylvania railroad company's petition for resettlement of capital stock tax. The Court of Common Pleas of Dauphin County sustained the action of the board of finance and review in refusing the petition, and the company appealed. The Pennsylvania Supreme Court, 403 Pa. 419, 169 A.2d 878, modified and affirmed the judgment, and the company appealed. The Supreme Court, Mr. Justice Harlan, held that cars which were owned by Pennsylvania railroad corporation were subject to Pennsylvania property tax at full value, although considerable number of cars spent substantial portion of tax year on lines of other railroads outside state, where it was not shown that cars traveled on regular routes through particular nondomiciliary states, or on irregular missions in particular nondomiciliary states, but that some cars were not subject to the tax.

Judgment vacated and case remanded.

Mr. Justice Douglas, Mr. Chief Justice Warren, and Mr. Justice Stewart dissented in part.

West Headnotes (17)

[1] **Taxation** Nature and taxation otherwise of property represented

The Pennsylvania Capital Stock Tax is equivalent of property tax. 72 P.S.Pa. §§ 1871, 1901.

1 Cases that cite this headnote

[2] **Taxation** Capital and Stock

Property employed by corporation in its operations in another state, and permanently located there, is not subject to Pennsylvania Capital Stock Tax. 72 P.S.Pa. §§ 1871, 1901.

1 Cases that cite this headnote

[3] **Federal Courts** Validity of state constitution or statutes

Supreme Court has jurisdiction of appeal from decision of the Pennsylvania Supreme Court upholding, over federal constitutional objections, application of Pennsylvania Capital Stock Tax to freight cars which were owned by Pennsylvania railroad and which spent substantial portion of tax year on lines of other railroads located outside the state. 28 U.S.C.A. § 1257(2); 72 P.S.Pa. §§ 1871, 1901; U.S.C.A. Const. art. 1, § 8, cl. 3; Amend. 14.

2 Cases that cite this headnote

[4] **Taxation** Railroads

A railroad or other taxpayer owning rolling stock cannot avoid imposition of its domicile's property tax on full value of assets merely by proving that some determinable fraction of its property was absent from state for part of tax year. U.S.C.A.Const. art. 1, § 8, cl. 3; Amend. 14.

4 Cases that cite this headnote

[5] **Taxation** Situs of Property

The state of domicile retains jurisdiction to tax tangible personal property which has not acquired actual situs elsewhere. U.S.C.A.Const. art. 1, § 8, cl. 3; Amend. 14.

4 Cases that cite this headnote

[6] **Commerce** Taxation of Property

It is only multiple taxation of interstate operation that casts forbidden burden upon interstate commerce, and state does not offend by subjecting its own corporations, although they be engaged in interstate transport, to nondiscriminatory property taxes. U.S.C.A.Const. art. 1, § 8, cl. 3; Amend. 14.

5 Cases that cite this headnote

[7] **Commerce** Taxation of Property

Forbidden multiple taxation of interstate operations is possible only if there exists some jurisdiction, in addition to taxpayer's domicile, which may constitutionally impose an ad valorem tax. U.S.C.A.Const. art. 1, § 8, cl. 3; Amend. 14.

25 Cases that cite this headnote

[8] **Constitutional Law** Property Taxes

Due process clause does not confine domiciliary state's taxing power to such proportion of value of property being taxed as is equal to fraction of tax year which property spends within state's borders. U.S.C.A.Const. Amend. 14.

8 Cases that cite this headnote

[9] **Taxation** Burden of proof

Taxpayer who contends that some portion of its total assets are beyond reach of taxing power of its domicile has burden to prove that same property may be similarly taxed in another jurisdiction. U.S.C.A.Const. art. 1, § 8, cl. 3; Amend. 14.

11 Cases that cite this headnote

[10] **Constitutional Law** Property Taxes

Taxation Railroads

Railroad cars which belonged to Pennsylvania railroad company and which were habitually run on fixed routes and regular schedules over lines of parent railroad in New Jersey would be subject to New Jersey's imposition of apportioned ad valorem tax on fleet of cars, and could not constitutionally be included in computation of Pennsylvania Capital Stock Tax. 72 P.S.Pa. §§ 1871, 1901; U.S.C.A.Const. art. 1, § 8, cl. 3; Amend. 14.

7 Cases that cite this headnote

[11] **Taxation** Property taxed in other jurisdiction

Domiciliary state is precluded from imposing ad valorem tax on any property to extent that property could be taxed by another state, not merely on such property as in fact is subjected to tax elsewhere. U.S.C.A.Const. art. 1, § 8, cl. 3; Amend. 14.

5 Cases that cite this headnote

[12] **Taxation** Railroads

States through which taxpayer's railroad cars travel along fixed and regular routes may impose property tax measured by some air apportioning formula. U.S.C.A.Const. art. 1, § 8, cl. 3; Amend. 14.

3 Cases that cite this headnote

[13] **Taxation** Railroads

Railroad cars which are shown to have traveled through other states along fixed and regular routes, so as to be subject to other states' property taxes are not constitutionally subject to domiciliary ad valorem tax at full property value, even if record is silent with respect to length of time spent in each non-domiciliary state. U.S.C.A.Const. art. 1, § 8, cl. 3; Amend. 14.

9 Cases that cite this headnote

[14] **Taxation** Railroads

Rolling stock may acquire nondomiciliary tax situs even if it does not follow prescribed routes and schedules in course through nondomiciliary state, as when it is habitually employed within a nondomiciliary state, albeit on irregular routes. U.S.C.A.Const. art. 1, § 8, cl. 3; Amend. 14.

12 Cases that cite this headnote

[15] **Taxation** Persons and property subject to taxation

Showing that determinable number of Pennsylvania railroad company's cars were employed outside Pennsylvania during tax year does not suffice to exclude Pennsylvania from taxing such cars at full value. U.S.C.A.Const. art. 1, § 8, cl. 3; Amend. 14.

2 Cases that cite this headnote

[16] **Taxation** Railroads

Cars which were owned by Pennsylvania railroad corporation were subject to Pennsylvania property tax at full value, although considerable number of cars spent substantial portion of tax year on lines of other railroads outside state, where it was not shown that cars traveled on regular routes through particular nondomiciliary states, or habitually traveled on irregular missions in particular nondomiciliary states. U.S.C.A.Const. art. 1, § 8, cl. 3; Amend. 14; 72 P.S.Pa. §§ 1871, 1901.

18 Cases that cite this headnote

[17] **Constitutional Law** Property Taxes

Taxation Corporations and corporate stock and property

For purposes of imposing Pennsylvania Capital Stock Tax, Pennsylvania differentiation between railroads whose tracks lay only within its borders, and those whose tracks were located both within and without state, did not deny equal protection to corporation with tracks entirely within state. 72 P.S.Pa. §§ 1871, 1901; U.S.C.A.Const. Amend. 14.

Cases that cite this headnote

Attorneys and Law Firms

****1299** ***608** Roy J. Keefer, Harrisburg, Pa., for appellant.

George W. Keitel, Harrisburg, Pa., for appellee.

Opinion

Mr. Justice HARLAN delivered the opinion of the Court.

[1] [2] [3] In this case we must decide whether the Commonwealth of Pennsylvania may, consistently with the Commerce Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, impose an annual property tax on the total value of freight cars owned by the appellant, a Pennsylvania corporation, despite the fact that a considerable number of such cars spend a substantial portion of the tax year on the lines of other railroads located outside the State. The Supreme Court of Pennsylvania upheld the application of the State's Capital Stock Tax, Purdon's Pa.Stat.Ann., 1949, Tit. 72, ss 1871, ****1300** 1901, to the full value of all appellant's freight

cars.[1] ***609** 403 Pa. 419, 169 A.2d 878. We postponed consideration of the question of jurisdiction to the hearing on the merits, Central R. Co. of Pa. v. State of Pa., 368 U.S. 912, 82 S.Ct. 195, 7 L.Ed.2d 129, and now find that the appeal is appropriately before us under 28 U.S.C. s 1257(2), 28 U.S.C.A. s 1257(2). E.g., Standard Oil Co. v. Peck, 342 U.S. 382, 72 S.Ct. 309, 96 L.Ed. 427.

We take the facts pertinent to decision from a stipulation submitted by the parties to the trial court. The appellant is a Pennsylvania corporation authorized to operate a railroad only within the State. It has not been licensed to do business elsewhere. The company's track runs from the anthracite coal region in Pennsylvania to the Pennsylvania-New Jersey border, at Easton, where it connects with the lines of the Central Railroad Company of New Jersey (hereinafter CNJ), a New Jersey corporation which owns all the outstanding shares of appellant's stock.

In 1951, the year for which the tax was assessed, the appellant owned 3,074 freight cars which were put to use in ordinary transport operations in three ways: (1) by the appellant on its own tracks; (2) by CNJ on that company's tracks in New Jersey; (3) by other unaffiliated railroads on their own lines in various parts of the country. CNJ's use of appellant's cars was pursuant to operating agreements under which CNJ was obliged to pay a daily rental equal to the then-effective rate prescribed by the Association of American Railroads. In order to facilitate interstate transportation by the interchange of equipment among carriers, as prescribed by 49 U.S.C. s 1, pars. (4), (10), (12), 49 U.S.C.A. s 1, pars. (4, 10, 12), the members of the Association, ***610** including the appellant, had entered into a separate 'Car Service and Per Diem Agreement' under which each subscriber was authorized to use on its own lines the available freight cars of other subscribers at the established per diem rental. Consequently, during 1951 many of the appellant's freight cars were also used by other railroads on lines outside Pennsylvania.

Appellant contended in the state courts, as it does here, that in computing its Pennsylvania capital stock tax, which is measured by the value of such property as is not exempt from taxation (note 1, supra), it was constitutionally entitled to deduct from the value of its taxable assets a proportional share reflecting the time spent by its freight cars outside Pennsylvania. In support of this claim appellant offered a statistical summary of the use of its freight cars during 1951, seeking to prove that a daily average of more than 1,659 of its 3,074 cars were located on the lines of railroads ****1301** (including CNJ) which owned no track in Pennsylvania.[2]

It also claimed that a daily average of approximately 1,056 other cars had been used by railroads having lines both within and without Pennsylvania. As to such cars, appellant sought to allocate to Pennsylvania only such portions of their value as the combined ratio of road miles of each user-railroad's tracks within Pennsylvania bore to its total road mileage throughout the United States. [3]

***611** These claims were disallowed by the Pennsylvania Board of Finance and Revenue, by the Court of Common Pleas of Dauphin County, and by the Supreme Court of Pennsylvania. [4] The state courts relied primarily on this Court's decision in New York Central & H.R.R. Co. v. Miller, 202 U.S. 584, 26 S.Ct. 714, 50 L.Ed. 1155, which upheld the constitutionality of a domiciliary State's ad valorem property tax levied upon the full value of a railroad's rolling stock, albeit 'some considerable proportion of the (railroad's) * * * cars always (was) absent from the state.' Id., at 595, 26 S.Ct. at 716.

I.

[4] **[5]** Since Miller this Court has decided numerous cases touching on the intricate problems of accommodating, under the Due Process and Commerce Clauses, the taxing powers of domiciliary and other States with respect to the instrumentalities of interstate commerce. [5] None of these decisions has weakened the pivotal holding in Miller—that a railroad or other taxpayer owning rolling stock cannot avoid the imposition of its domicile's property tax on the full value of its assets merely by proving that some determinable fraction of its property was absent from the State for part of the tax year. This Court has consistently held that the State of domicile retains jurisdiction ***612** to tax tangible personal property which has 'not acquired an actual situs elsewhere.' Johnson Oil Refining Co. v. Oklahoma, 290 U.S. 158, 161, 54 S.Ct. 152, 153.

[6] **[7]** This is because a State casts no forbidden burden upon interstate commerce by subjecting its own corporations, though they be engaged in interstate transport, to nondiscriminatory property taxes. It is only 'multiple taxation of interstate operations,' Standard Oil Co. v. Peck, 342 U.S. 382, 385, 72 S.Ct. 309, 310, that offends the Commerce Clause. And obviously multiple taxation is possible only if there exists some jurisdiction, in addition to the domicile of ****1302** the taxpayer, which may constitutionally impose an ad valorem tax.

[8] Nor does the Due Process Clause confine the domiciliary State's taxing power to such proportion of the value of the property being taxed as is equal to the fraction of the tax year which the property spends within the State's borders. Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 26 S.Ct. 36, 50 L.Ed. 150, held only that the Due Process Clause prohibited ad valorem taxation by the owner's domicile of tangible personal property permanently located in some other State. Northwest Airlines, Inc., v. Minnesota, 322 U.S. 292, 64 S.Ct. 950, reaffirmed the principle established by earlier cases that tangible property for which no tax situs has been established elsewhere may be taxed to its full value by the owner's domicile. See New York Central R. Co. v. Miller, supra; Southern Pacific Co. v. Kentucky, 222 U.S. 63, 69, 32 S.Ct. 13, 15; Johnson Oil Refining Co. v. Oklahoma, supra. If such property has had insufficient contact with States other than the owner's domicile to render any one of these jurisdictions a 'tax situs,' it is surely appropriate to presume that the domicile is the only State affording the 'opportunities, benefits, or protection' which due process demands as a prerequisite for taxation. See Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 174, 69 S.Ct. 432, 434.

***613** **[9]** Accordingly, the burden is on the taxpayer who contends that some portion of its total assets are beyond the reach of the taxing power of its domicile to prove that the same property may be similarly taxed in another jurisdiction. Cf. Dixie Ohio Express Co. v. State Revenue Comm'n, 306 U.S. 72, 59 S.Ct. 435, 83 L.Ed. 495.

The controlling question here is, therefore, the same as it was in Standard Oil Co. v. Peck, 342 U.S. 382, 72 S.Ct. 309, where the decision whether a state property tax might constitutionally be imposed on the full value of a domiciliary's moving assets turned on whether "a defined part of the domiciliary corpus"—there consisting of boats and barges traveling along inland waters—'could be taxed by the several states on an apportionment basis.' 342 U.S. at 384, 72 S.Ct. at 310.

Since the burden of proving an exemption is on the taxpayer who claims it, we must consider whether the stipulated facts show that some determinable portion of the value of the appellant's freight cars had acquired a tax situs in a jurisdiction other than Pennsylvania.

II.

[10] With respect to the freight cars that had been used on the lines of CNJ during the taxable year, the stipulation establishes that they 'were run on fixed routes and regular schedules * * * over the lines of CNJ * * * in New Jersey.' Their habitual employment within the jurisdiction in this manner would assuredly support New Jersey's imposition of an apportioned ad valorem tax on the value of the appellant's fleet of freight cars. Marye v. Baltimore & Ohio R. Co., 127 U.S. 117, 123—124, 8 S.Ct. 1037, 1039, 32 L.Ed. 94; Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 23, 11 S.Ct. 876, 878, 35 L.Ed. 613; Union Refrigerator Transit Co. v. Lynch, 177 U.S. 149, 20 S.Ct. 631, 44 L.Ed. 708; Johnson Oil Refining Co. v. Oklahoma, 290 U.S. 158, 162—163, 54 S.Ct. 152, 154; cf. ***614** Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 69 S.Ct. 432; Braniff Airways, Inc. v. Nebraska Board of Equalization, 347 U.S. 590, 601, 74 S.Ct. 757, 764, 98 L.Ed. 967. Consequently, the daily average of freight cars located on the CNJ lines in the 1951 tax year, 158 in number, could not constitutionally be included in the computation of this Pennsylvania tax. In this respect, the Pennsylvania Supreme Court's decision (which is difficult to reconcile with its holding as to the similarly situated locomotives, note 4, supra) cannot be accepted.

****1303** III.

We conclude, however, that on the record before us Pennsylvania was constitutionally permitted to tax, at full value, the remainder of appellant's fleet of freight cars, including those used by other railroads under the Car Service and Per Diem Agreement of the Association of American Railroads. These were, in the language of the stipulation, 'regularly, habitually and/or continuously employed' in this manner, but they did not run 'on fixed routes and regular schedules' as did the cars used by CNJ.

[11] **[12]** **[13]** Since the domiciliary State is precluded from imposing an ad valorem tax on any property to the extent that it could be taxed by another State, not merely on such property as is subjected to tax elsewhere, the validity of Pennsylvania's tax must be determined by considering whether the facts in the record disclose a possible tax situs in some other jurisdiction. Had the record shown that appellant's cars traveled through other States along fixed and regular routes, even if it were silent with respect to the length of time spent in each nondomiciliary State, it would doubtless follow that the State through which the regular traffic flowed could impose a property tax measured by some fair apportioning formula. Cf. Braniff Airways, Inc., v. Nebraska Board of Equalization, 347 U.S. 590, 74 S.Ct. 757. And this would render unconstitutional any domiciliary ad valorem tax at full value on property that could thus be ***615** taxes elsewhere. Standard Oil Co. v. Peck, supra, 342 U.S. at 384, 72 S.Ct. at 310. [6]

[14] Alternatively a nondomiciliary tax situs may be acquired even if the rolling stock does not follow prescribed routes and schedules in its course through the nondomiciliary State. In American Refrigerator Transit Co. v. Hall, 174 U.S. 70, 19 S.Ct. 599, 43 L.Ed. 899, this Court sustained the constitutionality of a Colorado property tax on a stipulated average number of railroad cars that had been located within the territorial limits of Colorado during the tax year, although it was agreed by the parties that the cars 'never were run in said state in fixed numbers nor at regular times, nor as a regular part of particular trains.' Id., at 72, 19 S.Ct. at 600. Habitual employment within the State of a substantial number of cars, albeit on irregular routes, may constitute sufficient contact to establish a tax situs permitting taxation of the average number of cars so engaged.

On the record before us, however, we find no evidence, except as to the CNJ cars, of either regular routes through particular nondomiciliary States or habitual presence, though on irregular missions, in particular nondomiciliary States. It is not disputed that many of the railroads listed as owning no track within Pennsylvania do have lines in more than one State, but there is no way of knowing which, if any, of these States may have acquired taxing jurisdiction over some of appellant's freight cars. And ***616** even with respect to railroads whose lines do not extent beyond the borders of a single State, it cannot be determined whether their use of appellant's cars was habitual or merely sporadic.[7] It ****1304** must be obvious that the fraction of a railroad's lines located within Pennsylvania is wholly unilluminating as to the consistency with which that railroad used appellant's cars in some other State.

[15] **[16]** In short, except as to freight cars traveling on the lines of the CNJ, this record shows only that a determinable number of appellant's cars were employed outside the Commonwealth of Pennsylvania during the relevant tax year. But as this leaves at large the possibility of their having a nondomiciliary tax situs elsewhere, that showing does not suffice under our cases to exclude Pennsylvania from taxing such cars to their full value. Neither Union Refrigerator Transit Co. v. Kentucky, supra, nor Standard Oil Co. v. Peck, supra, is properly read to the contrary. In the former, the case was remanded for further proceedings 'not inconsistent' with the Court's opinion that the cars in question, 'so far as they were (permanently) located and employed in other states,' were not subject to the taxing power of the domiciliary State. 199 U.S. at 211, 26 S.Ct. at 41. In the latter, the existence of a tax situs in one or more nondomiciliary States sufficiently appeared from the record. Note 6, supra. To accept the proposition that a mere general showing of continuous use of movable property outside the domiciliary State is sufficient to exclude the taxing power of ***617** that State with respect to it, would surely result in an unsound rule; in instances where it was ultimately found that a tax situs existed in no other State such property would escape this kind of taxation entirely.

As we have shown there is nothing to the contrary in Standard Oil Co. v. Peck. Note 6, supra. And neither the Braniff nor Ott case points to a different conclusion. In Braniff the airplanes held subject to nondomiciliary taxation were shown by the record to have flown on fixed and regular routes. 347 U.S. at 600—601, 74 S.Ct. at 763, 764. In Ott the Court was careful to point out that 'the statute 'was intended to cover and actually covers here, an average portion of property permanently within the State—and by permanently is meant throughout the taxing year.'' 336 U.S. at 175, 69 S.Ct. at 435. (Emphasis added.) In the case before us it is impossible to tell, except as to cars of the lines of the CNJ, what the average number of cars was annually in any given State.

IV.

[17] Finally, we think that the appellant's equal protection argument is insubstantial and that it was correctly rejected by the Pennsylvania Supreme Court. For purposes of this tax, Pennsylvania could reasonably differentiate between railroads having tracks which lay only within its borders and those whose tracks were located both within and without the State. The various considerations that justify such a classification from a federal constitutional standpoint need hardly be elaborated. It is sufficient to note that the State might reasonably have concluded that the probability of a nondomiciliary apportioned ad valorem tax on a railroad's total assets is greater if the railroad maintains tracks in another State than if it does not. Or it might have determined that the imposition of franchise or other taxes by nondomiciliary States in which the railroad did business compelled some ***618** mitigation of the domiciliary's property tax in order to prevent an oppressive tax burden. In either event, the possible basis for the taxing measure's classification would be reasonable and could not be held to violate the Equal Protection Clause. Cf. ****1305** Allied Stores of Ohio, Inc., v. Bowers, 358 U.S. 522, 526—528, 79 S.Ct. 437, 440, 3 L.Ed.2d 480; Stebbins v. Riley, 268 U.S. 137, 142, 45 S.Ct. 424, 426, 69 L.Ed. 884; Kidd v. Alabama, 188 U.S. 730, 23 S.Ct. 401, 47 L.Ed. 669.

Accordingly, we conclude that with respect to all cars other than those employed by CNJ on its lines in New Jersey the appellant has failed to sustain its burden of proving that a tax situs had been acquired elsewhere. The exemption was properly disallowed in this regard.

The judgment of the Supreme Court of Pennsylvania is vacated and the case is remanded for further proceedings not inconsistent with this opinion. It is so ordered. Judgment of Supreme Court of Pennsylvania vacated and case remanded.

Mr. Justice FRANKFURTER took no part in the decision of this case.

Mr. Justice WHITE took no part in the consideration or decision of this case.

Mr. Justice BLACK, concurring.

In holding that one State's property tax may be invalidated in part because excessive under the Commerce Clause upon the showing of a risk that some other State could impose a tax on part of the value of the same property, the Court is following principles announced in prior decisions of this Court from which I dissented.[1] While my views expressed in those cases remain unchanged, ***619** the necessity of this Court's deciding cases requires me to make decisions under the constitutional doctrine there declared so long as the Court remains committed to it.[2] Where a party seeks to invoke that doctrine, as here, I wholly agree with the Court that the burden of showing that there is a risk of multiple taxation should rest upon the party challenging the constitutionality of a state tax. I also agree with the Court that the railroad in this case his failed to show a risk of multiple taxation with reference to any cars other than the average number that are in New Jersey on any given day. It is for the foregoing reasons that I concur in the Court's judgment and its opinion insofar as it rests on the Commerce Clause.

Since I think partial invalidation of the tax as to the average number of cars in New Jersey on any given day in the taxable year is fully supported by the Commerce Clause as this Court has interpreted it. I would have been content not to discuss the due process question at all. But since the Court does rest in part on due process, I find it necessary to express my doubts about the use of the Due Process Clause to strike down state tax laws. The modern use of due process to invalidate state taxes rests on two doctrines: (1) that a State is without 'jurisdiction to tax' property beyond its boundaries, and (2) that multiple taxation of the same property by different States is prohibited. Nothing in the language or the history of the Fourteenth Amendment, however, indicates any intention to establish either of these two doctrines concerning the power of States to tax. In fact neither of these doctrines originated in the Due Process Clause at all, but were first declared by this Court long before the Fourteenth Amendment with its Due Process Clause was ***620** adopted in 1868.[3] ****1306** And in the first case striking down a state tax for lack of jurisdiction to tax after the passage of that Amendment neither the Amendment nor its Due Process Clause nor any other constitutional provision was even mentioned; the Court simply struck down the state tax saying that to sustain it would be 'giving effect to the acts of the legislature of Pennsylvania upon property and interests lying beyond her jurisdiction.'[4] These cases and others that followed for many years after the adoption of the Amendment rested either on the Commerce Clause or on no constitutional provision at all.[5] In fact not a single state tax was struck down by this Court as a violation of the Due Process Clause until 1903[6]—35 years after the adoption of the Amendment—and then wholly without any historical or other reasons to show why the cryptic words of the Due Process Clause justified the invalidation of otherwise lawful state taxes. Nor did the Court reveal its reasons for giving due process this meaning in the next case.[7] Finally, in the third case applying the Due Process Clause to strike down a state tax, the Court's complete lack of explanation led Mr. Justice Holmes to say:
'It seems to me that the result reached by the court probably is a desirable one, but I hardly understand ***621** how it can be deduced from the 14th Amendment; and as the Chief Justice feels the same difficulty, I think it proper to say that my doubt has not been removed.'[8]

****1307** The Court has ever since used the Due Process Clause to strike down state laws by finding in it substantially the same protection for interstate commerce as it has found in the Commerce Clause.[9] But there is no reference to commerce in the Fourteenth Amendment and the Court has still never adequately explained just what the basis for ***622** its constitutional doctrine is. Because of this I have long entertained many of the same doubts that Mr. Justice Holmes expressed as to the use of this flexible and expansive interpretation of due process to invalidate state tax laws, [10] but since the Court's holding here adequately rests on the presently prevailing interpretation of the Commerce Clause, I do not find this to be an appropriate occasion to suggest reconsideration of the applicability of the Due Process Clause to state tax laws.

Mr. Justice DOUGLAS, with whom THE CHIEF JUSTICE and Mr. Justice STEWART join, dissenting in part.

The stipulations of fact in this case show that an average of 158 freight cars (of the value of $525,765.71) run on fixed routes and regular schedules over railroad lines outside of Pennsylvania. The Court properly holds that they are beyond the constitutional reach of Pennsylvania.

The stipulations of fact also show that an average of 2189.30 freight cars (of the value of $7,282,773) run regularly, habitually, and continuously on the lines of other railroads outside of Pennsylvania, though not on fixed schedules. The Pennsylvania tax on these cars is sustained on the authority of New York Central & H.R.R. Co. v. Miller, 202 U.S. 584, 26 S.Ct. 714, 50 L.Ed. 1155; and if that case is still intact the Court is correct in denying the exemption claimed.

With all deference we cannot, however, allow Pennsylvania to lay this tax and adhere to our recent decisions. In Ott v. Mississippi Barge Line, 336 U.S. 169, 69 S.Ct. 432, 93 L.Ed. 585, we allowed Louisiana and the City of New Orleans to levy ad valorem taxes on barges of foreign corporations even though the barges were not permanently in those jurisdictions nor operated there on fixed routes and regular schedules. The assessments sustained were 'based on the ratio ***623** between the total number of miles of appellees' lines in Louisiana and the total number of miles of the entire line.' Id., at 171, 69 S.Ct. at 433. We adopted for barge lines the rule applicable to railroads, saying that we saw 'no practical difference so far as either the Due Process Clause or the Commerce Clause is concerned whether it is vessels or railroad cars that are moving in interstate commerce.' Id., at 174, 69 S.Ct. at 434. We went on to say: 'The problem under the Commerce Clause is to determine 'what portion of an interstate organism may appropriately be attributed to each of the various states in which it functions.' Nashville, C. & St. L.R. Co. v. Browning, 310 U.S. 362, 365, 60 S.Ct. 968, 970, 84 L.Ed. 1254. So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. See Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444, 61 S.Ct. 246, 249, 85 L.Ed. 267. Those requirements are satisfied if the tax ****1308** is fairly apportioned to the commerce carried on within the State.' Ibid.

We applied the decision in Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 11 S.Ct. 876, 35 L.Ed. 613, to barges, even though the Pullman's Car case, as noted in the Miller case (202 U.S. at 597, 26 S.Ct. at 717), sustained a tax on capital stock where the 'same cars were continuously receiving the protection' of the nondomiciliary taxing State. Nonetheless, in the Ott decision we allowed the tax by the nondomiciliary State to be levied on 'an average portion of property permanently within the State.' 336 U.S. at 175, 69 S.Ct. at 435.

In Standard Oil Co. v. Peck, 342 U.S. 382, 72 S.Ct. 309, 96 L.Ed. 427, we completed the redefinition of the holding in the Miller decision which was implicit in what we wrote in Ott. In the Peck case the domiciliary State was held to have no power to tax barges, except on a formula 'which fairly apportioned the tax to the commerce carried on within the state' (***624** id., at 383, 72 S.Ct. at 310), as a result of which 'inland water transportation' was placed 'on the same constitutional footing as other interstate enterprises.' Id., at 384, 72 S.Ct. at 310. We distinguished the Miller case by saying that there 'it did not appear that 'any specific cars or any average of cars' was so continuously in another state as to be taxable there.' Id., at 384, 72 S.Ct. at 310. And we went on to say:
'No one vessel may have been continuously in another state during the taxable year. But we do know that most, if not all, of them were operating in other waters and therefore under Ott v. Mississippi Barge Line Co., supra, could be taxed by the several states on an apportionment basis. The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile. See Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 26 S.Ct. 36, 50 L.Ed. 150. Otherwise there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations.' Id., at 384—385, 72 S.Ct. at 310.

In Braniff Airways, Inc., v. Nebraska State Board, 347 U.S. 590, 74 S.Ct. 757, 98 L.Ed. 967, we allowed a nondomiciliary State to levy an apportioned ad valorem tax on aircraft making 18 stops per day in that State. We said, 'We think such regular contact is sufficient to establish Nebraska's power to tax even though the same aircraft do not land every day and even though none of the aircraft is continuously within the state.' Id., at 601, 74 S.Ct. at 764.

As a result of the Ott, Peck and Braniff cases the average of 2189.30 freight cars that run regularly, habitually, and continuously on lines of other railroads outside Pennsylvania could be taxed by other States, even though no State can identify the precise cars within its borders and even though the complement of cars is constantly ***625** changing. Since that average of freight cars is regularly, habitually, and continuously outside Pennsylvania, those cars are taxable elsewhere and thus beyond Pennsylvania's reach. The fact that we do not know the average annual number of cars in any given State does not help Pennsylvania's case. Whatever the average in any one State, the total outside Pennsylvania and taxable elsewhere is known and definite. Since that is true, we sanction double taxation when we sustain this tax. We would not allow it in the case of any other interstate business; and, as I read the Constitution, no exception is made that puts the railroad business at a disadvantage.

All Citations

370 U.S. 607, 82 S.Ct. 1297, 8 L.Ed.2d 720

Footnotes

1 The tax imposed by the state statute is denominated a 'capital stock tax,' but it has been construed by the Pennsylvania courts as being the equivalent of a property tax. Pennsylvania v. Standard Oil Co., 101 Pa. 119, 145; Pennsylvania v. Union Shipbuilding Co., 271 Pa. 403, 114 A. 257. Property employed by a corporation in its operations in another State and permanently located there is not subject to this tax. Pennsylvania v. American Dredging Co., 122 Pa. 386, 15 A. 443, 1 L.R.A. 237. The value of the capital stock subjected to the tax is determined by multiplying the total value of the capital stock, as measured by the worth of all the corporation's real and personal property, by the ratio that the value of such nonexempt property within Pennsylvania (including that temporarily outside the State) bears to the value of the corporation's property everywhere. Purdon's Pa.Stat.Ann., 1949, Tit. 72, s 1896; Pennsylvania v. Delaware, L. & W.R. Co., 145 Pa. 96, 22 A. 157. With reference to this precise taxing measure, this Court has said in the past that it, in practical effect, amounts to 'a tax upon the specific property which gives the added value to the capital stock.' Delaware, L. & W.R. Co. v. Pennsylvania, 198 U.S. 341, 357, 25 S.Ct. 669, 674, 49 L.Ed. 1077.

2 If appellant's entire fleet of cars (3,074) is multiplied by the number of days in the year 1951 (365), the total number of 'car days' comes to 1,122,010. Appellant's schedules show that 605,678 'car days' were spent on railroads which owned no track in Pennsylvania. If this latter number is divided by 365, the quotient (1,659) represents the average number of cars located on such railroads on any one day during 1951.

3 For example, appellant computes 91,899 'car days' as having been spent on the lines of the New York Central Railroad. Since 7.36% of that railroad's track mileage is within Pennsylvania, appellant allocates 6,764 'car days,' a proportional share, to Pennsylvania.

4 The Supreme Court of Pennsylvania did find, however, that certain diesel locomotives which had been leased to CNJ by the appellant and which traveled along fixed routes and schedules had acquired a tax situs in New Jersey and could not be taxed at their full value by Pennsylvania. The State has not sought review of this part of that decision.

5 E.g., Southern Pac. Co. v. Kentucky, 222 U.S. 63, 32 S.Ct. 13, 56 L.Ed. 96; Johnson Oil Refining Co. v. Oklahoma, 290 U.S. 158, 54 S.Ct. 152, 78 L.Ed. 233; Northwest Airlines, Inc., v. Minnesota, 322 U.S. 292, 64 S.Ct. 950, 88 L.Ed. 1283; Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 69 S.Ct. 432, 93 L.Ed. 585; Standard Oil Co. v. Peck, 342 U.S. 382, 72 S.Ct. 309, 96 L.Ed. 427; Braniff Airways, Inc., v. Nebraska State Board of Equalization, 347 U.S. 590, 74 S.Ct. 757, 98 L.Ed. 967. See generally Developments, 75 Harv.L.Rev. 953, 979—987.

6 The record in Standard Oil Co. v. Peck discloses that the boats and barges which Ohio sought to tax had been traveling along three regular routes on the Mississippi and Ohio Rivers: from Memphis, Tennessee, to Mt. Vernon, Indiana; from Memphis, Tennessee, to Bromley, Kentucky; and from Baton Rouge or Gibson's Landing, Louisiana, to Bromley, Kentucky. The States in which the vessels landed, as well as those through which they regularly traveled, could undoubtedly have traced these regular trips and levied appropriately apportioned ad valorem taxes.

7 The fact that revenues for the use of one or more of appellant's cars were accounted for by a subscriber to the 'Car Service and Per Diem Agreement' does not necessarily indicate that such cars were ever used on the lines of that subscriber. For under the Agreement subscribers were authorized to permit the use of another railroad's cars by nonsubscribers, though they themselves remained liable to the owner railroad for the per diem rentals in respect of their nonsubscriber use.

1 See, e.g., Gwin, White & Prince, Inc., v. Henneford, 305 U.S. 434, 442, 59 S.Ct. 325, 329, 83 L.Ed. 272; J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 316, 58 S.Ct. 913, 918, 82 L.Ed. 1365. See also Northwest Airlines v. Minnesota, 322 U.S. 292, 301, 64 S.Ct. 950, 955, 88 L.Ed. 1283 (concurring opinion).

2 Cf. Morgan v. Virginia, 328 U.S. 373, 386, 66 S.Ct. 1050, 1058, 90 L.Ed. 1317 (concurring opinion).

3 Hays v. Pacific Mail Steamship Co., 17 How. 596, 15 L.Ed. 254 (1854). See also The Apollon, 9 Wheat. 362, 370, 6 L.Ed. 111 (1824); Braniff Airways, Inc. v. Nebraska State Board of Equalization, 347 U.S. 590, 599 note 18, 74 S.Ct. 757, 762, 98 L.Ed. 967.

4 Northern Central Railroad Co. v. Jackson, 7 Wall. 262, 268, 19 L.Ed. 88 (1869).

5 See, e.g., City of St. Louis v. Wiggins Ferry Co., 11 Wall. 423, 20 L.Ed. 192 (1871); State Tax on Foreign-Held Bonds, 15 Wall. 300, 21 L.Ed. 179 (1873); Morgan v. Parham, 16 Wall. 471, 21 L.Ed. 302 (1873); Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196, 5 S.Ct. 826, 29 L.Ed. 158 (1885). See also Tappan v. Merchants' National Bank, 19 Wall. 490, 22 L.Ed. 189 (1873); Coe v. Town of Errol, 116 U.S. 517, 6 S.Ct. 475, 29 L.Ed. 715 (1886); Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 11 S.Ct. 876, 35 L.Ed. 613 (1891).

6 Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U.S. 385, 23 S.Ct. 463, 47 L.Ed. 513.

7 Delaware, Lackawanna & Western R. Co. v. Pennsylvania, 198 U.S. 341, 25 S.Ct. 669, 49 L.Ed. 1077 (1905).

8 Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 211, 26 S.Ct. 36, 41, 50 L.Ed. 150 (1905). Professor Beale has said of this decision that, '(t)he dissent seemed sound as directed against the opinion that the state had no jurisdiction. Nevertheless, Judge Holmes was equally sound in saying that the result was a desirable one. It would be a rash constitutional lawyer who would argue today that an undesirable result was nevertheless constitutional.' 1 Beale, Conflict of Laws, 522. The use of the Due Process Clause as a method of striking down state tax laws remained a source of concern to Mr. Justice Holmes throughout the remainder of his service on the Court and produced quite a number of dissents. See, e.g., Safe Deposit & Trust Co. of Baltimore v. Virginia, 280 U.S. 83, 96, 50 S.Ct. 59, 62, 74 L.Ed. 180 (1929); Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204, 216, 50 S.Ct. 98, 102, 74 L.Ed. 371 (1930) (overruling Blackstone v. Miller, 188 U.S. 189, 23 S.Ct. 277, 47 L.Ed. 439); Baldwin v. Missouri, 281 U.S. 586, 595, 50 S.Ct. 436, 439, 74 L.Ed. 1056 (1930). In the Baldwin case he stated:

'I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable.' 281 U.S. at 595, 50 S.Ct. at 439. See also Mr. Justice, later Chief Justice, Stone's dissent in First National Bank of Boston v. Maine, 284 U.S. 312, 331, 52 S.Ct. 174, 178, 76 L.Ed. 313, in which he was joined by Mr. Justice Holmes and Mr. Justice Brandeis and State Tax Comm'n of Utah v. Aldrich, 316 U.S. 174, 62 S.Ct. 1008, 86 L.Ed. 1358, where the Court overruled First National Bank for the reasons expressed by the dissent in that case.

9 See H. P. Hood & Sons, Inc., v. Du Mond, 336 U.S. 525, 562, 69 S.Ct. 657, 668, 93 L.Ed. 865 (dissenting opinion).

10 See, e.g., Treichler v. Wisconsin, 338 U.S. 251, 257, 70 S.Ct. 1, 4, 94 L.Ed. 37 (dissenting opinion); Thomas v. Virginia, 364 U.S. 443, 81 S.Ct. 229, 5 L.Ed.2d 192 (dissenting opinion).

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Seegmiller v. County of Nevada, Cal.App. 3 Dist., March 31, 1997

56 Cal.App.3d 745
Court of Appeal, Second District, Division 1, California.

ICE CAPADES, INC., a Delaware Corporation, Plaintiff and Appellant,
v.
COUNTY OF LOS ANGELES, a political subdivision of the State of California and City of Los Angeles, a Municipal Corporation of the State of California, Defendants and Respondents.

Civ. 45747.
|
March 30, 1976.
|
Hearing Denied May 26, 1976.

Corporate taxpayer brought suit to recover property taxes paid to county under protest. The Superior Court, Los Angeles County, Parks Stillwell, J., entered judgment determining that county had properly assessed property tax measured by the value of the property, and taxpayer appealed. The Court of Appeal, Thompson, J., held that evidence that property of corporate taxpayer was physically present in Atlantic City for several months each year and that substantial other property of taxpayer remained present there in a permanent headquarters was such as to establish that New Jersey had offorded opportunities, benefits, or protection to taxpayer of such substance as to fix its power to tax and, to extent that property acquired a tax situs in a state other than California, due process and commerce clauses precluded imposition of county tax upon property without apportionment.

Reversed with directions.

West Headnotes (17)

[1] **Commerce** Property Employed in Commerce, in General
Constitutional Law Property Taxes
If taxpayer establishes that its movable personal property has acquired a tax situs in a state or states other than domicile of taxpayer, a property tax imposed by state of domicile satisfies due process and is not an unconstitutional burden on interstate

commerce if tax imposed by state of domicile is apportioned to allocate to domiciliary state only such property values as are not subject to potential of taxation elsewhere.

2 Cases that cite this headnote

[2] **Taxation** Burden of Proof

To prevail in its contention that its movable property physically absent from county on tax day was wholly or partially exempt from taxation by county, corporate taxpayer was required to establish that absent property had acquired a tax situs in some other state or in a foreign country.

Cases that cite this headnote

[3] **Taxation** Hearing

Issue of quantum of contact of property and its owner with a state necessary to establish a tax situs is essentially one of fact to be determined by principles distilled from an overabundance of authority.

1 Cases that cite this headnote

[4] **Taxation** Situs of Property

Length of time that property is in the nondomiciliary jurisdiction and the intent of its presence are significant to tax situs.

Cases that cite this headnote

[5] **Taxation** Property Temporarily Within Jurisdiction

Where personal property is moved from the domicile of its owner to another location with the intent that it remain there for a short period and then removed elsewhere or returned to the place of the owner's domicile, its tax situs is the owner's domicile, but where the property is moved from the owner's domicile to another state to remain there for an indefinite period of time or for a relatively long time, the place where the property is physically located is its tax situs.

Cases that cite this headnote

[6] **Taxation** Situs of Property

The nature of the property owner's contact with the jurisdiction other than his domicile is significant in the determination of whether his property temporarily present in the jurisdiction acquires a tax situs there.

2 Cases that cite this headnote

[7] **Taxation** Situs of Property

Nature of property owner's contact with jurisdiction other than his domicile is relevant to the opportunities, benefits, or protection than must be afforded by a state if it is to have the power to tax.

Cases that cite this headnote

[8] **Taxation** Property Temporarily Within Jurisdiction

If the nondomiciliary owner habitually employs movable property in the jurisdiction for all or a greater part of the tax year, the property acquires a tax situs although any one item of the property mix may be present for only a short predetermined period.

2 Cases that cite this headnote

[9] **Taxation** Property Temporarily Within Jurisdiction

Transitory contact that corporate taxpayer doing business in county had with cities in which its ice show played was not sufficient to establish a nondomiciliary tax status for its property in those cities.

Cases that cite this headnote

[10] **Commerce** Property Employed in Commerce, in General

Constitutional Law Property Taxes

That property of corporate taxpayer was physically present in Atlantic City for several months each year and that substantial other property of taxpayer remained present there in a permanent headquarters were such as to establish that New Jersey had afforded opportunities, benefits, or protection to taxpayer of such substance as to fix its power to tax and, to extent that property acquired a tax situs in a state other than California, due process and commerce clauses precluded imposition of county personal property tax upon property without apportionment. U.S.C.A. Const. Art. 1, § 8, cl. 3; U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[11] **Taxation** Property Temporarily Within Jurisdiction

Corporate taxpayer doing business in county failed to meet its burden of proof to establish a tax situs for its property in Minnesota so as to require an apportionment of personal property tax where, though property was in Minnesota some one to two months each year, its presence there was merely with expectation that it would move on.

Cases that cite this headnote

[12] **Taxation** Personal Property

Since property of corporate taxpayer absent from California had acquired a tax situs in New Jersey so as to be subject to taxation in that state, county was limited in its power of taxation of property to its value fairly apportioned to California.

1 Cases that cite this headnote

[13] **Taxation** Valuation of Property

Development of a formula of apportionment is primarily the task of the authority imposing the tax.

Cases that cite this headnote

[14] **Taxation** Place of Taxation

A property tax formula will be valid if it apportions to county as domicile of taxpayer, the proportion of the value of property that the period of the tax year during which the property is not present in the nondomiciliary bears to 365 days.

1 Cases that cite this headnote

[15] **Commerce** Taxation in General

No constitutional issue of burden upon interstate commerce is present where the problem is determination of the taxing power of individual counties within a state.

Cases that cite this headnote

[16] Taxation Property Temporarily Within Jurisdiction

The county in which the tax situs is located has the power to impose an unapportioned property tax although the property may be temporarily absent.

1 Cases that cite this headnote

[17] Taxation Valuation of Property

Property tax imposed by county was not required to be apportioned to remove from tax measure values fairly attributable to other counties in California in which property was "regularly" employed in absence of evidence that a county other than Los Angeles was the tax situs of property in years in question.

Cases that cite this headnote

Attorneys and Law Firms

***749 **719** Sherwood M. Sullivan, San Jose, Stephen H. Pettigrew, Los Altos, and Hopkins & Carley, San Jose, for plaintiff and appellant.

John H. Larson, County Counsel, Los Angeles, and Lawrence B. Launer, Deputy County Counsel, for defendants and respondents.

Opinion

THOMPSON, Associate Justice.

This is an appeal by a taxpayer from a judgment sustaining the imposition of an unapportioned county tax upon personal property of the taxpayer physically outside of the taxing county on the lien date because of its use in interstate commerce. We conclude that, to the extent the property had acquired a tax situs in a state other than California, the due process and commerce clauses of the United States Constitution preclude the imposition of tax without apportionment. We conclude, also, that the property here taxed had acquired a tax situs in New Jersey as well as in California. Accordingly, we reverse the judgment with directions that the trial court remand the matter to the Los Angeles Board of Tax Appeals for application of a formula of apportionment.

***750** *Facts*

Ice Capades is a Delaware corporation which, during the tax years here involved, had its principal place of business in Los Angeles County. It is in the business of staging ice shows throughout the United States and Canada. Ice Capades produces two separate shows, each presented by its own touring company. The companies are designated 'East Show' and 'West Show.' Each has its own stage equipment, props, and costumes. East Show plays the larger cities, while West Show performs in smaller communities. Ice Capades shows are designated editions with each edition being ****720** a new show. A new edition goes on tour annually. East Show performs the edition first. The same edition is performed the next year by West Show.

In the taxable years here involved, a new edition was planned at the Los Angeles headquarters of Ice Capades and its props, equipment, and costumes manufactured, purchased, and assembled during a period beginning in January and ending in May, June, or July. At the end of the period, the props, equipment, and costumes of East Show were shipped to a training headquarters maintained by Ice Capades in Atlantic City, New Jersey. From the time the property arrived until September, the cast of the East Show rehearsed the performance at the Atlantic City headquarters and prepared it for the tour. Commencing in September, the East Show went on tour through the United States, playing in ice arenas in the cities of the tour. The show was booked into the various arenas by contracts arranging the dates of performance at least one year in advance with some of the contracts being on a multiple year basis. Advance personnel arrived three to four weeks in advance of the show itself, and the show played periods of approximately one week in each city of its tour. The East Show generally played its final performance of the edition in Los Angeles. Its equipment, props, and costumes were then kept in the Los Angeles headquarters of Ice Capades where they were refurbished and made ready for use by the West Show in the next year.

The preceding year's props, equipment, and costumes of the East Show were shipped from Los Angeles to Duluth, Minnesota, the training headquarters of the West Show, arriving there in June or July. The performers of the West Show rehearsed it for thirty to sixty days at the Duluth headquarters. The show then commenced its tour, playing at ice arenas on dates contracted at least one year in advance, with some of the ***751** contracts being on a multiple year basis. Advance personnel arrived in each city of the tour approximately four weeks in advance of the show itself, and the show played for approximately one week in each city. The West Show generally concluded its tour in Honolulu, Hawaii, in the spring of the year and its equipment, props, and costumes were shipped to the Los Angeles headquarters or scrapped. The used costumes and most of the equipment and props remained stored in Los Angeles. With minor exceptions, they were not reused.

Ice Capades maintained all office equipment necessary for its operation in New Jersey at its Atlantic City training headquarters throughout the year. The equipment was used during the training and rehearsal period of the East Show and then stored. During the training and rehearsal period, all of Ice Capades production staff and the majority of its administrative staff, except for its accounting department, moved to Atlantic City.

The Duluth training headquarters of the West Show was maintained in leased facilities in the Duluth Arena Auditorium. During the period the West Show was not being rehearsed, unspecified tools, sewing equipment, and the like were stored at the auditorium.

For the tax years 1966 through 1969, the County of Los Angeles included within the measure of personal property tax payable by Ice Capades the value of all of its personal property, including that on tour outside of the county on the tax lien date. Ice Capades exhausted its administrative remedies, claiming that only property within the county on the lien date was subject to tax. Its administrative claim having been disallowed, Ice Capades paid, under protest, the taxes claimed by the county. It filed its complaint in the case at bench to recover the taxes paid.

The trial court found that, in the tax years 1966 through 1969, Ice Capades had no intention permanently to remove the personal property used by its East and West Shows from Los Angeles County, that the property did not acquire a tax situs elsewhere, and that it retained its tax ****721** situs in Los Angeles. Accordingly, it concluded that Los Angeles County had properly assessed personal property tax measured by the value of the property. This appeal followed.

***752** *Issues*

On this appeal, Ice Capades accepts the valuations of the property used by the county in assessing its tax. Ice Capades contends: (1) the county's assessment of an unapportioned tax measured by the value of the property violates the commerce and due process clauses of the United States Constitution; and (2) the tax was invalidity assessed to the extent that it was unapportioned to other counties in California.

Constitutional Issues

[1] '(T)he Due Process Clause (does not) confine the domiciliary State's taxing power to such proportion of the value of the property being taxed as is equal to the fraction of the tax year which the property spends within the State's borders.' (Central R. Co. v. Pennsylvania (1961) 370 U.S. 607, 612, 82 S.Ct. 1297, 1302; Note, Domiciliary Jurisdiction to Tax Movable Tangibles Employed Outside the State, 50 Cal.L.Rev. 890.) '(T)he State of domicile retains jurisdiction to tax tangible personal property which has 'not acquired an actual situs elsewhere.'' (Central R. Co. v. Pennsylvania, supra, at pp. 611—612, 82 S.Ct. at 1301.) 'If such property has had insufficient contact with States other than the owners's domicile to render any one of these jurisdictions a 'tax situs,' it is surely appropriate to presume that the domicile is the only State affording the 'opportunities, benefits, or protection' which due process demands as a prerequisite for taxation.' (Central R. Co. v. Pennsylvania, supra, at p. 612, 82 S.Ct. at p. 1302.) '(T)he burden is on the taxpayer who contends that some portion of its total assets are (sic) beyond the reach of the taxing power of its domicile to prove that the same property may be similarly taxed in another jurisdiction.' (Central R. Co. v. Pennsylvania, supra, at p. 613, 82 S.Ct. at 1302.) If the taxpayer establishes that its movable personal property has acquired a tax situs in a state or states other than the domicile of the taxpayer, a property tax imposed by the state of domicile satisfies the due process clause and is not an unconstitutional burden on interstate commerce only if the tax imposed by the state of domicile is apportioned to allocate to the domiciliary state only such property values as are not subject to the potential of taxation elsewhere. (Standard Oil Co. v. Peck (1951) 342 U.S. 382, 384—385, 72 S.Ct. 309, 96 L.Ed. 427; Comment, Federal Limitations on State State Taxation of Interstate Business, 75 Harv.L.Rev. 953, 983—984.)

***753** [2] Ice Capades, the taxpayer in the case at bench, concedes that it is a corporation domiciled in California. To prevail in its contention that its movable property physically absent from the County of Los Angeles on tax day is wholly or partially exempt from taxation by the county, it must thus establish that the absent property had acquired a tax situs in some other state or in a foreign country.

[3] The issue of the quantum of contact of property and its owner with a state necessary to establish a tax situs has been much litigated, not always to a consistent result. (See e.g., Annotation, Tangible Personalty—Situs for Taxation, 110 A.L.R. 707.)[1] The issue is essentially one of fact to be determined by principles distilled from an overabundance of authority.

[4] [5] Length of time that property is in the nondomiciliary jurisdiction and the intent of its presence are significant to tax situs. Where personal property is moved from the domicile of its owner to another location with the intent that it remain there for a short period and then be moved elsewhere or returned to the place of the ****722** owner's domicile, the owner's domicile and not the place where the property is temporarily situated is its tax situs. (Scandinavian Airlines System, Inc. v. County of Los Angeles (1961)56 Cal.2d 11, 14 Cal.Rptr. 25, 363 P.2d 25, cert. den. 368 U.S. 899, 82 S.Ct. 175, 7 L.Ed.2d 94, as characterized in Sea-Land Service Inc. v. County of Alameda (1974) 12 Cal.3d 772, 786, 117 Cal.Rptr. 448, 528 P.2d 56; Brock & Co. v. Board of Supervisors (1937) 8 Cal.2d 286, 65 P.2d 791; In re Moss Trucking Company, Inc. (1972) 16 N.C.App. 261, 191 S.E.2d 919; Dennis v. City of Waco (Tex.1969) 445 S.W.2d 56; Nacogdoches Independent School Dist. v. McKinney (Tex.1974) 504 S.W. 832; Wm. J. Kennedy & Sons, Inc. V. Town of Albany (Wis.1975) 66 Wis.2d 447, 225 N.W.2d

624.) Conversely, where the property is moved from the owner's domicile to another state to remain there for an indefinite period or for a relatively long time, then the place where the property is physically located is its tax situs. (Minnesota v. Blasius (1933) 290 U.S. 1, 54 S.Ct. 34, 78 L.Ed. 131; Griggsby Construction Co. v. Freeman (La.1902) 108 La. 435, 32 So. 399; Hamilton & Gleason Co. v. Emery County (1930) 75 Utah 406, 285 P. 1006.)

[6] [7] [8] The nature of the property owner's contact with the jurisdiction other than his domicile is similarly significant in the determination of ***754** whether his property temporarily present in the jurisdiction acquires a tax situs there. The nature of the contact is relevant to the 'opportunities, benefits, or protection' which must be afforded by a state if it is to have power to tax. (Ott v. Mississippi Barge Line (1948) 336 U.S. 169, 174, 69 S.Ct. 432, 93 L.Ed. 585; Central R. Co. v. Pennsylvania,supra, 370 U.S. 607, 612, 82 S.Ct. 1297, 8 L.Ed.2d 720.) Thus, if the nondomiciliary owner habitually employs movable property in the jurisdiction for all or a greater part of the tax year, the property acquires a tax situs although any one item of the property mix may be present for only a short predetermined period. (Pullman's Car Co. v. Pennsylvania (1890) 141 U.S. 18, 11 S.Ct. 876, 35 L.Ed. 613; American Refrigerator Transit Co. v. Hall (1898) 174 U.S. 70, 19 S.Ct. 599, 43 L.Ed. 899; Braniff Airways v. Nebraska Board (1953) 347 U.S. 590, 74 S.Ct. 757, 98 L.Ed. 967; Sea-Land Service, Inc. v. County of Alameda, supra, 12 Cal.3d 772, 778, 117 Cal.Rptr. 448, 528 P.2d 56; Comment, State Taxation of Moving Equipment Engaged in Interstate Commerce, 15 Ala.L.Rev. 186, 189.)

In the case at bench, we deal with three categories of quantum of contact by Ice Capades and its property with states other than California. There is the short-term transitory contact with the cities in which the shows appear. There is the substantial contact with New Jersey where the East Show training headquarters is maintained on a permanent basis, and there is the contact with Minnesota where the Duluth training headquarters of the West Show is maintained for a portion of each year.

[9] The transitory contact with the cities in which Ice Capades plays is not sufficient to establish a tax situs. The Ice Capades property is present in those cities for a short, predetermined period of time with the intent that at the end of the predetermined period it will move on. On virtually identical facts, a circus was held not to have acquired a tax situs in a jurisdiction in which it was presenting its performance on the tax lien date. (Robinson v. Longley (1883) 18 Nev. 71, 1 P. 377.)[2]

****723** [10] The presence in New Jersey is another matter. Property of the Ice Capades East Show is physically present in Atlantic City for months ***755** each year. When the East Show is on tour, substantial other property of the taxpayer remains present there in a permanent headquarters. Those facts establish as a matter of law that New Jersey has afforded 'opportunities, benefits, or protection' of such substance as to fix its power to tax, and hence is a tax situs of Ice Capades property. The tax imposed by a California agency must thus be apportioned to exclude from the California measure values attributable to the New Jersey situs. [3]

[11] The presence in Minnesota presents a situation of a third character. While the West Show property is in Duluth for from one to two months each year, it is present with the expectation that it will move on. There is only very sketchy evidence of the nature of the Duluth headquarters between training periods. On those facts, either the inference of a sufficient presence for tax situs in Minnesota or a contrary inference of lack of sufficient presence is a reasonable one. In that situation, we must accept the conclusion drawn by the trial court. Here that conclusion is that Ice Capades failed to meet its burden of proof to establish a tax situs in Duluth.

Apportionment

[12] **[13]** **[14]** Since the property of Ice Capades absent from California had acquired a tax situs in New Jersey so as to be subject to taxation in that state, the County of Los Angeles was limited in its power of taxation of the property to its value fairly apportioned to California. (Standard Oil Co. v. Peck, supra, 342 U.S. 382, 384—385, 72 S.Ct. 309, 96 L.Ed. 427.) The development of a formula of apportionment is primarily the task of the authority imposing the tax. We suggest for the guidance of the trial court and the county tax authorities on remand that a formula will be valid if it apportions to the County of Los Angeles, as the domicile of Ice Capades, the proportion of the value of the property which the period of the tax year during which the property was not present in New Jersey bears to 365 days. (See Johnson Oil Co. v. Oklahoma (1933) 290 U.S. 158, 54 S.Ct. 152, 78 L.Ed. 238.)

***756** *Apportionment within California*

Citing Zantop Air Transport, Inc. v. County of San Bernardino (1966) 246 Cal.App.2d 433, 59 Cal.Rptr. 813, Ice Capades contends that the property tax imposed by the County of Los Angeles must be apportioned to remove from the tax measure values fairly attributable to other counties in California in which the property is 'regularly' employed. The argument misses the mark.

[15] **[16]** **[17]** No constitutional issue of burden upon interstate commerce is present where the problem is determination of the taxing power of individual counties within a state. Zantop Air Transport requires, as a matter of state law, only that tax situs is a prerequisite to the power to impose a property tax. The county in which the tax situs is located has power to impose an unapportioned property tax although the property may be temporarily absent. (Church v. City of Los Angeles (1950) 96 Cal.App.2d 89, 91, 214 P.2d 550.) Here no county in California other than Los Angeles was the tax situs of the property in the years in question.

Disposition

The judgment (order denying peremptory writ of mandate) is reversed. The trial court is directed to issue a peremptory writ of mandate remanding the matter to the Los Angeles County Board of Tax Appeals ****724** with instructions to apply a formula apportioning taxpayer's taxable property so as to reflect the tax situs of that property in New Jersey for portions of each of the relevant tax years.

LILLIE, Acting P.J., and HANSON, J., concur.

All Citations

56 Cal.App.3d 745, 128 Cal.Rptr. 717

Footnotes

1 Much inconsistency in the cases is more apparent than real. It is often attributable to a particular taxpayer's not having sustained its burden of proof.

2 Focusing on the use of the phrase 'habitually present' in such cases as Sea-Land Service, Inc. v. County of Alameda, supra, 12 Cal.3d 772, 117 Cal.Rptr. 448, 528 P.2d 56, Ice Capades argues that its property is 'habitually employed' and hence acquires a tax situs in all cities where its show regularly plays from year to year. The phrase, however, is used in a different context as a basis for tax situs. 'Habitual employment' during the tax year of similar items of property requires that the aggregate of the property be considered in determining the contact with the jurisdiction. It is not, of itself, a basis of tax situs.

3 The county argues that the requirement of apportionment is limited to taxation of 'instrumentalities of commerce' such as railroad cars, trucks, and shipping. Compelling authority holds to the contrary. (International Paper Co. v. Massachusetts (1917) 246 U.S. 135, 38 S.Ct. 292, 62 L.Ed. 624.)

Complete Auto Transit, Inc. v. Brady
430 U.S. 274 (1977)

U.S. Supreme Court

No. 76-29

Argued January 19, 1977

Decided March 7, 1977

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APPEAL FROM THE SUPREME COURT OF MISSISSIPPI

Syllabus

A Mississippi tax on the privilege of doing business in the State *held* not to violate the Commerce Clause when it is applied to an interstate activity (here, the transportation by motor carrier in Mississippi to Mississippi dealers of cars manufactured outside the State) with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State. *Spector Motor Service v. O'Connor,* 340 U. S. 602, overruled. Pp. 430 U. S. 279-289.

330 So.2d 268, affirmed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Once again we are presented with

"'the perennial problem of the validity of a state tax for the privilege of carrying on, within a state, certain activities' related to a corporation's operation of an interstate business."

Colonial Pipeline Co. v. Traigle, 421 U. S. 100, 421 U. S. 101 (1975), quoting *Memphis Gas Co. v. Stone,* 335 U. S. 80, 335 U. S. 85 (1948). The issue in this case is whether Mississippi runs afoul of the Commerce Clause, U.S.Const., Art. I, § 8, cl. 3, when it applies the tax it imposes on "the privilege of . . . doing business" within the State to appellant's activity in interstate commerce. The Supreme Court of Mississippi unanimously sustained the tax against

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appellant's constitutional challenge. 330 So.2d 268 (1976). We noted probable jurisdiction in order to consider anew the applicable principles in this troublesome area. 429 U.S. 813 (1976).

I

The taxes in question are sales taxes assessed by the Mississippi State Tax Commission against the appellant, Complete Auto Transit, Inc., for the period from August 1, 1968, through July 31, 1972. The assessments were made pursuant to the following Mississippi statutes:

"There is hereby levied and assessed and shall be collected, privilege taxes for the privilege of engaging or continuing in business or doing business within this state to be determined by the application of rates against gross proceeds of sales or gross income or values, as the case may be, as provided in the following sections."

Miss.Code Ann., 1942, § 10105 (1972 Supp.), as amended. [Footnote 1]

"Upon every person operating a pipeline, railroad, airplane, bus, truck, or any other transportation business for the transportation of persons or property for compensation or hire between points within this State, there is hereby levied, assessed, and shall be collected, a tax equal to five per cent of the gross income of such business. . . ."

§ 10109(2), as amended. [Footnote 2]

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Any person liable for the tax is required to add it to the gross sales price and, "insofar as practicable," to collect it at the time the sales price is collected. § 10117, as amended. [Footnote 3]

Appellant is a Michigan corporation engaged in the business of transporting motor vehicles by motor carrier for General Motors Corporation. General Motors assembles outside Mississippi vehicles that are destined for dealers within the State. The vehicles are then shipped by rail to Jackson, Miss., where, usually within 48 hours, they are loaded onto appellant's trucks and transported by appellant to the Mississippi dealers. App. 478, 78-79, 86-87. Appellant is paid on a contract basis for the transportation from the railhead to the dealers. [Footnote 4] *Id.* at 50-51, 68.

By letter dated October 5, 1971, the Mississippi Tax Commission

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informed appellant that it was being assessed taxes and interest totaling $122,160.59 for the sales of transportation services during the three-year period from August 1, 1968, through July 31, 1971. [Footnote 5] Remittance within 10 days was requested. *Id.*

at 9-10. By similar letter dated December 28, 1972, the Commission advised appellant of an assessment of $42,990.89 for the period from August 1, 1971, through July 31, 1972. *Id.* at 11-12. Appellant paid the assessments under protest and, in April, 1973, pursuant to § 10121.1, as amended, of the 1942 Code (now § 27-657 of the 1972 Code), instituted the present refund action in the Chancery Court of the First Judicial District of Hinds County.

Appellant claimed that its transportation was but one part of an interstate movement, and that the taxes assessed and paid were unconstitutional as applied to operations in interstate commerce. App. 4, 7. The Chancery Court, in an unreported opinion, sustained the assessments. *Id.* at 99-102.

The Mississippi Supreme Court affirmed. It concluded:

"It will be noted that Taxpayer has a large operation in this State. It is dependent upon the State for police protection and other State services the same as other citizens. It should pay its fair share of taxes so long, but only so long, as the tax does not discriminate against interstate commerce, and there is no danger of interstate commerce being smothered by cumulative taxes of several states. There is no possibility of any other state duplicating the tax involved in this case."

330 So.2d at 272.

Appellant, in its complaint in Chancery Court, did not allege that its activity which Mississippi taxes does not have a

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sufficient nexus with the State; or that the tax discriminates against interstate commerce; or that the tax is unfairly apportioned; or that it is unrelated to services provided by the State. [Footnote 6] No such claims were made before the Mississippi Supreme Court, and although appellant argues here that a tax on "the privilege of engaging in interstate commerce" creates an unacceptable risk of discrimination and undue burdens, Brief for Appellant 20-27, it does not claim that discrimination or undue burdens exist in fact.

Appellant's attack is based solely on decisions of this Court holding that a tax on the "privilege" of engaging in an activity in the State may not be applied to an activity that is part of interstate commerce. *See, e.g., Spector Motor Service v. O'Connor,* 340 U. S. 602 (1951); *Freeman v. Hewit,* 329 U. S. 249 (1946). This rule looks only to the fact that the incidence of the tax is the "privilege of doing business"; it deems irrelevant any consideration of the practical effect of the tax. The rule reflects an underlying philosophy that interstate commerce should enjoy a sort of "free trade" immunity from state taxation. [Footnote 7]

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Appellee, in its turn, relies on decisions of this Court stating that

"[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden, even though it increases the cost of doing the business,"

Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 303 U. S. 254 (1938). These decisions [Footnote 8] have considered not the formal language of the tax statute, but rather its practical effect, and have sustained a tax against Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state.

Over the years, the Court has applied this practical analysis in approving many types of tax that avoided running afoul of the prohibition against taxing the "privilege of doing business," but, in each instance, it has refused to overrule the prohibition. Under the present state of the law, the *Spector* rule, as it has come to be known, has no relationship to economic realities. Rather, it stands only as a trap for the unwary draftsman.

II

The modern origin of the *Spector* rule may be found in *Freeman v. Hewit, supra.* [Footnote 9] At issue in *Freeman* was the application

of an Indiana tax upon "the receipt of the entire gross income" of residents and domiciliaries. 329 U.S. at 329 U. S. 250. Indiana sought to impose this tax on income generated when a trustee of an Indiana estate instructed his local stockbroker to sell certain securities. The broker arranged with correspondents in New York to sell the securities on the New York Stock Exchange. The securities were sold, and the New York brokers, after deducting expenses and commission, transmitted the proceeds to the Indiana broker, who, in turn, delivered them, less his commission, to the trustee. The Indiana Supreme Court sustained the tax, but this Court reversed.

Mr. Justice Frankfurter, speaking for five Members of the Court, announced a blanket prohibition against any state taxation imposed directly on an interstate transaction. He explicitly deemed unnecessary to the decision of the case any showing of discrimination against interstate commerce or error in apportionment of the tax. *Id.* at 329 U. S. 254, 329 U. S. 256-257. He recognized that a State could constitutionally tax local manufacture, impose license taxes on corporations doing business in the State, tax property within the State, and tax the privilege of residence in the State and measure the privilege by net income, including that derived from interstate commerce. *Id.* at 329 U. S. 255. Nevertheless, a direct tax on interstate sales, even if fairly apportioned and nondiscriminatory, was held to be unconstitutional *per se.*

Mr. Justice Rutledge, in a lengthy concurring opinion, argued that the tax should be judged by its economic effects, rather than by its formal phrasing. After reviewing the Court's prior decisions, he concluded:

"The fact is that 'direct incidence' of a state tax or regulation . . . has long since been discarded as being in itself sufficient to outlaw state legislation."

Id. at 329 U. S. 265-266. In his view, a state tax is unconstitutional

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only if the activity lacks the necessary connection with the taxing state to give "jurisdiction to tax," *id.* at 329 U. S. 271, or if the tax discriminates against interstate commerce, or if the activity is subject to multiple taxation. *Id.* at 329 U. S. 276-277. [Footnote 10]

The rule announced in *Freeman* was viewed in the commentary as a triumph of formalism over substance, providing little guidance even as to formal requirements. *See* P. Hartman, State Taxation of Interstate Commerce 200-204 (1953); Dunham, Gross Receipts Taxes on Interstate Transactions, 47 Colum.L.Rev. 211 (1947). Although the rule might have been utilized as the keystone of a movement toward absolute immunity of interstate commerce from state taxation, [Footnote 11] the Court consistently has indicated that "interstate commerce may be made to pay its way," and has moved toward a standard of permissibility of state taxation based upon its actual effect, rather than its legal terminology.

The narrowing of the rule to one of draftsmanship and phraseology began with another Mississippi case, *Memphis Gas Co. v. Stone,* 335 U. S. 80 (1948). Memphis Natural Gas Company owned and operated a pipeline running from Louisiana to Memphis. Approximately 135 miles of the line were in Mississippi. Mississippi imposed a "franchise or excise" tax measured by

"the value of the capital used, invested or employed in the exercise of any power, privilege or right enjoyed by [a corporation] within this state."

Miss.Code Ann., 1942, § 9313. The Mississippi Supreme Court upheld the tax, and this Court affirmed.

In an opinion for himself and two others, Mr. Justice Reed

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noted that the tax was not discriminatory, that there was no possibility of multiple taxation, that the amount of the tax was reasonable, and that the tax was properly apportioned to the investment in Mississippi. 335 U.S. at 335 U. S. 87-88. He then went on to consider whether the tax was "upon the privilege of doing interstate business within the state." *Id.* at 335 U. S. 88. He drew a distinction between a tax on "the privilege of doing interstate business" and a tax on "the privilege of exercising corporate functions within the State," and held that, while the former is unconstitutional, the latter is not barred by the Commerce Clause. *Id.* at 335 U. S. 88-93. He then approved the tax there at issue because

"there is no attempt to tax the privilege of doing an interstate business or to secure anything from the corporation by this statute except compensation for the protection of the enumerated local activities of 'maintaining, keeping in repair, and otherwise in manning the facilities.'"

Id. at 335 U. S. 93.

Mr. Justice Black concurred in the judgment without opinion. *Id.* at 335 U. S. 96. Mr. Justice Rutledge provided the fifth vote, stating in his concurrence:

"[I]t is enough for me to sustain the tax imposed in this case that it is one clearly within the state's power to lay insofar as any limitation of due process or 'jurisdiction to tax' in that sense is concerned; it is nondiscriminatory, that is, places no greater burden upon interstate commerce than the state places upon competing intrastate commerce of like character; is duly apportioned, that is, does not undertake to tax any interstate activities carried on outside the state's borders; and cannot be repeated by any other state."

Id. at 335 U. S. 96-97 (footnotes omitted).

Four Justices dissented, *id.* at 335 U. S. 99, on the grounds that it had not been shown that the State afforded any protection in

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return for the tax, [Footnote 12] and that, therefore, the tax must be viewed as one on the "privilege" of engaging in interstate commerce. The dissenters recognized that an identical effect could be achieved by an increase in the *ad valorem* property tax, *id.* at 335 U. S. 104, but would have held, notwithstanding, that a tax on the "privilege" is unconstitutional.

The prohibition against state taxation of the "privilege" of engaging in commerce that is interstate was reaffirmed in *Spector Motor Service v. O'Connor,* 340 U. S. 602 (1951), a case similar on its facts to the instant case. The taxpayer there was a Missouri corporation engaged exclusively in interstate trucking. Some of its shipments originated or terminated in Connecticut. Connecticut imposed on a corporation a "tax or excise upon its franchise for the privilege of carrying on or doing business within the state," measured by apportioned net income. *Id.* at 340 U. S. 603-604, n. 1. *Spector* brought suit in federal court to enjoin collection of the tax as applied to its activities. The District Court issued the injunction. The Second Circuit reversed. This Court, with three Justices in dissent, in turn reversed the Court of Appeals and held the tax unconstitutional as applied.

The Court recognized that,

"where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate

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and intrastate."

Id. at 340 U. S. 609-610 (footnote omitted). It held, nevertheless, that a tax on the "privilege" of doing business is unconstitutional if applied against what is exclusively interstate commerce. The dissenters argued, on the other hand, *id.* at 340 U. S. 610, that there is no constitutional difference between an "exclusively interstate" business and a "mixed" business, and that a fairly apportioned and nondiscriminatory tax on either type is not prohibited by the Commerce Clause.

The *Spector* rule was applied in *Railway Express Agency v. Virginia,* 347 U. S. 359 (1954) (*Railway Express I*), to declare unconstitutional a State's "annual license tax" levied on gross receipts for the "privilege of doing business in this State." The Court, by a 5-to-4 vote, held that the tax on gross receipts was a tax on the privilege of doing business, rather than a tax on property in the State, as Virginia contended.

Virginia thereupon revised the wording of its statute to impose a "franchise tax" on "intangible property" in the form of "going concern" value as measured by gross receipts. The tax was again asserted against the Agency, which, in Virginia, was engaged exclusively in interstate commerce. This Court's opinion, buttressed by two concurring opinions and one concurrence in the result, upheld the reworded statute as not violative of the *Spector* rule. *Railway Express Agency v. Virginia,* 358 U. S. 434 (1959) (*Railway Express II*). In upholding the statute, the Court's opinion recognized that the rule against taxing the "privilege" of doing interstate business had created a situation where "the use of magic words or labels" could "disable an otherwise constitutional levy." *Id.* at 358 U. S. 441.

There was no real economic difference between the statutes in *Railway Express I* and *Railway Express II.* The Court long since had recognized that interstate commerce may be made to pay its way. Yet, under the *Spector* rule, the economic realities in *Railway Express I* became irrelevant. The

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Spector rule had come to operate only as a rule of draftsmanship, and served only to distract the courts and parties from their inquiry into whether the challenged tax produced results forbidden by the Commerce Clause.

On the day it announced *Railway Express II,* the Court further confirmed that a State, with proper drafting, may tax exclusively interstate commerce so long as the tax does not create any effect forbidden by the Commerce Clause. In *Northwestern Cement Co. v. Minnesota,* 358 U. S. 450 (1959), the Court held that net income from the interstate operations of a foreign corporation may be subjected to state taxation, provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the tax. Limited in that way, the tax could be levied even though the income was generated exclusively by interstate sales. *Spector* was distinguished, briefly and in passing, as a case in which "the incidence" of the tax "was the privilege of doing business." 358 U.S. at 358 U. S. 464.

Thus, applying the rule of *Northwestern Cement* to the facts of *Spector,* it is clear that Connecticut could have taxed the apportioned net income derived from the exclusively interstate commerce. It could not, however, tax the "privilege" of doing business as measured by the apportioned net income. The reason for attaching constitutional significance to a semantic difference is difficult to discern.

The unsatisfactory operation of the *Spector* rule is well demonstrated by our recent case of *Colonial Pipeline Co. v. Traigle,* 421 U. S. 100 (1975). Colonial was a Delaware corporation with an interstate pipeline running through Louisiana for approximately 258 miles. It maintained a workforce and pumping stations in Louisiana to keep the pipeline flowing, but it did no intrastate business in that State. *Id.* at 421 U. S. 101-102. In 1962, Louisiana imposed on Colonial a franchise tax for "the privilege of carrying on or doing business" in the State. The Louisiana Court of Appeal invalidated the

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tax as violative of the rule of *Spector. Colonial Pipeline Co. v. Mouton,* 228 So.2d 718 (1969). The Supreme Court of Louisiana refused review. 255 La. 474, 231 So.2d 393 (1970). The Louisiana Legislature, perhaps recognizing that it had run afoul of a rule of words, rather than a rule of substance, then redrafted the statute to levy the tax, as an alternative incident, on the "qualification to carry on or do business in this state or the actual doing of business within this state in a corporate form." Again, the Court of Appeal held the tax unconstitutional as applied to the appellant. *Colonial Pipeline Co. v. Agerton,* 275 So.2d 834 (1973). But this time the Louisiana Supreme Court upheld the new tax. 289 So.2d 93 (1974)

By a 7-to-1 vote, this Court affirmed. No question had been raised as to the propriety of the apportionment of the tax, and no claim was made that the tax was discriminatory. 421 U.S. at 421 U. S. 101. The Court noted that the tax was imposed on that aspect of interstate commerce to which the State bore a special relation, and that the State bestowed powers, privileges, and benefits sufficient to support a tax on doing business in the corporate form in Louisiana. *Id.* at 421 U. S. 109. Accordingly, on the authority of *Memphis Gas,* the tax was held to be constitutional. The Court distinguished *Spector* on the familiar ground that it involved a tax on the privilege of carrying on interstate commerce, while the Louisiana Legislature, in contrast, had worded the statute at issue "narrowly to confine the impost to one related to appellant's activities within the State in the corporate form." 421 U.S. at 421 U. S. 113-114. [Footnote 13]

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While refraining from overruling *Spector,* the Court noted:

"[D]ecisions of this Court, particularly during recent decades, have sustained nondiscriminatory, properly apportioned state corporate taxes upon foreign corporations doing an exclusively interstate business when the tax is related to a corporation's local activities and the State has provided benefits and protections for those activities for which it is justified in asking a fair and reasonable return."

Id. at 421 U. S. 108. One commentator concluded:

"After reading *Colonial,* only the most sanguine taxpayer would conclude that the Court maintains a serious belief in the doctrine that the privilege of doing interstate business is immune from state taxation."

Hellerstein, State Taxation of Interstate Business and the Supreme Court, 1974 Term: *Standard Pressed Steel* and *Colonial Pipeline,* 62 Va.L.Rev. 149, 188 (1976). [Footnote 14]

III

In this case, of course, we are confronted with a situation like that presented in *Spector.* The tax is labeled a privilege tax "for the privilege of . . . doing business" in Mississippi, § 10105 of the State's 1942 Code, as amended, and the activity taxed is, or has been assumed to be, interstate commerce. We note again that no claim is made that the activity is not sufficiently connected to the State to justify a tax, or that the tax is not fairly related to benefits provided the taxpayer, or that the tax discriminates against interstate commerce, or that the tax is not fairly apportioned.

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The view of the Commerce Clause that gave rise to the rule of *Spector* perhaps was not without some substance. Nonetheless, the possibility of defending it in the abstract does not alter the fact that the Court has rejected the proposition that interstate commerce is immune from state taxation:

"It is a truism that the mere act of carrying on business in interstate commerce does not exempt a corporation from state taxation."

"It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business."

"*Western Live Stock v. Bureau of Revenue,* 303 U. S. 250, 303 U. S. 254 (1938)."

Colonial Pipeline Co. v. Traigle, 421 U.S. at 421 U. S. 108.

Not only has the philosophy underlying the rule been rejected, but the rule itself has been stripped of any practical significance. If Mississippi had called its tax one on "net income" or on the "going concern value" of appellant's business, the *Spector* rule could not invalidate it. There is no economic consequence that follows necessarily from the use of the particular words, "privilege of doing business," and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect. Simply put, the *Spector* rule does not address the problems with which the Commerce Clause is concerned. [Footnote 15] Accordingly, we now reject the rule of

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Spector Motor Service, Inc. v. O'Connor that a state tax on the "privilege of doing business" is *per se* unconstitutional when it is applied to interstate commerce, and that case is overruled.

There being no objection to Mississippi's tax on appellant except that it was imposed on nothing other than the "privilege of doing business" that is interstate, the judgment of the Supreme Court of Mississippi is affirmed.

It is so ordered.

[Footnote 1]

The statute is now § 27-65-13 of the State's 1972 Code.

[Footnote 2]

This statute is now § 27-65-19(2) of the 1972 Code. It was amended, effective August 1, 1972, to exclude the transportation of property. 1972 Miss.Laws, c. 506, § 2.

Section 10109, as codified in 1942, imposed a tax on gross income from all transportation, with gross income defined to exclude

"so much thereof as is derived from business conducted in commerce between this State and other States of the United States . . . which the State of Mississippi is prohibited from taxing under the Constitution of the United States of America."

In 1955, this exclusionary language was eliminated and the statute was amended to cover only transportation "between points within this state." 1955 Miss.Laws, c. 109, § 10. The amendment gave the statute essentially the form it possessed during the period relevant here.

It might be argued that the statute, as so amended, evinces an intent to reach only intrastate commerce, and that it should be so construed. Appellant, however, does not make that argument, and the Supreme Court of Mississippi clearly viewed that statute as applying to both intrastate commerce and interstate commerce.

We are advised by the appellee that the tax has been applied only to commercial transactions in which a distinct service is performed and payment made for transportation from one point within the State to another point within the State. Tr. of Oral Arg. 34-35, 38.

[Footnote 3]

This statute is now § 27-65-31 of the 1972 Code. Violation of the requirements of the section is a misdemeanor. *Ibid.*

[Footnote 4]

The parties understandably go to great pains to describe the details of the bills of lading, and the responsibility of various entities for the vehicles as they travel from the assembly plant to the dealers. Appellant seeks to demonstrate that the transportation it provides from the railhead to the dealers is part of a movement in interstate commerce. Appellee argues that appellant's transportation is intrastate business, but further argues that even if the activity is part of interstate commerce, the tax is not unconstitutional. Brief for Appellant 11-14; Brief for Appellee 12-24; Reply Brief for Appellant 14-16. The Mississippi courts, in upholding the tax, assumed that the transportation is in interstate commerce. For present purposes, we make the same assumption.

[Footnote 5]

Although appellant had been operating in Mississippi since 1960, App. 77, the state audit and assessment covered only the period beginning August 1, 1968. *Id.* at 37-38. No effort had been made to apply the tax to appellant for any period prior to that date.

[Footnote 6]

See Boston Stock Exchange v. State Tax Comm'n, 429 U. S. 318 (1977); *General Motors Corp. v. Washington,* 377 U. S. 436 (1964); *Illinois Cent. R. Co. v. Minnesota,* 309 U. S. 157 (1940); *Ingels v. Morf,* 300 U. S. 290 (1937). *See also Standard Steel Co. v. Washington Rev. Dept.,* 419 U. S. 560 (1975), and *Clark v. Paul Gray, Inc.,* 306 U. S. 583 (1939).

[Footnote 7]

The Court summarized the "free trade" view in *Freeman v. Hewit,* 329 U.S. at 329 U. S. 252.

"[T]he Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but, by its own force, created an area of trade free from interference by the States. In short, the Commerce Clause, even without implementing legislation by Congress, is a limitation upon the power of the States. . . . This limitation on State power . . . does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance."

[Footnote 8]

See, e.g., General Motors Corp. v. Washington, supra; Northwestern Cement Co. v. Minnesota, 358 U. S. 450 (1959); *Memphis Gas Co. v. Stone,* 335 U. S. 80 (1948); *Wisconsin v. J. C. Penney Co.,* 311 U. S. 435, 311 U. S. 444 (1940).

[Footnote 9]

Although we mention *Freeman* as the starting point, elements of the views expressed therein, and the positions that underlie that debate, were evident in prior opinions. *Compare 82 U. S.* 15 Wall. 284 (1873), *with Fargo v. Michigan,* 121 U. S. 230 (1887); and *compare Disanto v. Pennsylvania,* 273 U. S. 34 (1927), *and Cooney v. Mountain States Tel. Co.,* 294 U. S. 384 (1935), *with Western Live Stock v. Bureau of Revenue,* 303 U. S. 250 (1938). *See generally* P. Hartman, State Taxation of Interstate Commerce (1953); Barrett, State Taxation of Interstate Commerce -- "Direct Burdens," "Multiple Burdens," or What Have You?, 4 Vand.L.Rev. 496 (1951), and writings cited therein at 496 n. 1; Dunham, Gross Receipts Taxes on Interstate Transactions, 47 Colum.L.Rev. 211 (1947).

[Footnote 10]

Mr. Justice Rutledge agreed with the result the Court reached in *Freeman* because of his belief that the apportionment problem was best solved if States other than the market State were forbidden to impose unapportioned gross receipts taxes of the kind Indiana sought to exact.

[Footnote 11]

A consistent application of the doctrine of immunity for interstate commerce, of course, would have necessitated overruling the cases approved by the *Freeman* Court that upheld taxes whose burden, although indirect, fell on interstate commerce.

[Footnote 12]

In arriving at this conclusion, the dissent relied upon a construction of a stipulation entered into by the parties, 335 U.S. at 335 U. S. 100-101, and upon an independent review of the record. The plurality rejected the dissent's reading of the stipulation and noted, in addition, that the question presented in the petition for certiorari did not raise a claim that the State was providing no service for which it could ask recompense. *Id.* at 335 U. S. 83-84. The plurality then relied on the Supreme Court of Mississippi's holding that the State did provide protection that could properly be the subject of a tax.

[Footnote 13]

Five Members of the Court joined in the opinion distinguishing *Spector.* Two concurred in the judgment, but viewed *Spector* as indistinguishable, and would have overruled it. 421 U.S. at 421 U. S. 114-116. One also viewed *Spector* as indistinguishable, but felt that it was an established precedent until forthrightly overruled. *Id.* at 421 U. S. 116. Mr. Justice Douglas took no part.

[Footnote 14]

Less charitably put:

"In light of the expanding scope of the state taxing power over interstate commerce, *Spector* is an anachronism. . . . Continued adherence to *Spector,* especially after *Northwestern States Portland Cement,* cannot be justified."

Comment, Pipelines, Privileges and Labels: *Colonial Pipeline Co. v. Traigle,* 70 Nw.U.L.Rev. 835, 854 (1975).

[Footnote 15]

It might be argued that "privilege" taxes, by focusing on the doing of business, are easily tailored to single out interstate businesses and subject them to effects forbidden by the Commerce Clause, and that, therefore, "privilege" taxes should be subjected to a *per se* rule against their imposition on interstate business. Yet property taxes also may be tailored to differentiate between property used in transportation and other types of property, *see Railway Express II,* 358 U. S. 434 (1959); an income tax could use different rates for different types of business; and a tax on the "privilege of doing business in corporate form" could be made to change with the nature of the corporate activity involved. Any tailored tax of this sort creates an increased danger of error in apportionment, of discrimination against interstate commerce, and of a lack of relationship to the services provided by the State. *See Freeman v. Hewit,* 329 U.S. at 329 U. S. 265-266, n. 13 (concurring opinion). A tailored tax, however accomplished, must receive the careful scrutiny of the courts to determine whether it produces a forbidden effect on interstate commerce. We perceive no reason, however, why a tax on the "privilege of doing business" should be viewed as creating a qualitatively different danger so as to require a *per se* rule of unconstitutionality.

It might also be argued that adoption of a rule of absolute immunity for interstate commerce (a rule that would, of course, go beyond *Spector*) would relieve this Court of difficult judgments that on occasion will have to be made. We believe, however, that administrative convenience, in this instance, is insufficient justification for abandoning the principle that "interstate commerce may be made to pay its way."

KeyCite Red Flag - Severe Negative Treatment
Abrogation Recognized by Comptroller of Treasury of Maryland v. Wynne, U.S.Md., May 18, 2015

109 S.Ct. 582
Supreme Court of the United States

Jerome F. GOLDBERG and Robert McTigue, Appellants,
v.
Roger D. SWEET, Director, Illinois Department of Revenue, et al.
GTE SPRINT COMMUNICATIONS CORPORATION, Appellants,
v.
Roger D. SWEET, etc., et al.

Nos. 87–826, 87–1101.
|
Argued Oct. 12, 1988.
|
Decided Jan. 10, 1989.

Appeal was taken from decision of the Illinois Supreme Court, 117 Ill.2d 493, 111 Ill.Dec. 625, 512 N.E.2d 1262, finding that the Illinois Telecommunications Excise Tax Act did not violate the commerce clause. The Supreme Court, Justice Marshall, held that tax did not violate the commerce clause because it was fairly apportioned, did not discriminate against interstate commerce, and was fairly related to services which the state provided to taxpayers.

Affirmed.

Justices Stevens and O'Connor concurred in part, concurred in judgment, and filed opinions.

Justice Scalia concurred in judgment and filed opinion.

West Headnotes (8)

[1] **Commerce** Multiple Taxation;Apportionment

Whether state tax bearing on interstate commerce is fairly apportioned is determined by examining whether it is internally and externally consistent; to be internally consistent, tax must be structured so that if every state were to impose identical tax, no multiple taxation would result, while external consistency requires that state tax only that portion of revenues from interstate activity which reasonably reflects in-state component of activity. U.S.C.A. Const. Art. 1, § 8, cl. 3.

113 Cases that cite this headnote

[2] **Commerce** Means and Instrumentalities of Commerce
Telecommunications Validity

In context of commerce clause challenge, Illinois tax on interstate telecommunications was internally consistent; if every state taxed only those interstate telephone calls which were charged to in-state service address, only one state would tax each interstate telephone call. Ill.S.H.A. ch. 120, ¶¶ 2002, 2004; U.S.C.A. Const. Art. 1, § 8, cl. 3.

67 Cases that cite this headnote

[3] **Commerce** Particular Subjects and Taxes
Telecommunications Validity

Illinois tax on interstate telecommunications, which reached only those calls originated or terminated in Illinois and charged to Illinois service address, was fairly apportioned for purpose of commerce clause; tax had characteristics of sales tax in that it was assessed on individual consumer, collected by retailer, and accompanied retail purchase of interstate telephone calls, risk of multiple taxation was low, and actual multiple taxation was precluded by provision for credit upon proof that taxpayer had paid tax in another state on same telephone call which triggered Illinois tax. Ill.S.H.A. ch. 120, ¶¶ 2002, 2004; U.S.C.A. Const. Art. 1, § 8, cl. 3.

61 Cases that cite this headnote

[4] **Commerce** Means and Instrumentalities of Commerce

Only two states have nexus substantial enough to tax consumer's purchase of interstate telephone call—state which taxes origination or termination of interstate telephone call charged to service address within state, and state which taxes origination or termination of interstate telephone call billed or paid within state. U.S.C.A. Const. Art. 1, § 8, cl. 3.

14 Cases that cite this headnote

[5] **Commerce** Means and Instrumentalities of Commerce

Telecommunications Validity

Illinois tax on interstate telecommunications, which taxed only those calls originated or terminated in Illinois and charged to Illinois service address, did not discriminate in favor of intrastate commerce at expense of interstate commerce. Ill.S.H.A. ch. 120, ¶¶ 2001–2021; U.S.C.A. Const. Art. 1, § 8, cl. 3.

4 Cases that cite this headnote

[6] **Commerce** Means and Instrumentalities of Commerce

Telecommunications Validity

Illinois tax on interstate telecommunications was fairly related to presence and activities of taxpayer within Illinois. Ill.S.H.A. ch. 120, ¶¶ 2001–2021; U.S.C.A. Const. Art. 1, § 8, cl. 3.

11 Cases that cite this headnote

[7] **Commerce** Taxation in General

In determining whether state tax bearing on interstate commerce is fairly related to presence and activities of taxpayer within state, focus is on wide range of benefits provided to taxpayer, not just precise activity connected to interstate activity at issue. U.S.C.A. Const. Art. 1, § 8, cl. 3.

20 Cases that cite this headnote

[8] **Commerce** Particular Subjects and Taxes

Telecommunications Validity

Illinois tax on interstate telecommunications did not violate commerce clause; tax was fairly apportioned, did not discriminate against interstate commerce, and was fairly related to services which state provided to taxpayer. Ill.S.H.A. ch. 120, ¶¶ 2001–2021; U.S.C.A. Const. Art. 1, § 8, cl. 3.

31 Cases that cite this headnote

****584** *Syllabus*[*]

***252** In light of recent technological changes creating billions of possible electronic paths that an interstate telephone call can take from one point to another, which paths are often indirect, typically bear no relation to state boundaries, and are virtually impossible to trace and record, Illinois passed its Telecommunications Excise Tax Act (Tax Act), which, *inter alia,* imposes a 5% tax on the gross charges of interstate telecommunications originated or terminated in the State and charged to an Illinois service address, regardless of where a particular call is billed or paid; provides a credit to any taxpayer upon proof that another State has taxed the same call; and requires telecommunications retailers, like appellant GTE Sprint Communications Corporation (Sprint), to collect the tax from consumers. The Illinois trial court held that the tax violates the Commerce Clause of the Federal Constitution in a class action brought by appellant Illinois residents, who were subject to and paid the tax, against appellee Director of the State's Department of Revenue and various long-distance telephone carriers, including Sprint, which cross-claimed against the Director. However, the State Supreme Court reversed, ruling that the tax satisfies the four-pronged test set forth in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326, and its progeny, for determining compliance with the Commerce Clause. All parties concede in this Court that the tax satisfies the first prong of the *Complete Auto* test; *i.e.,* it is applied to an activity having a substantial nexus with Illinois.

Held: The Illinois tax does not violate the Commerce Clause, since it satisfies the final three prongs of the *Complete Auto* test. Pp. 587–592.

(a) The tax is fairly apportioned. It is internally consistent, since it is so structured that if every State were to impose an identical tax on only those interstate phone calls which are charged to an in-state service address, only one State would tax each such call and, accordingly, no multiple taxation would result. The tax is also externally consistent even though it is assessed on the gross charges of an interstate activity, since ***253** it is reasonably limited to the in-state business activity which triggers the taxable event in light of its practical or economic effects on interstate activity. Because it is assessed on the individual consumer, collected by the retailer, and accompanies the retail purchase of an interstate call, the tax's economic effect is like that of a sales tax, such that it reasonably reflects the way that consumers purchase interstate calls and can permissibly be based on gross charges even though the retail purchase, which triggers simultaneous activity in several States, is not a purely local event. Moreover, the risk of multiple taxation is low, since only two types of States—a State like Illinois which taxes interstate calls billed to an in-state address and a State which taxes calls billed or paid in state—have a substantial enough nexus to tax an interstate call. In any event, actual multiple taxation is precluded by the Tax Act's credit provision. Furthermore, an apportionment formula based on mileage or some other geographic division of interstate calls would produce insurmountable administrative and technical barriers, since such calls involve the intangible movement of electronic impulses through vast computerized networks. Pp. 588–591.

(b) The tax does not discriminate against interstate commerce by allocating a larger share of its burden to interstate calls, since that burden falls on in-state consumers rather than on out-of-state consumers, and since, unlike mileage on state highways, the exact path of thousands of electronic signals can neither be traced nor recorded. ****585** *American Trucking Assns., Inc. v. Scheiner,* 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226, distinguished. P. 591.

(c) The tax is fairly related to services which the State provides to the benefit of taxpayers. Such services are not limited to those provided to telecommunications equipment used during interstate calls, but also include the ability to subscribe to telephone service and to own or rent telephone equipment at an address within the State, as well as police and fire protection and other general services. P. 592.

117 Ill.2d 493, 111 Ill.Dec. 625, 512 N.E.2d 1262, (1987) affirmed.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and BRENNAN, WHITE, BLACKMUN, and KENNEDY, JJ., joined. STEVENS, J., *post,* p. 592, and O'CONNOR, J., *post,* p. 593, filed opinions concurring in part and concurring in the judgment. SCALIA, J., filed an opinion concurring in the judgment, *post,* p. 594.

Attorneys and Law Firms

Walter A. Smith, Jr., argued the cause for appellants. With him on the briefs for appellants Goldberg et al. were *John G. Roberts, Jr., John G. Jacobs,* and *William G. Clark,* ***254** *Jr. Laura DiGiantonio, Richard N. Wiley,* and *Robert L. Weinberg* filed briefs for appellant GTE Sprint Communications Corp.

Andrew L. Frey argued the cause for appellees. On the brief were *Neil F. Hartigan,* Attorney General of Illinois, *Robert J. Ruiz,* Solicitor General, *Terry F. Moritz,* Special Assistant Attorney General, and *Alan P. Solow.*†>>>>

† *William C. Lane* filed a brief for the National Taxpayers Union as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the National Conference of State Legislatures et al. by *Benna Ruth Solomon, Joyce Holmes Benjamin, James F. Flug,* and *Martin Lobel;* and for MCI Telecommunications Corp. by *Frederic S. Lane, William T. Barker,* and *Walter Nagel.*

Opinion

Justice MARSHALL delivered the opinion of the Court.

In this appeal, we must decide whether a tax on interstate telecommunications imposed by the State of Illinois violates the Commerce Clause. We hold that it does not.

I

A

These cases come to us against a backdrop of massive technological and legal changes in the telecommunications industry. [1] Years ago, all interstate telephone calls were relayed through electric wires and transferred by human operators working switchboards. Those days are past. Today, a computerized network of electronic paths transmits thousands of electronic signals per minute through a complex system of microwave radios, fiber optics, satellites, and cables. DOJ ***255** Report 1.2–1.6, 1.8 (DOJ Report); Brief for MCI Telecommunications Corporation as *Amicus Curiae* 2. When fully connected, this network offers billions of paths from one point to another. DOJ Report 1.18. When a direct path is full or not working efficiently, the computer system instantly activates another path. Signals may even change paths in the middle of a telephone call without perceptible interruption. Brief for National Conference of State Legislatures et al. as *Amici Curiae* 6. Thus, the path taken by the electronic signals is often indirect and typically bears no relation to state boundaries. [2] The number of possible paths, the nature of the electronic signals, and the system of computerized switching make it virtually impossible to trace and record the actual paths taken by the electronic signals which create an individual telephone call.

The explosion in new telecommunications technologies and the brwrkup of the AT & T monopoly [3] has led a number of States to ****586** revise the taxes they impose on the telecommunications industry. [4] In 1985, Illinois passed the Illinois ***256** Telecommunications Excise Tax Act (Tax Act), Ill.Rev.Stat., ch. 120, ¶¶ 2001–2021 (1987). The Tax Act imposes a 5% tax on the gross charge of interstate telecommunications (1) originated or terminated in Illinois, ¶ 2004, § 4 (hereinafter § 4) [5] and (2) charged to an Illinois service address, regardless of where the telephone call is billed or paid. ¶ 2002, §§ 2(a) and (b). [6] The Tax Act imposes an identical 5% tax on intrastate telecommunications. ¶ 2003, § 3. In order to prevent "actual multi-state taxation," the Tax Act provides a credit to any taxpayer upon proof that the taxpayer has paid a tax in another State on the same telephone call which triggered the Illinois tax. ¶ 2004, § 4. To facilitate collection, the Tax Act ***257** requires telecommunications retailers, like appellant GTE Sprint Communications Corporation (Sprint), to collect the tax from the consumer who charged the call to his service address. ¶ 2005, § 5.

B

Eight months after the Tax Act was passed, Jerome Goldberg and Robert McTigue, Illinois residents who are subject to and have paid telecommunications taxes through their retailers, filed a class action complaint in the Circuit Court of Cook County, Illinois. They named as defendants J. Thomas Johnson, Director of the Department of Revenue for the State of Illinois, (Director),[7] and various long-distance telephone carriers, including Sprint. The complaint alleged that § 4 of the Tax Act violates the Commerce Clause of the United States Constitution.[8] Sprint cross-claimed against the Director, seeking a declaration that the Tax Act is unconstitutional under the Commerce Clause. The Director then filed a motion for summary judgment against Sprint and the other long-distance carriers. Sprint responded ****587** with a motion for summary judgment against the Director; Goldberg and McTigue, in turn, filed their own motion for summary judgment against both the Director and Sprint.

After briefing and a hearing, the trial court declared § 4 unconstitutional. It found that *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), and its progeny control this litigation. Under the four-pronged test originated in *Complete Auto,* a state tax will withstand scrutiny under the Commerce Clause if "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." ***258** *Id.,* at 279, 97 S.Ct., at 1079.[9] In the view of the trial court, the Tax Act did not satisfy the last three prongs of the *Complete Auto* test because:

> "Illinois is attempting to tax the entire cost of an interstate act which takes place only partially in Illinois. This tax by its own terms is not fairly apportioned. It discriminates against interstate commerce and it is not related to services provided in Illinois. For all of these reasons the Act must fail." *Goldberg v. Johnson,* No. 85 CH 8081 (Cook County, Oct. 21, 1986), App. to Juris. Statement in No. 87–826, p. 24a.

The Illinois Supreme Court reversed, *Goldberg v. Johnson,* 117 Ill.2d 493, 111 Ill.Dec. 625, 512 N.E.2d 1262 (1987) (*per curiam*) despite its finding that the tax is "not an apportioned tax" because it "applies to the entirety of each and every interstate telecommunication." *Id.,* at 501, 111 Ill.Dec., at 629, 512 N.E.2d, at 1266. The court reasoned that an unapportioned tax is "constitutionally suspect" because of the risk of multiple taxation, *ibid.,* but decided that the Tax Act adequately avoided this danger. With respect to interstate calls originating in Illinois, the court noted that no other State could levy a tax on such calls. *Id.,* at 502, 111 Ill.Dec., at 629, 512 N.E.2d, at 1266. As for calls terminating in Illinois and charged to an Illinois service address, the court found that even though the tax created "a real risk of multiple taxation," *id.,* at 502, 111 Ill.Dec., at 630, 512 N.E.2d, at 1267,[10] that risk was eliminated by § 4's credit provision. *Id.,* at 503, 111 Ill.Dec., at 630, 512 N.E.2d, at 1267.

As for discrimination, the third prong of the *Complete Auto* test, the court held that the Tax Act is constitutionally valid since a 5% tax is imposed on intrastate as well as interstate ***259** telecommunications. Turning to the fourth prong, the court held that the tax is fairly related to services provided by Illinois. The court explained that Illinois provided services and other benefits with respect to that portion of an interstate call occurring within the State, and that "the benefits afforded by other States in facilitating the same interstate telecommunication are too speculative to override the substantial benefits extended by Illinois." *Id.,* at 504, 111 Ill.Dec., at 630, 512 N.E.2d, at 1267.

Having found that the Tax Act satisfied the requirements of *Complete Auto,* the Illinois Supreme Court concluded that it did not violate the Commerce Clause. Sprint, Goldberg and McTigue appealed to this Court. We noted probable jurisdiction, 484 U.S. 1057, 108 S.Ct. 1010, 98 L.Ed.2d 976 (1988), and now affirm.

II

A

This Court has frequently had occasion to consider whether state taxes violate the Commerce Clause. The wavering doctrinal lines of our pre-*Complete Auto* cases reflect the tension between two competing ****588** concepts: the view that interstate commerce enjoys a "free trade" immunity from state taxation; and the view that businesses engaged in interstate commerce may be required to pay their own way. *Complete Auto, supra,* 430 U.S., at 278–279, 97 S.Ct., at 1078–1079; see also *American Trucking Assns., Inc. v. Scheiner,* 483 U.S. 266, 281, 282, nn. 12, 13, 107 S.Ct. 2829, 2839–2840, nn. 12, 13, 97 L.Ed.2d 226 (1987); *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 645, 101 S.Ct. 2946, 2967, 69 L.Ed.2d 884 (1981) (BLACKMUN, J., dissenting). *Complete Auto* sought to resolve this tension by specifically rejecting the view that the States cannot tax interstate commerce, while at the same time placing limits on state taxation of interstate commerce. 430 U.S., at 288, 97 S.Ct., at 1083; see also *Commonwealth Edison Co., supra,* 453 U.S., at 645, 101 S.Ct., at 2967.[11]

Since the *Complete Auto* decision we have ***260** applied its four-pronged test on numerous occasions. [12] We now apply it to the Illinois tax.

B

As all parties agree that Illinois has a substantial nexus with the interstate telecommunications reached by the Tax Act, we begin our inquiry with apportionment, the second prong of the *Complete Auto* test. Appellants argue that the telecommunications tax is not fairly apportioned because Illinois taxes the gross charge of each telephone call. They interpret our prior cases, specifically *Michigan–Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 74 S.Ct. 396, 98 L.Ed. 583 (1954), *Central Greyhound Lines, Inc. v. Mealey,* 334 U.S. 653, 68 S.Ct. 1260, 92 L.Ed. 1633 (1948), and *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823 (1938), to require Illinois to tax only a fraction of the gross charge of each telephone call based on the miles which the electronic signals traveled within Illinois as a portion of the total miles traveled. The Director, in turn, argues that Illinois apportions its telecommunications tax by carefully limiting the type of interstate telephone calls which it reaches.

[1] In analyzing these contentions, we are mindful that the central purpose behind the apportionment requirement is to ***261** ensure that each State taxes only its fair share of an interstate transaction. See, *e.g., Container Corp. of America v. Franchise Tax Bd.,* 463 U.S. 159, 169, 103 S.Ct. 2933, 2942, 77 L.Ed.2d 545 (1983). But "we have long held that the Constitution imposes no single [apportionment] formula on the States," *id.,* at 164, 103 S.Ct., at 2939, and therefore have declined to undertake the essentially legislative task of establishing a "single constitutionally mandated method of taxation." *Id.,* at 171, 103 S.Ct., at 2943; see also ****589** *Moorman Mfg. Co. v. Bair,* 437 U.S. 267, 278–280, 98 S.Ct. 2340, 2347–2348, 57 L.Ed.2d 197 (1978). Instead, we determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent. *Scheiner, supra,* 483 U.S., at 285, 107 S.Ct., at 2841; *Armco Inc. v. Hardesty,* 467 U.S. 638, 644, 104 S.Ct. 2620, 2623, 81 L.Ed.2d 540 (1984); *Container Corp., supra,* 463 U.S., at 169–170,103 S.Ct., at 2942–2943.

[2] To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result. 463 U.S., at 169, 103 S.Ct., at 2942. Thus, the internal consistency test focuses on the text of the challenged statute and hypothesizes a situation where other States have passed an identical statute. We conclude that the Tax Act is internally consistent, for if every State taxed only those interstate phone calls which are charged to an in-state service address, only one State would tax each interstate telephone call.

Appellant Sprint argues that our decision in *Armco* dictates a different standard. It contends that, under *Armco,* a court evaluating the internal consistency of a challenged tax must also compare the tax to the similar, but not identical, taxes imposed by other States. Sprint misreads *Armco.* If we were to determine the internal consistency of one State's tax by comparing it with slightly different taxes imposed by other States, the validity of state taxes would turn solely on "the shifting complexities of the tax codes of 49 other States." *Armco, supra,* 467 U.S., at 645, 104 S.Ct., at 2624; see also *Moorman, supra,* 437 U.S., at 277, n. 12, 98 S.Ct., at 2346, n. 12. In any event, to the extent that other States have passed tax statutes which create a risk of multiple taxation, ***262** we reach that issue under the external consistency test, to which we now turn.

[3] The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed. *Container Corp., supra,* 463 U.S., at 169–170, 103 S.Ct., at 2942–2943. We thus examine the in-state business activity which triggers the taxable event and the practical or economic effect of the tax on that interstate activity. Appellants first contend that any tax assessed on the gross charge of an interstate activity cannot reasonably reflect in-state business activity and therefore must be unapportioned. The Director argues that, because the Tax Act has the same economic effect as a sales tax, it can be based on the gross charge of the telephone call. See, *e.g., McGoldrick v. Berwind–White Coal Mining Co.,* 309 U.S. 33, 58, 60 S.Ct. 388, 398, 84 L.Ed. 565 (1940) (sales tax); cf. *D. H. Holmes Co. v. McNamara,* 486 U.S. 24, 31–32, 108 S.Ct. 1619, 1623–1624, 100 L.Ed.2d 21 (1988) (use tax); *Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue,* 483 U.S. 232, 251, 107 S.Ct. 2810, 2822, 97 L.Ed.2d 199 (1987) (gross receipts).

We believe that the Director has the better of this argument. The tax at issue has many of the characteristics of a sales tax. It is assessed on the individual consumer, collected by the retailer, and accompanies the retail purchase of an interstate telephone call. Even though such a retail purchase is not a purely local event since it triggers simultaneous activity in several States, cf. *McGoldrick, supra,* 309 U.S., at 58, 60 S.Ct., at 398, the Tax Act reasonably reflects the way that consumers purchase interstate telephone calls.

The Director further contends that the Illinois telecommunications tax is fairly apportioned because the Tax Act reaches only those interstate calls which are (1) originated or terminated in Illinois and (2) charged to an Illinois service address. Appellants Goldberg and McTigue, by contrast, raise the specter of many States assessing a tax on the gross charge of an interstate telephone call. Appellants have exaggerated the extent to which the Tax Act creates a risk of ***263** multiple taxation. We doubt that States through which the telephone call's electronic signals merely pass have a sufficient ****590** nexus to tax that call. See *United Air Lines, Inc. v. Mahin,* 410 U.S. 623, 631, 93 S.Ct. 1186, 1191, 35 L.Ed.2d 545 (1973) (State has no nexus to tax an airplane based solely on its flight over the State); *Northwest Airlines, Inc. v. Minnesota,* 322 U.S. 292, 302–304, 64 S.Ct. 950, 955–956, 88 L.Ed. 1283 (1944) (Jackson, J., concurring) (same). We also doubt that termination of an interstate telephone call, by itself, provides a substantial enough nexus for a State to tax a call. See *National Bellas Hess, Inc. v. Department of Revenue of Illinois,* 386 U.S. 753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967) (receipt of mail provides insufficient nexus).

[4] We believe that only two States have a nexus substantial enough to tax a consumer's purchase of an interstate telephone call. The first is a State like Illinois which taxes the origination or termination of an interstate telephone call charged to a service address within that State. The second is a State which taxes the origination or termination of an interstate telephone call billed or paid within that State. See, *e.g.,* Ark.Code Ann. § 26–52–301(3) (Supp.1987); Wash.Rev.Code § 82.04.065(2) (1987).

We recognize that, if the service address and billing location of a taxpayer are in different States, some interstate telephone calls could be subject to multiple taxation. [13] This ***264** limited possibility of multiple taxation, however, is not sufficient to invalidate the Illinois statutory scheme. See *Container Corp.,* 463 U.S., at 171, 103 S.Ct., at 2943; *Moorman,* 437 U.S., at 272–273, 98 S.Ct., at 2343–2344. To the extent that other States' telecommunications taxes pose a risk of multiple taxation, the credit provision contained in the Tax Act operates to avoid actual multiple taxation. *D.H. Holmes, supra,* at 31, 108 S.Ct., at 1623 ("The ... taxing scheme is fairly apportioned, for it provides a credit against its use tax for sales taxes that have been paid in other States"); see also *Tyler Pipe, supra,* at 245, n. 13, 107 S.Ct. at 2819, n. 13.

It should not be overlooked, moreover, that the external consistency test is essentially a practical inquiry. In previous cases we have endorsed apportionment formulas based upon the miles a bus, train, or truck traveled within the taxing State. [14] But those cases all dealt with the movement of large physical objects over identifiable routes, where it was practicable to keep track of the distance actually traveled within the taxing State. See, *e.g., Central Greyhound,* 334 U.S., at 663, 68 S.Ct., at 1266 ("There is no dispute as to feasibility ****591** in apportioning this tax"); see also *Western Live Stock,* 303 U.S., at 257, 58 S.Ct., at 549. These cases, by contrast, involve the more intangible movement of electronic impulses through computerized networks. An apportionment formula based on mileage or some other geographic division of individual telephone calls would produce insurmountable administrative and technological ***265** barriers. See *Scheiner,* 483 U.S., at 296, 107 S.Ct., at 2847 (apportionment does not require State to adopt a tax which would "pose genuine administrative burdens"). [15] We thus find it significant that Illinois' method of taxation is a realistic legislative solution to the technology of the present-day telecommunications industry. [16]

In sum, we hold that the Tax Act is fairly apportioned. Its economic effect is like that of a sales tax, the risk of multiple taxation is low, and actual multiple taxation is precluded by the credit provision. Moreover, we conclude that mileage or some other geographic division of individual telephone calls would be infeasible.

C

[5] We turn next to the third prong of the *Complete Auto* test, which prohibits a State from imposing a discriminatory tax on interstate commerce. Appellants argue that irrespective of the identical 5% tax on the gross charge of intrastate telephone calls, the Tax Act discriminates against interstate commerce by allocating a larger share of the tax burden to interstate telephone calls. They rely on *Scheiner,* where we ***266** stated that, "[i]n its guarantee of a free trade area among the States, ... the Commerce Clause has a deeper meaning that may be implicated even though state provisions ... do not allocate tax burdens between insiders and outsiders in a manner that is facially discriminatory." *Scheiner, supra,* at 281, 107 S.Ct., at 2839.

In *Scheiner,* we held that Pennsylvania's flat taxes on the operation of all trucks on Pennsylvania highways imposed a disproportionate burden on interstate trucks, as compared with intrastate trucks, because the interstate trucks traveled fewer miles per year on Pennsylvania highways. 483 U.S., at 286, 107 S.Ct., at 2841. The Illinois tax differs from the flat taxes found discriminatory in *Scheiner* in two important ways. First, whereas Pennsylvania's flat taxes burdened out-of-state truckers who would have difficulty effecting legislative change, the economic burden of the Illinois telecommunications tax falls on the Illinois telecommunications consumer, the insider who presumably is able to complain about and change the tax through the Illinois political process. It is not a purpose of the Commerce Clause to protect state residents from their own state taxes.

Second, whereas with Pennsylvania's flat taxes it was possible to measure the activities within the State because truck mileage on state highways could be tallied, reported, and apportioned, the exact path of thousands of electronic signals can neither be traced nor recorded. We therefore conclude that the Tax Act does not discriminate ****592** in favor of intrastate commerce at the expense of interstate commerce.

D

[6] [7] Finally, we reach the fourth prong of the *Complete Auto* test, namely, whether the Illinois tax is fairly related to the presence and activities of the taxpayer within the State. See *D.H. Holmes,* 486 U.S., at 32–34, 108 S.Ct., at 1624–1625. The purpose of this test is to ensure that a State's tax burden is not placed upon ***267** persons who do not benefit from services provided by the State. *Commonwealth Edison,* 453 U.S., at 627, 101 S.Ct., at 2958.

Appellants would severely limit this test by focusing solely on those services which Illinois provides to telecommunications equipment located within the State. We cannot accept this view. The tax which may be imposed on a particular interstate transaction need not be limited to the cost of the services incurred by the State on account of that particular activity. *Id.,* at 627, n. 16, 101 S.Ct., at 2958, n. 16. On the contrary, "interstate commerce may be required to contribute to the cost of providing *all* governmental services, including those services from which it arguably receives no direct 'benefit.' " *Ibid.* (emphasis in original). The fourth prong of the *Complete Auto* test thus focuses on the wide range of benefits provided to the taxpayer, not just the precise activity connected to the interstate activity at issue. Indeed, last Term, in *D.H. Holmes, supra,* at 32, 108 S.Ct., at 1624, we noted that a taxpayer's receipt of police and fire protection, the use of public roads and mass transit, and the other advantages of civilized society satisfied the requirement that the tax be fairly related to benefits provided by the State to the taxpayer.

In light of the foregoing, we have little difficulty concluding that the Tax Act is fairly related to the benefits received by Illinois telephone consumers. The benefits that Illinois provides cannot be limited to those exact services provided to the equipment used during each interstate telephone call. Illinois telephone consumers also subscribe to telephone service in Illinois, own or rent telephone equipment at an Illinois service address, and receive police and fire protection as well as the other general services provided by the State of Illinois.

III

[8] For the reasons stated above, we hold that the telecommunications tax imposed by the Tax Act is consistent with the Commerce Clause. It is fairly apportioned, does not discriminate against interstate commerce, and is fairly related ***268** to services which the State of Illinois provides to the taxpayer. The judgment of the Illinois Supreme Court is hereby

Affirmed.

Justice STEVENS, concurring in part and concurring in the judgment.

My reasons for concluding that the Illinois tax does not discriminate against interstate commerce are different from those expressed in Part II–C of the Court's opinion. Unlike the Court, I do not believe Illinois may discriminate among its own residents by placing a heavier tax on those who engage in interstate commerce than on those who merely engage in local commerce. See *ante,* at 591 ("It is not a purpose of the Commerce Clause to protect state residents from their own state taxes"). In fact, such a holding is a clear departure from our precedents. See, *e.g., Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue,* 483 U.S. 232, 240–248, 107 S.Ct. 2810, 2816–2820, 97 L.Ed.2d 199 (1987) (invalidating manufacturing tax that discriminated between in state manufacturers that sold at wholesale in state and those that sold at wholesale out of state); *Bacchus Imports, Ltd. v. Dias,* 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984) (invalidating tax exemption for locally produced alcoholic beverages in case brought by local wholesalers); ****593** *Boston Stock Exchange v. State Tax Comm'n,* 429 U.S. 318, 333–334, 97 S.Ct. 599, 608–609, 50 L.Ed.2d 514 (1977) (invalidating securities transfer tax that discriminated against those state residents who sold out of state rather than in state). Surely a state tax of 3% on the shipment of goods intrastate and of 5% on the shipment of goods interstate would violate the Commerce Clause. [1]

***269** Appellants' discrimination claim can best be illustrated by example: A call originating and terminating in Illinois that costs $10 is taxed at full value at 5%. A second call, originating in Illinois but terminating in Indiana, costs the same $10 and is taxed at the same full value at the same 5% rate. But while Illinois may properly tax the entire $10 of the first call, it (technically) may tax only that portion of the second call over which it has jurisdiction, namely, the intrastate portion of the call (say, for example, $5). By imposing an identical 50¢ tax on the two calls, Illinois has imposed a disproportionate economic burden on the interstate call. See *American Trucking Assns., Inc. v. Scheiner,* 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987) (invalidating flat tax that imposed disproportionate economic burden on interstate commerce).

This argument, however, overlooks the true overall incidence of the Illinois tax. Although Illinois taxes the entirety of every call charged to an Illinois number, it does not tax any part of the calls that are received at an Illinois number but charged elsewhere. Thus, although Illinois taxes the entire Illinois–Indiana $10 call, it taxes no part of the reciprocal Indiana–Illinois $10 call. At the 5% rate, Illinois receives 50¢ from the two calls combined, precisely the amount it receives from one $10 purely intrastate call. By taxing half of the relevant universe of interstate calls at full value, Illinois ***270** achieves the same economic result as taxing all of those calls at half value would achieve. As a result, interstate phone calls are taxed at a lower effective rate than intrastate calls, [2] and accordingly bear a proportional tax burden. [3]

With the exception of Part II–C, I join the Court's opinion.

Justice O'CONNOR, concurring in part and concurring in the judgment.

I agree that the Illinois Telecommunications Excise Tax Act does not violate the Commerce Clause, and join Parts I, II–A, II–D, and III of the Court's opinion. I write separately to explain why I do not join Parts II–B and II–C. First, I am still ****594** unsure of the need and authority for applying the internal consistency test to state taxes challenged under the Commerce Clause. See *American Trucking Assns., Inc. v. Scheiner,* 483 U.S. 266, 303, 107 S.Ct. 2829, 2850–2851, 97 L.Ed.2d 226 (1987) (O'CONNOR, J., dissenting). I therefore do not join in the Court's application of that test to the Tax Act. *Ante,* at 588–589. Second, I agree with Justice STEVENS that a State may not discriminate among its own residents by placing a heavier tax on those who engage in interstate commerce than those who merely engage in local commerce. *Ante,* at 592 (STEVENS, J., concurring in part and concurring in judgment). Accordingly, I cannot join the Court's statement that "[i]t is not a purpose of the Commerce Clause to protect state residents from their own state taxes." *Ante,* at 591.

***271** Justice SCALIA, concurring in the judgment.

I remain of the view that only state taxes that facially discriminate against interstate commerce violate the negative Commerce Clause, see *Tyler Pipe Industries, Inc. v. Washington Dept. of Revenue,* 483 U.S. 232, 254, 107 S.Ct. 2810, 2823, 97 L.Ed.2d 199 (1987) (SCALIA, J., concurring in part and dissenting in part); *American Trucking Assns., Inc. v. Scheiner,* 483 U.S. 266, 303, 107 S.Ct. 2829, 2850, 97 L.Ed.2d 226 (1987) (SCALIA, J., dissenting). Because the Illinois Telecommunications Excise Tax is assessed upon intrastate and interstate calls at precisely the same rate, it poses no constitutional difficulty.

All Citations

488 U.S. 252, 109 S.Ct. 582, 102 L.Ed.2d 607, 98 P.U.R.4th 263, 65 Rad. Reg. 2d (P & F) 1402

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 See, *e.g.,* U.S. Dept. of Justice, The Geodesic Network: 1987 Report on Competition in the Telephone Industry (hereinafter DOJ Report) (discussing technological changes); Connecticut General Assembly, Final Report of the Connecticut Telecommunications Task Force, Finance, Revenue and Bonding Committee (1985) (discussing legal and technological

changes); Council of State Policy & Planning Agencies, K. Case, State Tax Policy and the Telecommunications Industry, in The Challenge of Telecommunications State Regulatory and Tax Policies for a New Industry 33 (B. Dyer ed. 1986) (discussing changes in state taxation policies).

2 A signal traveling from one microwave tower to another may pass through a State but never touch anything in it. A satellite transmission may leave a caller's building, travel to outer space, and remain there until it is received by a satellite dish at the building housing the receiving party. Brief for National Conference of State Legislatures et al. as *Amici Curiae* 6.

3 See *United States v. American Tel. & Tel. Co.,* 552 F.Supp. 131 (DC 1982), summarily aff'd *sub nom. Maryland v. United States,* 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983).

4 See, *e.g.,* Ark.Code Ann. § 26–52–301 (Supp.1987); Fla.Stat. § 212.05(1)(e) (Supp.1988); Haw.Rev.Stat. § 237–13(6) (Supp.1987); Minn.Stat. § 297A.01 Subd. 3(f) (Supp.1987); N.M.Stat.Ann. § 7–9–56(C) (Supp.1988); Ohio Rev.Code Ann. § 5739.01(B)(3)(f) (Supp.1987); Okla.Stat., Tit. 68, § 1354(1)(D) (Supp.1987); Tex.Tax Code Ann. § 151.323 (Supp.1988); Wash.Rev.Code § 82.04.065 (1987); Wis.Stat. § 77.51(14)(m) (1985–1986).

Some municipalities have begun to impose taxes on telephone calls. See, *e.g.,* Greeley, Colorado, Ordinance, Tit. 4, § 4.04.005 *et seq.* (1985); Wheat Ridge, Colorado, Ordinance No. 630 (1988), Los Angeles, California, Ordinance No. 162586 (1987).

5 Section 4 states in part:

> "A tax is imposed upon the act or privilege of originating in this State or receiving in this State interstate telecommunications by a person in this State at the rate of 5% of the gross charge for such telecommunications purchased at retail from a retailer by such person."

"Gross charge" is defined as the amount paid for the telephone call, ¶ 2002, §§ 2(a) and (b), less charges for certain types of special equipment not at issue here. ¶ 2002, §§ 2(a)(1)–(5).

The Tax Act defines telecommunications broadly to include

"in addition to the meaning ordinarily and popularly ascribed to it, ... without limitation, messages or information transmitted through use of local, toll and wide area telephone service; private line services; channel services; telegraph services; teletypewriter; computer exchange services; cellular mobile telecommunications service; specialized mobile radio; stationary two way radio; paging service; or any other form of mobile and portable one-way or two-way communications; or any other transmission of messages or information by electronic or similar means, between or among points by wire, cable, fiber-optics, laser, microwave, radio, satellite or similar facilities." ¶ 2002, § 2(b).

For the sake of simplicity, we use the terms "call" and "telephone call" to refer to these multifarious forms of telecommunications.

6 Although not defined in the Tax Act, we understand the term "service address" to mean the address where the telephone equipment is located and to which the telephone number is assigned. See ¶ 2002, §§ 2(b) and (h).

7 Roger Sweet has since replaced J. Thomas Johnson as Director of the Department of Revenue.

8 Goldberg and McTigue also alleged that the Tax Act violates the Due Process and Equal Protection Clauses. They have abandoned these claims in this appeal. Brief for Appellants Goldberg and McTigue 9, n. 7.

9 All parties conceded before the trial court, as they do here, that Illinois has a substantial nexus with the interstate telecommunications reached by the Tax Act.

10 A collect call is one example of a telephone call which originates in another State but terminates in Illinois and is charged to an Illinois service address.

11 In *Complete Auto Transit, Inc. v. Brady,* we overruled *Spector Motor Service, Inc. v. O'Connor,* 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951), which had prohibited state taxation on the privilege of doing business within a State if the tax reached interstate commerce. In *Complete Auto* we rejected *Spector's* formalistic approach, stating that "[u]nder the present state of the law, the *Spector* rule, as it has come to be known, has no relationship to economic realities." 430 U.S. at 279, 97 S.Ct. at 1079. We now seek to " 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.' " *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 615, 101 S.Ct. 2946, 2952, 69 L.Ed.2d884 (1981) (quoting *Mobil Oil Corp. v. Commissioner of Taxes of Vermont,* 445 U.S. 425, 443, 100 S.Ct. 1223, 1234, 63 L.Ed.2d 510 (1980)).

12 See, *e.g.,* *D.H. Holmes Co. v. McNamara,* 486 U.S. 24, 108 S.Ct. 1619, 100 L.Ed.2d 21 (1988) (use tax); *Wardair Canada Inc. v. Florida Dept. of Revenue,* 477 U.S. 1, 106 S.Ct. 2369, 91 L.Ed.2d 1 (1986) (sales tax on fuel used in international commerce); *Commonwealth Edison Co. v. Montana, supra* (severance tax); *Maryland v. Louisiana,* 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981) (use tax); *Mobil Oil Corp. v. Commissioner of Taxes of Vermont,* 445 U.S. 425, 100 S.Ct. 1223, 63 L.Ed.2d 510 (1980) (corporate income tax); *Washington Dept. of Revenue v. Association of Washington Stevedoring Cos.,* 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978) (business and occupation tax).

13 Those taxpayers who split their billing and service addresses between two different States face a risk of multiple taxation on a limited number of their interstate telephone calls. For example, if a company's Arkansas headquarters paid the telephone bills of its Illinois subsidiary, two state taxes would be paid on telephone calls made by the Illinois subsidiary to the head office or any other Arkansas location. Such calls would terminate and be billed or paid in Arkansas, and they would also originate and be charged to an Illinois service address. Likewise, a collect call from the Arkansas headquarters to the Illinois subsidiary could be taxed in both States. The collect call would originate and be billed or paid in Arkansas, and it would also terminate and be charged to an Illinois service address. Noncollect calls from the Arkansas headquarters to the Illinois subsidiary would not, however, be captured by the Illinois Tax Act. Likewise, the Arkansas statute would not tax interstate calls made by the Illinois subsidiary to States other than Arkansas.

14 Many of our Commerce Clause decisions concern state taxes on the movement of goods or the instrumentalities of interstate transportation. See, *e.g., American Trucking Assns., Inc. v. Scheiner,* 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987) (trucks); *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979) (cargo containers); *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977) (motor carriers); *Michigan–Wisconsin Pipe Line Co. v. Calvert,* 347 U.S. 157, 74 S.Ct. 396, 98 L.Ed. 583 (1954) (oil pipelines); *Central Greyhound Lines, Inc. v. Mealey,* 334 U.S. 653, 68 S.Ct. 1260, 92 L.Ed. 1633 (1948) (buses); cf. *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 257, 58 S.Ct. 546, 549, 82 L.Ed. 823 (1938) (tax on gross receipts of intrastate train travel is valid while a like tax on interstate train travel is not).

15 Sprint alleges that it is "capable, administratively, of billing more than one state's tax on a single interstate communication." Brief for Appellant GTE Sprint Communications Corp. 4. This statement, however, tells us no more than that Sprint's computerized billing system is capable of adding another line to consumers' bills. Sprint does not explain, however, how it would keep track of and record the exact paths and in-state mileage of thousands of electronic impulses per minute.

16 Years ago, we considered and rejected certain state taxes on interstate telecommunications. See, *e.g., Cooney v. Mountain States Tel. & Tel. Co.,* 294 U.S. 384, 55 S.Ct. 477, 79 L.Ed. 934 (1935); *Western Union Tel. Co. v. Pennsylvania,* 128 U.S. 39, 9 S.Ct. 6, 32 L.Ed. 345 (1888); *Ratterman v. Western Union Tel. Co.,* 127 U.S. 411, 8 S.Ct. 1127, 32 L.Ed. 229 (1888); cf. *Pensacola Tel. Co. v. Western Union Tel. Co.,* 96 U.S. 1, 24 L.Ed. 708 (1878) (because the telegraph industry is interstate commerce, Act of Congress pre-empts state regulation). These cases considered a telecommunications technology only distantly related to modern telecommunications technology and were decided in a pre-*Complete Auto* era when this Court held the view that interstate commerce itself could not be taxed. See n. 11, *supra.*

1 Perhaps it is the sales tax-like attributes of the Tax Act that have persuaded the Court to dismiss the discrimination claim by focusing solely on the sales tax-like impact on local residents. See *ante,* at 589, 591, 592. A State may assess a sales tax on the entire value of the purchased item even though some amount of that value was added in other States. Appellees have contended throughout this litigation that the tax involved here should be viewed as a sales tax on the cost of the phone call. The state court refused to so characterize the tax, instead concluding that the tax was assessed on interstate commerce. *Goldberg v. Johnson,* 117 Ill.2d 493, 498–500, 111 Ill.Dec. 625, 628–629, 512 N.E.2d 1262, 1265–1266 (1987) *(per curiam)*. Although the Court's analysis is properly informed by the sales tax-like attributes of the tax in question, it does not ultimately challenge the state court's characterization of the tax and does not rest its holding on a recharacterization of the tax as a sales tax. Thus, it is insufficient to say, in response to the discrimination argument advanced by appellants, that because the tax burden falls only on the Illinois consumer, the tax—like a sales tax with a similar burden—is nondiscriminatory. Because the premise of our review of the Tax Act is that it applies to interstate activity, we must go further in responding to appellants' contention that the Act imposes a disproportionate burden on interstate commerce.

2 That is, half of the interstate calls are taxed at 5%, but the other half are taxed at 0%; the effective rate is 2½%. On the other hand, all intrastate calls are taxed at 5%.

3 This analysis is not obviated by the Court's statement, with which I agree, that "[w]e ... doubt that termination of an interstate telephone call, by itself, provides a substantial enough nexus for a State to tax a call." *Ante,* at 589–590. That one State through which interstate commerce flows may not constitutionally tax such commerce does not mean that another State may make up for the gap, as it were, by taxing its share as well as the first State's share. Thus, even if Indiana could not constitutionally tax the mere termination of an Illinois–Indiana call, Illinois still may tax only the portion of the call over which it has jurisdiction.

End of Document

STATE OF CALIFORNIA

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November 3, 2011

Re: Legal Opinion – Aircraft Property Tax Issues
Assignment No.: 11-072

Dear Mr. :

This is in response to your April 22, 2011 letter to the Board of Equalization's Legal Department wherein you requested our opinion on numerous questions pertaining to the assessment of aircraft. Please see the below analysis for answers to your questions.

Facts

Your letter contains three hypothetical situations regarding the assessment of aircraft for property tax purposes. After each hypothetical, you pose a number of questions which we address below. The first hypothetical situation addresses the business inventory exemption; the second and third hypothetical situations address the question of situs.

SITUATION 1[1]

> An aircraft owner places an aircraft for sale with a broker in the state of Washington in July of 2009 and signs a listing agreement giving him exclusive rights to sell his aircraft for, say, $16,000,000, a 2% fee of the gross selling price will be charged at closing of escrow; and, the broker bears responsibility for all advertising and marketing costs; the aircraft is housed in a repair/storage facility owned by a third party who is acting on behalf of the owner to keep the aircraft in good maintenance and according to FAA regulations. The repair facility's staff is authorized to show and demo the aircraft to all prospective buyers. Logs are kept that show the aircraft has only been flown for demo and maintenance. Between the listing date and the lien date, only five hours have been flown for maintenance. Logs kept by the maintenance facility show each flight and none are for personal or business use of the owners. The corporate aviation company that has the listing has advertised in Amstat, Net Jet, and Plane Mover. Due to the down market in corporate jets, the aircraft does not sell until July of 2010 for almost $10,000,000 less than the original asking price. The intent to sell is evidenced by many drops in selling prices before the aircraft is sold.

[1] For the purposes of this letter your hypothetical situations have been renumbered.

SITUATION 2

An aircraft was purchased on 12/17/2007 and delivered to the buyer, and LLC, in Salem, Oregon on 1/25/08. On 2/6/08 the aircraft was relocated to Reno, Nevada, where a managing partner lives. The aircraft was subsequently used partly in personal business by the owner and partly in charter, Part 135 usage, during the 2008 calendar year, but the home base, tax situs, remained in Reno, NV, but no Nevada personal property taxes were assessed or paid on the aircraft. Even though the aircraft was never on the ground for more than a few days at a time on Los Angeles, and the aircraft was not there on the lien date, 2009, it was assessed by Los Angeles County for the 2009 tax year and the value was apportioned based on the ground time listed in the aircraft's logs.

After the purchase, the aircraft underwent some repairs and modification, thus the lag in delivery form the purchase date. Here are the locations and ground days for the aircraft:

CALIFORINA

DAYS IN VAN NUYS	67
DAYS IN OTHER L.A. COUNTY	1
TOTAL L.A.	68
ONTARIO	9
MONTEREY	57
OTHER CA LOCATIONS	22
TOTAL CALIFORNIA	156

OUTSIDE CALIFORINA

OREGON	2
NEVADA	122
OTHER STATES AND INTERNATIONAL	61
TOTAL OTHER	185
TOTAL DAYS PER LOGS IN 2008	341
DAYS NOT FLOWN IN 2008	24
TOTAL DAYS IN 2008	365

Even though the aircraft was never in Los Angeles for 60 days at a time, the minimum number of days said needed to establish a tax situs in California, the owner did not have a residence in California, nor does he have any other income generated from California sources, the county apportioned the aircraft values of $6,000,000 45.7%, 156 days divided by 341 days to Los Angeles, and said 54.3%, 183 Days divided by 341 days, was exempt.

SITUATION 3

> An aircraft is based in Los Angeles and the owner is domiciled in California, however the aircraft is taken back east every year for around two or three months, where it is used in charter service. The owner has a home in New York and operates the charter service from a New York airport, where a hanger is rented each year.
>
> In 2009 the aircraft operated out of New York for 67 days, but the ground days during this period were: 51 ground days in New York, 6 ground days in Montana, 4 ground days in New Jersey, 5 ground days in California, and one ground day in Ohio. The aircraft always returned to New York after the various flights. During the rest of the year, the aircraft was flown to New York at various times from California, where it returned between flights, and an additional 30 ground days in New York were accumulated. The owner did not pay any property tax in New York as personal property is not assessed there.

Law & Analysis

I. *Business Inventory Exemption*

The assessor has the duty to prepare the local assessment roll and to assess all property subject to general property taxation at its full value. (Rev. & Tax. Code, § 401; see §§ 110, 110.1, 110.5, 405, 601; see also Cal. Const., art. XIII, § 1, art. XIII A, § 1, 2.)

The business inventory exemption is set forth in Revenue and Taxation Code,[2] sections 219 and 129, and Property Tax Rule[3] 133. Section 219 provides that: "For the 1980-81 fiscal year and fiscal years thereafter, business inventories are exempt from taxation and the assessor shall not assess business inventories." Section 129, states, in relevant part:

> 'Business inventories' shall include goods intended for sale or lease in the ordinary course of business and shall include raw materials and work in progress with respect to such goods.

Rule 133 states, in relevant part:

> (a) Scope of Exemption.
>
> (1) 'Business inventories' that are eligible for a partial exemption from taxation under section 129 of the Revenue and Taxation Code include all tangible personal property, whether raw materials, work in process or finished goods, which will become a part of or are themselves items of personalty held for sale or lease in the ordinary course of business . . .

Section 129 provides that business inventories include "goods intended for sale or lease in the ordinary course of business" but do not include "any item held for lease which has been or is intended to be used by the lessor prior to or subsequent to the lease." Consigned goods that

[2] All section references are to the Revenue and Taxation Code unless otherwise specified.
[3] Cal. Code Regs., tit. 18, § 133. All Rule references are sections to title 18 of the California Code of Regulations.

are held for sale may qualify for the business inventory exemption. (Letter to Assessors (LTA) 80/69, Question C4.)

Pursuant to section 5391, aircraft may qualify for the business inventory exemption: "Aircraft which are considered business inventories, within the meaning of Section 129 of the Revenue and Taxation Code, shall be included in the inventory exemption." The guidelines for the exemption of aircraft as business inventory are the same as for other properties, that is, to be eligible for the business inventory exemption the aircraft must be either held for sale or lease in the ordinary course of business on the lien date. Assessors' Handbook section 576 (AH 576) (February 2002), *Assessment of Vessels*, provides guidance for the application of the business inventory exemption to vessels held for consignment. While the definition of vessel specifically excludes aircraft (Rev. & Tax. Code, § 130), the business inventory exemption applies to both vessels and aircraft and thus the guidance in AH 576 can be instructive in the case of consigned aircraft. AH 576, pages 39-40, states:

> PROPERTY HELD FOR LEASE OR CONSIGNMENT
>
> Business inventory includes property held for lease or consignment by lessors, sublessors, and consignors. Exemptions allowed, however, are not based solely upon the status of a vessel on the lien date and the assessor should not judge the validity of the business inventory exemption based on that fact alone, but instead look to the true intent of the owner. Individual facts such as a vessel's actual use before and after the lien date, the length of a consignment or lease, and the location of the vessel tend to indicate the owner's intent, but are not singularly controlling . . .
>
> To qualify for the business inventory exemption, the owner or lessor must have the intent to actually have the property available for lease or under consignment in accordance with the regular and usual practice and method of the business of the lessor or consignor. The vessel owners are not required to be in the business of selling or leasing vessels, only that the property is so held. The business inventory exemption is available to owners who have validly put their vessel up for consignment to a consignor . . . The key to qualifying for the business inventory exemption is that the vessel must be held for sale, lease, or consignment in the ordinary course of business of the seller, lessor, or consignor.

<u>Situation 1</u>

An aircraft owner places an aircraft for sale with a broker in the state of Washington. The aircraft is housed in a repair/storage facility owned by a third party who is acting on behalf of the owner to keep the aircraft in good maintenance and according to FAA regulations. You ask the following questions.

> 1. <u>Does the listing with an out-of-state broker meet the criteria spelled out as a vendor or lessor of the property in his ordinary course of business when his course of business is to take listings from anywhere in the United States and sell or lease the aircraft?</u>

As an initial matter, we note that the burden of proof is upon the taxpayer to establish that property for which an exemption is claimed falls within a specific constitutional or statutory exemption. (*Amdahl Corp. v. County of Santa Clara* (2004) 116 Cal. App. 4th 604, 614.) Thus, the burden is on the aircraft owner to establish to the assessor's satisfaction that aircraft was held for sale or lease in the ordinary course of business on the lien date and that all the other requirements of section 129 and Rule 133 were met.

For consigned aircraft to be eligible for the business inventory exemption, they must be held for sale or lease in the ordinary course of business on the lien date, in accordance with the regular and usual practice and method of the business of the consignor, and all the other requirements of section 129 and Rule 133 must be met. Assessors' Handbook section 577 (AH 577) (November 2003), *Assessment of General Aircraft*, provides at page 26:

> In determining whether or not the business claiming the exemption is selling or leasing aircraft as part of their *ordinary course of business*, the business should have, but not limited to, the following:
>
> FAA dealer's license
> State of California seller's permit
> Local business license
> Location on an airport or airfield
> Listing or consignment agreements
> Statement that they have total care, custody, and control of consignment aircraft

The above documentation is evidence that a broker is in the business of selling, leasing, or consigning aircraft. You state that in your situation the broker's course of business is "to take listings from anywhere in the United States and sell or lease the aircraft." If such is the case, then the broker should be able to provide some, if not all, of the above documentation. Again, this is a fact-specific inquiry and the assessor should take all evidence into consideration in determining what business the broker is in and whether or not it is holding the aircraft in the ordinary course of business. The fact that the broker is located outside of California should not affect this inquiry.[4]

2. <u>Do all of the following conditions have to be met for a vendor to qualify as vendor doing business in his ordinary course of business?</u>

- FAA dealer's license
- State of California seller's permit
- Local business license
- Location on an airport or airfield
- Listing or consignment agreements
- Statement that they have total care, custody, and control of consignment aircraft

[4] In your situation, you do not state whether the aircraft has established situs in California. We assume that it has since otherwise no California property tax would be due and the application of the business inventory exemption would be irrelevant.

As explained above, the documentation listed in AH 577 is evidence that a broker is in the business of selling, leasing, or consigning aircraft. However, it is not exhaustive and is meant only to guide the assessor's determination. There may be other persuasive evidence of the broker's ordinary course of business. The assessor should consider all evidence, not just the above-mentioned documentation, in determining whether or not the taxpayer has met the burden of showing that the property is held for sale or lease in the broker's ordinary course of business. In our opinion, it is possible that an assessor could find that property is held for sale or lease in the broker's ordinary course of business even though a broker could not provide all of the above documentation.

3. Does the aircraft have to be in the broker/vendor's physical possession, or can it be in the care, custody, and control of the third party, who is the agent for the owner or broker?

When determining whether a property placed on consignment qualifies for the business inventory exemption, the assessor must ascertain the true intent of the owner. Factors that reflect that intent include the property's actual use before and after the lien date, the length of a consignment or lease, and the location of the property. (AH 576, pp. 39-40.)

As explained in the supporting letter to Property Tax Annotation[5] (Annotation) 205.0180, the location of the property is one factor to be considered in determining the owner's intent. If the property remains housed with the owner, it is possible that the owner could use the property for purposes not consistent with its sale or lease, rendering it ineligible for the exemption. (Rule 133, subd. (b).) In this case, the aircraft is located at the storage facility of a third party. Since the third party is acting on behalf of the owner, and is not an agent of the consignor, the owner has not given control of the aircraft to the consignor and there is still the possibility that the aircraft might be used for purposes other than its sale or lease. However, you also state that the logs kept by the third party show that only five hours have been flown for maintenance, and that the aircraft has not been flown for personal or business use.

While the foregoing facts are consistent with the aircraft being held exclusively for sale by the consignor, it is our opinion that more facts would be necessary to make a determination that the taxpayer has met its burden. For example, copies of the consignment agreement and the agreement between the owner and the third party would be helpful in determining the parties' rights with regard to the aircraft. Also, the location of the storage facility could have an effect on the analysis. Further, determining the intent of the owner is a subjective inquiry and there may be other facts not disclosed here that could affect the assessor's decision.

II. Situs

Pursuant to the California Constitution, article XIII, section 14, all property taxed by local government shall be assessed in the county, city, and district in which it is situated. General aircraft are assessable at the location where the aircraft is habitually situated. (AH 577, p. 21; Rule 205, subd. (b).) AH 577, pages 22-23, provides the following guidance when an aircraft establishes tax situs both in California and outside of California.

[5] Property Tax Annotations are summaries of the conclusions reached in selected legal rulings of Board legal counsel published in the Board's Property Tax Law Guide and on the Board's website. See Cal. Code Regs., tit. 18, § 5700 for more information regarding annotations.

> If an aircraft establishes tax situs both in California and outside California, apportionment is necessary between California and other jurisdictions under the rulings established in *Ice Capades, Inc.* v. *County of Los Angeles* and *GeoMetrics* v. *County of Santa Clara*. The interpretation of tax situs is that property must have "such contacts as confer jurisdiction to tax." Due process requires that the nature of the contacts sufficient to support a state's power to tax must provide the opportunities, benefits, or protection afforded by the state. For movable personal property such as aircraft, the amount and nature of the contact of property and its owner with a state necessary to establish tax situs is a factual determination. In general, relevant factors to be considered include the domicile of the aircraft owner, the aircraft's length of time in the state, the owner's intent to bring the aircraft into the county, and the owner's contact with the state. The court held that these were the determinative factors in *Ice Capades.* ¶ . . . ¶
>
> When an aircraft owner is domiciled in California and the aircraft (1) has established a tax situs in California, (2) has established a tax situs in another state, states, or foreign country, (3) operates in other states or foreign countries but does not establish tax situs in those states or foreign countries, and (4) is predominantly located in California during the year, the county may assess portions of value reflecting the portion of the year that the aircraft is present in California and the portion of the year that the aircraft operates in the states or foreign countries where the aircraft has not established tax situs. ¶ . . . ¶
>
> When an aircraft owner is domiciled in a state *other than* California and the aircraft (1) has established a tax situs in the owner's domiciliary state, (2) has established a tax situs in California, and (3) operates in another state, states, or foreign country, the county may assess portions of value reflecting only the portion of the year that the aircraft is present in California. In other words, the value is apportioned for only the time spent in California.

<u>Situation 2</u>

In situation 2, the aircraft is domiciled in Reno, Nevada, where it has established situs. The aircraft was in California airspace many times during the 2008 year, and spent 156 ground days in California (68 in Los Angeles County). You ask the following questions.

> 1. <u>Are 68 days in Los Angeles County enough time to establish a taxable situs there in 2008?</u>

First, we note that the question of whether the aircraft has established situs in California must be answered before we determine which county may tax the aircraft. As explained in *Ice Capades, Inc. v. County of Los Angeles* (1976) 56 Cal. App. 3d 745, 746 (*Ice Capades*) and *GeoMetrics* v. *County of Santa Clara* (1982) 127 Cal.App.3d 940, to establish situs, the property must have such contacts as to confer jurisdiction to tax. Due process requires that the nature of the contacts sufficient to support a state's power to tax must provide the opportunities, benefits, or protection afforded by the state. For movable personal property such as aircraft, the amount and nature of the contact of property and its owner with a state necessary to establish tax situs is a factual determination. In general, relevant factors to be considered include the domicile of the aircraft owner, the aircraft's length of time in the state, the owner's intent to bring the aircraft into the county, and the owner's contact with the state.

In our opinion, the fact that the aircraft spent 156 ground days in California is a significant indication that the aircraft received the opportunities, benefits and protection of the state. Of course, the assessor may also consider other factors in making his determination (e.g., the owner's intent and the owner's contact with the state).

Assuming the assessor determines that the aircraft has situs in California, the decision of which county has the power to tax the aircraft is guided by Rule 205, subdivision (b). According to that Rule, once California tax situs has been established, the aircraft is "habitually situated" at the airport of the local jurisdiction where the aircraft spends its ground time. If the aircraft spends a substantial amount of time at multiple airports, it is habitually situated at the airport where it spends the most ground time. With regard to your specific situation, assuming that the aircraft has established situs in California, it is habitually situated in Los Angeles County for the year 2008, since the aircraft spent more ground days there than in any other county.

2. If a taxable situs in California has not been established does this contact with the county give them the right to add the time spent in other counties in California?

As explained above, the amount of time spent in all California counties is relevant to the threshold inquiry of whether or not taxable situs has been established in California. If the aircraft has not established situs in California, it is not necessary to determine in which county the aircraft is habitually situated; the aircraft is not taxable by Los Angeles County or any other California county.

3. What amount of short-term contacts in a year must an aircraft have before it can be assessed?

Again, whether an aircraft has established situs in California is a question of fact for the assessor to determine. The amount of time spent in California is only one factor to be considered. Therefore, there is no set number of short-term contacts that will determine the issue of situs.

4. Shouldn't short term days of one to two days to pick up passengers (often charter flight operators stay overnight or a weekend to pick up passengers the following day or Monday) be categorized as "transitory contact"?

In *Ice Capades*, the Court used the term "transitory contact" to describe the production of the taxpayer's show in a given jurisdiction. (*Ice Capades, Inc. v. County of Los Angeles, supra*, 56 Cal. App. 3d 745, 754.) The Court held that these contacts alone were insufficient to establish situs. In Assessors' Handbook section 504 (October 2002), *Assessment of Personal Property and Fixtures*, page 35, we advised that "transitory contact, such as may occur when a vessel or aircraft makes a round-the-world voyage, does not establish substantial presence." In our opinion, housing a plane in a jurisdiction for one or two days is more significant contact than that which might occur during a round-the-world voyage. As such, it is our opinion that the activity you describe is not likely transitory contact. Also, we note that in *Ice Capades*, each transitory contact was an isolated incident. That is, the court did not address the issue of whether multiple instances of transitory contact in the same jurisdiction in the same year would be sufficient to establish situs.

5. Is there an overall percentage of time in a county, say 50%, like in [Property Tax Annotation 740.0002], that has to be met before a taxable situs is established? Would there be a minimum of 60 days in a year?

Annotation 740.0002 addressed one situation, among others, where aircraft had already established situs in California. In that case, pursuant to Rule 205, subdivision (b), we concluded that since the aircraft spent approximately 50 percent of its ground time in Orange County, that the aircraft was habitually situated in Orange County and thus had situs in that county.

Again, the inquiry of whether an aircraft has established situs in California is separate from the question of which county may impose personal property tax on the aircraft. In determining whether the aircraft has established situs in California, the amount of time spent in California is only one factor to be considered and there is no set number of ground days that will determine the issue of situs. If the aircraft has established situs in California, then it will be taxed in the county where it is habitually situated, i.e., has the most ground days. Whether 60 ground days is sufficient will depend on the amount of ground days spent in other counties.

6. If there is a taxable situs, shouldn't the numerator in the county's calculation have been 365, instead of 341?

Where, as here, an aircraft owner is domiciled in a state other than California and the aircraft (1) has established a tax situs in the owner's domiciliary state, (2) has established a tax situs in California, and (3) operates in another state, states, or foreign country, the county may assess portions of value reflecting only the portion of the year that the aircraft is present in California. (AH 577, p. 23) As explained in Annotation 740.0003, the time spent by the aircraft in the state in which the aircraft has acquired secondary taxable situs, California in this case, divided by 365 days provides the percentage of fair market value to be prorated to the state of secondary taxable situs.

Situation 3

In situation 3, the aircraft is based in Los Angeles and the owner is domiciled in California. In 2009, the aircraft is taken to New York for 67 days. The ground days during this period were: 51 ground days in New York, six ground days in Montana, four ground days in New Jersey, five ground days in California, and one ground day in Ohio. The aircraft always returned to New York after the various flights. During the rest of the year, the aircraft was flown to New York at various times from California, where it returned between flights, and an additional 30 ground days in New York were accumulated. You ask the following questions.

1. Were the ground days in New York sufficient to establish a tax situs there when the intent was to stay at least 60 days and there was a business reason in having the aircraft operated out of New York?

As explained above, for movable personal property such as aircraft, the amount and nature of the contact of the aircraft and its owner with a state necessary to establish tax situs is a factual determination. In general, relevant factors to be considered include the domicile of the aircraft owner, the aircraft's length of time in the state, the owner's intent to bring the aircraft into the county, and the owner's contact with the state. In determining whether the aircraft has established situs outside of California, the amount of time spent in the other state is only one factor to be considered and there is no set number of ground days that will determine the issue of situs. While the facts that the aircraft operated out of New York for 67 days and spent 51 ground days there are consistent with establishing situs in New York, such a determination is best left for the county assessor after weighing all of the relevant factors.

2. <u>Do the flights to other jurisdictions from New York detract from the total days in the east?</u>

AH 577, page 22, provides that

> When an aircraft owner is domiciled in California and the aircraft (1) has established a tax situs in California, (2) has established a tax situs in another state, states, or foreign country, (3) operates in other states or foreign countries but does not establish tax situs in those states or foreign countries, and (4) is predominantly located in California during the year, the county may assess portions of value reflecting the portion of the year that the aircraft is present in California and the portion of the year that the aircraft operates in the states or foreign countries where the aircraft has not established tax situs.

Therefore, if the aircraft has not established situs in the other jurisdictions, the ground time spent in those jurisdictions may be apportioned to California.

3. <u>If 60 continuous ground days are not required for non-resident flights into Los Angeles to establish a tax situs, why would they be required to establish a tax situs in another state for an aircraft owned by a person who's domiciled is in California (if this is the case)?</u>

As explained above, the amount and nature of the contact of property and its owner with a state necessary to establish tax situs is a factual determination. Several factors must be considered including the domicile of the aircraft owner, the aircraft's length of time in the state, the owner's intent to bring the aircraft into the county, and the owner's contact with the state. Length of time is alone not sufficient to make a determination. The assessor must also consider other factors including the nature of the time spent in the jurisdiction as well as the owner's contact with the state. Therefore, a specific amount of time may establish situs in one case and not in another.

The views expressed in this letter are only advisory in nature; they represent the analysis of the legal staff of the Board based on present law and the facts set forth herein, and are not binding on any person or public entity.

Sincerely,

/s/ Daniel Paul

Daniel Paul
Tax Counsel

DMP:yg
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cc: Honorable
County Assessor

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