Wyoming Law Journal

Volume 2 | Number 3 Article 8

December 2019

Radio Taxation

William C. Lagos

RADIO TAXATION

A New Mexico radio station, sought to determine its liability under an emergency school tax statute which imposed a two percent privilege tax on the gross receipts of its business. It is contended that its broadcasting was wholly interstate even though it included some broadcasting that was primarily for local audiences and that the tax was a burden on interstate commerce.[1] *Held,* that the local advertising originating from the studios was not interstate commerce and was not therefore subject to the tax, but that transcribed or network programs of nationally advertised products constituted interstate commerce and was not subject to the tax. *Albuquerque Broadcasting Co. v. Bureau of Revenue,* 184 P. (2d) 416 (N. M. 1947).

It is well settled that radio broadcasting is subject to federal regulation. In its present stage of development, there cannot be any physical division of radio waves between intrastate and interstate communication.[2] Congress, by enacting legislation, has assumed exclusive control of radio communication.[3] As early as 1902, the United States Attorney General[4] expressed the opinion "that the transmission of messages by wireless telegraphy was commerce, and subject to the regulation by Congress." In 1926, in an opinion to the Secretary of Commerce,[5] the Attorney General stated that radio communication was a proper subject for federal regulation under the commerce clause and that even intrastate transmission of radio waves could fall within the scope of federal power when the effect of such intrastate transmission was to interfere with interstate commerce. Subsequent to the Radio Act of 1927,[6] many cases appeared before the courts questioning the validity of the federal legislation.[7] The courts sustained the legislation on the theory that radio communication was a species of interstate commerce and therefore subject to regulation by Congress. Early attempts by states to impose license fees and some forms of taxation on broadcasting were struck down on the theory then held that all radio broadcasting was interstate commerce.[8] Although it is settled that even local radio broadcasting so affects

1. U. S. Const. Art. I, Sec. 8 (3).
2. Federal Radio Commission v. Nelson Bros. Bond & Mort. Co., 289 U. S. 266, 53 Sup. Ct. 627, 77 L. Ed. 1166, 89 A. L. R. 406 (1933).
3. 48 Stat. 1081 (1934), as amended, 47 U. S. C. A. secs. 151-155 and 301-329 (Supp. 1947).
4. 24 Ops. Att'y Gen. 100 (1902). See 40 A. L. R. 1514. See also Hoover v. Intercity Radio Co., 286 Fed. 1003 (App. D. C. 1923).
5. 35 Ops. Att'y Gen. 126 (1926).
6. 44 Stat. 1162, 47 U. S. C. A. Sec. 81.
7. KFKB Broadcasting Association Inc. v. Federal Radio Commission, 47 F. (2d) 670 (App. D. C. 1931); White v. Federal Radio Commission, 29 F. (2d) 113, 66 A. L. R. 1363 (N. D. Ill. 1928); United States v. Am. Bond & Mort. Co., 31 F. (2d) 448 (N. D. Ill. 1929); City of New York v. Federal Radio Commission, 36 F. (2d) 115 (App. D. C. 1929); Technical Radio Laboratory v. Federal Radio Commission, 36 F. (2d) 111, 66 A. L. R. 1355, (App. D. C. 1929); General Electric Co. v. Federal Radio Commission, 58 App. D. C. 386, 31 F. (2d) 630 (1929).
8. In Whitehurst v. Grimes, 21 F. (2d) 787 (E. D. Ky. 1927), it was held that a city ordinance which required persons operating a radio station to pay a license tax was void as a regulation of interstate commerce. The court stated that "radio communication is all interstate . . . though they may be intended only for intrastate transmission." Similarly in Station WBT v. Poulnot, 46 F. (2d) 671 (E. D. S. C. 1931), discussed in 17 Iowa L. Rev. 431, 79 U. of Pa. L. Rev. 1148, 40 Yale L. J. 990, and 17 Va. L. Rev. 694, a state tax on receiving sets was struck down as being a direct tax upon a

interstate communication as to be subject to federal regulation, it does not necessarily follow that it is all interstate commerce and therefore not subject to any form of state taxation. The most common type of tax which states impose on this activity is the general property tax. Property within the state is subject to normal property taxation even though the property be used in interstate commerce.[9]

During the period from 1931-1937, courts struck down nearly all attempts by states to tax the business of broadcasting itself. In *Station WBT, Inc. v. Poulnot*,[10] the state was enjoined from enforcing the collection of a tax on radio receiving sets on the ground that the tax was laid directly upon a necessary instrument of interstate commerce. A Washington court in *KVL, Inc. v. Tax Commission of Washington*[11] declared a tax on the gross income of a radio station invalid as an imposition of a direct burden on interstate commerce because the radio carrier waves in intrastate commerce could not be segregated from carrier waves in interstate business. The court reasoned that since the segregation of intrastate business from interstate business was impossible, the person or firm engaged in the business of radio broadcasting must be wholly exempt from the tax. Another early attempt by the State of Washington to collect an occupation tax measured by the gross receipts of the business of radio broadcasting was declared invalid, as imposing a burden on interstate commerce, by the United States Supreme Court in 1936 in the landmark case of *Fisher's Blend Station Inc. v. Tax Commission of Washington*.[12] In the 1937 case of *City of Atlanta v. Southern Broadcasting Co.*,[13] a Georgia court declared an occupation tax on its broadcasting station invalid as a direct burden upon interstate commerce;[14] but for several years after 1937, no new attempts were made by states to tax the business of broadcasting.

The court in the instant case, in holding that a gross receipts tax was applicable to receipts from the broadcasting of local advertising, demonstrates a method of imposing such a tax on the business of radio broadcasting. The court

---

necessary instrument of interstate commerce and imposing a burden thereon, and therefore unconstitutional. In United States v. Am. Bond & Mort. Co., 31 F. (2d) 448 (N. D. Ill. 1929), affirmed in 52 F. (2d) 318 (C. C. A. 7th 1931); Technical Radio Laboratory v. Federal Radio Commission, 36 F. (2d) 111, 66 A. L. R. 1355, (App. D. C. 1929); United States v. Gregg, 5 F. Supp. 848 (S. D. Tex. 1934), federal courts upheld federal power to license and regulate broadcasting stations on the ground that broadcasting was interstate commerce. *Contra*: Atlanta v. Oglethorpe University, 178 Ga. 379, 173 S. E. 110 (1934), where the broadcasting originated locally and was solely for local audiences.

9. Western Union Tel. Co. v. Weaver, 5 F. Supp. 493 (D. C. Neb. 1934); Allen v. Pullman Palace Car Co. 191 U. S. 171, 24 Sup. Ct. 39, 48 L. Ed. 1347 (1903); New Jersey Bell Tel. Co. v. State Bd. of Taxes, 280 U. S. 338, 50 Sup. Ct. 111, 74 L. Ed. 463 (1930); See Leloup v. Mobile, 127 U. S. 640, 644, 8 Sup. Ct. 1384 (1888).
10. Cited supra note 8.
11. 12 F. Supp. 497 (W. D. Wash. 1935).
12. 297 U. S. 650, 56 Sup. Ct. 608, 80 L. Ed. 956 (1936).
13. 184 Ga. 9, 190 S. E. 594 (1937).
14. However, in Atlanta v. Oglethorpe University, 178 Ga. 379, 173 S.E. 110, 112 (1934), it was held that a city ordinance which imposed a license fee on a broadcasting station was valid. The court said that "even if it is true that some of its messages do go beyond state lines, that does not make it interstate business." But even if the station did receive messages to be transmitted beyond the state line, the business is almost altogether intrastate, and its income is derived almost entirely from what might be called intrastate commerce.

cited the *Fisher's Blend* case for the proposition that, since listeners in both New Mexico and other states heard the broadcasts, the business was both intrastate and interstate.[15] Mr. Justice Stone, speaking for the court in the *Fisher's Blend* case had suggested that the Washington occupation tax would have been upheld had it appeared that the taxed income had been allocated to that part of the business that was entirely intrastate. The instant case demonstrates the successful application of Mr. Justice Stone's suggestion of allocation to intrastate business.

In other types of business, many attempts have been made to reach gross receipts by taxation. In *Western Live Stock Co. v. Bureau of Revenue*,[16] the United States Supreme Court upheld a New Mexico statute imposing a privilege tax on the amounts received from the sale of advertising space by persons engaged in the business of publishing newspapers or magazines. The court stated that the tax was actually on a local activity since the business of printing and publishing the magazine advertisements was local, and that it was in no way connected with the activity of circulation; furthermore, that interstate commerce must pay its just share of the state tax burden. Since the court saw no possibility of any other state imposing a similar tax on this activity, the tax was upheld. In the case of *Adams Manufacturing Co. v. Storen*,[17] however, the same court struck down a gross receipts tax because of the possibility of multiple taxation. The court felt that such taxes could be duplicated in other states, and that since a part of the business was interstate, the tax was invalid because not apportioned to the intrastate business.[18] This same fear of multiple taxation was expressed in *Gwin, White & Prince v. Henneford*,[19] although the court also placed emphasis on the fact that the state was attempting to lay a privilege tax measured by gross receipts derived from activities in commerce which extended beyond the territorial limits of the taxing state.

The decision in the instant case appears to be on quite firm ground inasmuch as it relied upon the United States Supreme Court's strong language in the *Western Live Stock* case. There, as here, the tax was determined by receipts from advertising. The tax in both cases was sustained for the reasons that it was capable of being applied only to local business, and that there was no possibility of the same activity being taxed by any other state. Additional support can be found in the early case of *Ratterman v. Western Union Telegraph Co.*,[20]

15. This same proposition was advanced in Whitmore v. Bureau of Revenue of State of New Mexico, 64 F. Supp. 911 (D. C. N. M. 1946); affirmed in 329 U. S. 668, 67 Sup. Ct. 62 (1946); in which the same tax statute came before the District Court for the District of New Mexico. The action was dismissed without prejudice to institution of actions in state courts, the court stating that the New Mexico state courts had jurisdiction to hear an action for relief against a collector of taxes and penalties imposed under authority of sec. 76-1404, N. M. Stat. Ann. (1941).
16. 303 U. S. 250, 58 Sup. Ct. 546, 82 L. Ed. 823, 115 A. L. R. 944 (1938).
17. 304 U. S. 307, 58 Sup. Ct. 913, 82 L. Ed. 1365, 117 A. L. R. 429 (1938).
18. For an excellent discussion of the apportionment of gross receipts taxes to intrastate business and the danger of duplication of such taxes by other states, see Powell, More Ado About Gross Receipt Taxes, 60 Harv. L. Rev. 501; Dowling, Interstate Commerce and State Power, 27 Va. L. Rev. 1; Dunham, Gross Receipts Taxes on Interstate Transactions, 47 Col. L. Rev. 211.
19. 305 U. S. 434, 59 Sup. Ct. 326, 83 L. Ed. 272 (1939).
20. 127 U. S. 411, 8 Sup. Ct. 1127, 32 L. Ed. 229 (1888).

which suggested that state taxation could be applied to radio if it were a severable gross receipts tax. The court said it could sustain a tax on gross receipts from intrastate commerce and condemn only that part of the tax that reached receipts from interstate commerce. In *Whitmore v. Bureau of Revenue,* a case based on facts like those in the instant case, the United States District Court for New Mexico held that the business of radio broadcasting was partially intrastate and partially interstate and that the intrastate business was taxable by the state. The Supreme Court affirmed this decision without opinion.[21]

The New Mexico courts have approached the subject of state taxation of radio broadcasting from a practical viewpoint, adopting the views Mr. Justice Stone first advanced in 1938. In accordance with these views, the court would strike down a tax measured by the gross receipts only if such receipts were derived from activities which extended beyond the territorial limits of the taxing state, or if such tax was capable of duplication by other states. However, in the recent case of *Freeman v. Hewit,*[23] the language of the court indicates the possibility of returning to the pre-1938 doctrine of "direct" and "indirect" burden as the test to be applied, and of discarding what seems to be the more practical tests; apportionment to intrastate commerce and the danger of multiple taxation. A return of the court to the "direct-indirect" test could result in preventing other state legislatures from seeking additional revenue by taxation even upon that radio broadcasting which is intrastate. However, the gross receipts tax on the privilege of intrastate broadcasting is now in effect in New Mexico[24] and the high court in that state has supported the legislature's action on the subject.

WILLIAM C. LAGOS

WARNING DEVICES AT CROSSINGS

In an action for personal injuries, the plaintiff stopped in reliance upon a wigwag provided by the defendant railroad company. After the wigwag had stopped oscillating and an electric car had passed, the plaintiff drove his car across the tracks. The plaintiff looked to the south upon reaching the first of four sets of tracks but did not see the train approaching from the north until about five feet from the point of collision. The defendant was clearly negligent in operating its electric car but it is contended that the plaintiff was contributorily negligent as a matter of law. Having been nonsuited in the court below, the plaintiff appeals. *Held,* that the driver's contributory negligence was a question for the jury and the judgment was reversed. *Spendlove v. Pacific Electric Ry. Co.,* 184 P. (2d) 873 (Cal. 1947).

"The decisions are not in accord as to the extent which a traveler may rely on the indication of safety which the silence of a signaling device at a crossing

21. Cited supra note 15.
22. Cited supra note 8.
23. 329 U. S. 249, 67 Sup. Ct. 274 (1946).
24. For a similar statute see Ariz. Code Ann. Sec. 73-1301 par. 2 subsec. (c) (8) (1939).