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Privilege Tax on Interstate Commerce Measured by Gross Receipts

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PRIVILEGE TAX ON INTERSTATE COMMERCE MEASURED BY GROSS RECEIPTS

Mississippi imposed a privilege tax on the appellant, a Delaware corporation qualified to do business in Mississippi, for the operation of a pipeline from oil fields within the state to loading racks adjacent to railroads also within the state, whence the oil was transported to other states. The appellant transported the oil as agent of the owner and received therefor a fee per barrel. The privilege tax was measured by the gross receipts from the operation of the pipe line. The Mississippi Supreme Court held the tax valid as one upon intrastate commerce. Upon appeal, *Held* that, the tax was constitutional. *Interstate Oil Pipe Line Company v. Stone,* 337 U. S. 662, 69 Sup. Ct. 1264, 93 L. Ed. 1163 (1949).

Four justices affirming[1] were of the opinion that even though the tax be considered a direct tax on the privilege of engaging in interstate commerce it was valid because it did not discriminate against interstate commerce, it could not be duplicated by any other state, it did not attempt to levy on activity outside the state border, and here was no need for apportionment because all of the business was carried on within the taxing state. The case of *Maine v. Grand Trunk R. Co.*[2] was considered as controlling in the present controversy. In that case a state statute was held valid which imposed upon an interstate railroad corporation an annual excise tax, measured by apportioned gross receipts, for the privilege of exercising its franchise within the state. Justice Burton, the fifth member of the majority, did not concur in the reasoning but thought along with the state court that the activity was intrastate and the tax thereon valid.

Since the *Grand Trunk* case taxes have been held valid which are imposed on the corporate franchise[3] when they are properly apportioned.[4] If the tax is properly apportioned it does not attempt to impose a tax upon interstate commerce outside the state boundary line, nor is there any duplication of the tax by any other state. Such a tax does, however, allow what is considered to be, in effect, a direct burden upon the interstate commerce itself.[5] The split of the court in the present instance evolves from the two approaches to the problem of what constitutes an undue burden on interstate commerce, the one being what

1. JJ. Rutledge, Black, Douglas, and Murphy.
2. 142 U. S. 217, 12 Sup. Ct. 121, 35 L. Ed. 994 (1891).
3. 15 C. J. S. 485.
4. International Shoe Co. v. Shartel, 279 U.S. 429, 49 Sup. Ct. 380, 73 L. Ed. 781, (Rehearing denied) 50 Sup. Ct. 79, (1929); St. Louis-San Francisco Ry. v. Middlekamp, 256 U. S. 226, 231, 41 Sup. Ct. 489, 65 L. Ed. 905 (1921); Hump Hairpin Co. v. Emmerson, 258 U. S. 290, 42 Sup. Ct. 305, 66 L. Ed. 622; Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 119, 41 Sup. Ct. 45, 65 L. Ed. 165 (1920); St. Louis Southwestern Ry. Co. v. Arkansas, 235 U. S. 350, 35 Sup. Ct. 99, 59 L. Ed. 265 (1914); Kansas City, Ft. S. & M. Railway Co. v. Kansas, 240 U. S. 227, 36 Sup. Ct. 261, 60 L. Ed. 617 (1916); Kansas City, etc., R. R. Co. v. Stiles, 242 U. S. 111, 37 Sup. Ct. 58, 61 L. Ed. 176 (1916); Southern Railway Co. v. Watts, 260 U. S. 519, 43 Sup. Ct. 192, 67 L. Ed. 375 (1923).
5. Almy v. California 24 How. 169 (1860); Cook v. Pennsylvania, 97 U. S. 566 (1878); Philadelphia & S. S. S. Co. v. Pennsylvania, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200 (1887); Leloup v. Port of Mobile, 127 U. S. 640, 648, 8 Sup. Ct. 1380, 32 L. Ed. 311 (1888); State Freight Tax Case, 15 Wall. 232, 21 L. Ed. 121 (1873); Welton v. Missouri, 91 U. S. 275, 278, 23 L. Ed. 347 (1876); Fargo v. Michigan, 121 U. S. 230, 7 Sup. Ct. 857, 30 L. Ed. 888 (1887); Walling v. Michigan, 116 U. S. 446, 6 Sup. Ct. 454, 29 L. Ed. 691 (1886); A. J. 754.

might be called the economic approach in which apportionment is an important factor, and the other the traditional direct or indirect burden test.

The traditional view since the *Case of the State Freight Tax*[6] has been that any tax which directly burdens interstate commerce is unconstitutional.[8] A tax which is in effect on gross receipts is such a direct tax.[9] This direct or indirect test does not lend itself to the economic consideration of whether or not interstate commerce is paying its share of the cost of maintaining the state government in which it operates as does the test of apportionment. In addition to the apportionment factor, the economic approach includes consideration of discrimination against interstate commerce, taxing of activities outside the state, and the possibility of other states imposing the same tax on the interstate commerce. These considerations have no place in the direct burden test.

The economic approach to the problem was stressed in 1938 in the case of *Western Live Stock v. Bureau of Internal Revenue*[10] in which Chief Justice Stone advanced what is called the "cumulative burdens test,"[11] which corresponds to the economic approach. This view allowed the state more latitude in taxing interstate commerce so as to make it pay its share of the cost of the operation of the state. The economic approach was in favor with the supreme court until 1946[12] when *Freeman v. Hewit*[13] was decided, followed in 1947 by *Joseph v. Carter* N *Weeks Stevedoring Co.*[14] In the former case the majority said that the immunities of the commerce clause cannot be made to depend on the economics involved.[15] As was pointed out in the concurring opinion of Mr. Justice Rutledge, the majority decision was based on the traditional direct burden test.[16] In the latter case it was said that the stevedoring was a part of the commerce itself although wholly within the state, and a tax upon its gross receipts or upon the privilege of engaging in the business was an unconstitutional burden on interstate commerce.[17] These two cases dismiss the economic view in favor of the old direct burden theory as favored by the dissenters in the principal case.

Those affirming the tax in the present case would absolutely discard the direct burden test and allow the tax to be pinned on the privilege of engaging in the business so long as the tax was apportioned; thus, they would like to return to the economic approach through the apportioned gross receipts tax.[18] The

6. 15 Wall. 232, 21 L. Ed. 121 (1873).
7. Ch. J. Vinson, JJ. Reed, Frankfurter, and Jackson.
8. 12 C. J. 97.
9. See note 5 supra; 2 Wyo. L. J. 135.
10. 303 U. S. 250, 58 Sup. Ct. 546, 82 L. Ed. 823, 115 A. L. R. 944 (1938).
11. "According to this doctrine, state taxation of interstate commerce would be allowed provided that interstate commerce was not subjected to multiple taxation resulting in cumulative burdens which would place interstate commerce at a competitive disadvantage with local commerce." 46 Mich. L. Rev. 50.
12. 26 Tex. L. Rev. 341.
13. 329 U. S. 249, 67 Sup. Ct. 274, 91 L. Ed. 265 (1946).
14. 330 U. S. 422, 67 Sup. Ct. 815, 91 L. Ed. 993 (1947).
15. See note 13 supra.
16. Ibid.
17. See note 14 supra.
18. As evidence of this trend, see Central Greyhound Lines v. Mealey, 334 U. S. 653, 68 Sup. Ct. 1260, 92 L. Ed. 1633 (1948); International Harvester Co. v. Evatt, 329 U. S. 416, 67 Sup. Ct. 444, 91 L. Ed. 390 (1947); Memphis Gas Co. v. Stone, 335 U. S. 80, 68 Sup. Ct. 1475, 92 L. Ed. 1832 (1948); Aero Mayflower Transit Co. v. Board of Commissioners, 332 U. S. 495, 68 Sup. Ct. 167, 92 L. Ed. 99 (1947).

four dissenting justices indicate their desire to retain the direct burden test originally followed and recently returned to in the *Freeman* and *Carter & Weeks* decisions.

Since Justice Burton did not express his view on the most desirable approach to the problem, the case presents no clear answer to this perplexing problem. The stand taken by those affirming the validity of the tax does indicate that there is serious consideration of again discarding the original direct burden test.

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JUDICIAL DISCRETION IN IMPOSING SENTENCE

Defendant was found guilty of murder in the first degree. Although the jury recommended life imprisonment, the trial judge imposed the death sentence after considering additional information obtained through the court's probation department, "and through other sources" as prescribed by the New York Criminal Code pre-sentencing procedure statutes.[1] Counsel for the defendant contended that, as construed and applied, the controlling statutes were in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, "in that the sentence of death was based upon information supplied by witnesses with whom the accused had not been confronted and as to whom he had no opportunity for cross-examination or rebuttal."[2] On appeal, the United States Supreme Court *held* that the protection of the due process clause applies where the question for consideration is the *guilt* of the defendant, but a judge in imposing sentence may exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of *punishment* to be imposed within the limits fixed by law. The verdict and sentence of the trial court were accordingly affirmed. *Williams v. People of the State of New York,* 337 U. S. 241, 69 Sup. St. 1079, 93 L. Ed. 1008 (1949).

The Court reasoned that a sentencing judge is not confined to the narrow issue of guilt, and the reasons behind the rules of evidence which apply to criminal trials on the issue of guilt are not present when determining the sentence to be imposed. The Court observed that sentencing judges have long exercised this wide discretion, and it is highly relevant—if not essential—to their exercise of discretion in selecting an appropriate sentence that they possess the fullest information possible concerning the defendant's life and character. The due process clause, according to the opinion, should not be treated as a uniform command that the courts throughout the nation abandon their age-old practice of seeking information from out-of-court sources to guide their judgment toward a more en-

1. (The court cites N.Y. Crim. Code sec. 482). The available statute is (N.Y.) McK. Crim. Code 1939 sec. 482: " * * * Before rendering judgment or pronouncing sentence the court shall cause the defendant's previous criminal record to be submitted to it, including any reports that may have been made as a result of a mental, psychiatric or physical examinations of such person, and may seek any information that will aid the court in determining the proper treatment of such defendant."
2. Williams v. People of N.Y., 337 U. S. 241, 69 Sup. Ct. 1079, 1081, 93 L. Ed. 1008 (1949).