Indiana Law Journal

Volume 16 | Issue 2 Article 13

12-1940

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In response to needs created by the depression, many states enacted general sales taxes. These tax laws developed both economic and legal defects. Particularly, they could not be levied upon interstate sales.[1] Avoidance of the tax was easily effected by buying out-of-state. Not only did this result in a short-changing of the state's coffers, but also, it produced a serious diminution of business within the state.[2] Local merchants whose transactions were subject to the tax could not compete on equal terms with out-of-state sellers. To remedy this defect the use tax was adopted by many states.[3]

The use tax is a levy on the use of property which would have been subject to a sales tax had it been purchased locally.[4] The tax rate is usually the same as the sales levy, and the statutes generally provide that no article on which a sales or use tax has once been paid within the state shall be again taxable.[5] Eight states provide for compensatory or offset provisions, crediting the taxpayers with the amount of sales or use tax paid on the purchase in any other state up to the full amount of the levy in the taxing state.[6]

The constitutional validity of the general compensatory use tax, complementary to a general sales tax, was established in *Henneford v. Silas Mason Co.*[7] The principle of compensating taxation in interstate commerce had previously gained approval.[8] Also taxes upon the use of gasoline within the state, though neither general nor complementary to a sales tax, had been sustained,[9] as had taxes upon storage and

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[1] Lowndes, *State Taxation of Interstate Sales* (1935) 7 Miss. L.J. 223, 229.

[2] It seems likely to suppose that avoidance practices are indulged in by large scale purchasers rather than the average consumer. See Lowndes, *supra* note 1 at 223.

[3] Rule 178 of the Tax Commission of Washington states: "The primary purpose of the compensating tax is to protect the merchants of Washington from discrimination arising by reason of the inability of the state, because of the Federal Constitution, to impose a tax upon sales made to residents of this state by competitive merchants in other states." C.C.H. Wash. ¶58-950 (1937). For a list of states with use taxes see MARKETING LAWS SURVEY W.P.A. (1939) 73-81.

[4] See the statement by Mr. Justice Cardozo: "The privilege of use is only one attribute, among many, of the bundle of privileges that make property or ownership . . . . A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charges distributively. Henneford v. Silas Mason Co., 300 U.S. 577, 582 (1937). Yet it seems unquestioned that the use tax does not partake of the nature of a property tax to such an extent as to require uniformity or meet the other constitutional limitations on property taxes.

[5] A typical use tax statute is Calif. Acts. 1935, ch. 361.

[6] MARKETING LAWS SURVEY W.P.A. (1939) 73.

[7] 300 U.S. 577 (1937).

[8] Hinson v. Lott, 8 Wall. 148 (U.S.1868).

[9] Gregg Dyeing Co. v. Query, 286 U.S. 472 (1932); Monamotor Oil Co. v. Johnson, 292 U.S. 86 (1934).

withdrawal from storage,[10] even though the articles were to be used in interstate commerce. The rationale upon which the storage and withdrawal taxes were sustained was that the "use" was wholly intrastate, and therefore taxable by the state, even though the article was intended for immediate consumption in interstate commerce.[11] The same rationale was used in sustaining the general compensatory use tax.[12]

As the use tax is sustained upon the theory that interstate movement has either ceased or not begun, the ever-present question as to when interstate commerce begins and ends complicates the question of validity and practical value of the use tax. A use tax has been upheld though applied to extrastate purchases of a foreign corporation engaged in interstate commerce, to be used in interstate commerce, and installed immediately upon arrival within the state.[13] The court said: "We think there was a taxable moment when the former had reached the end of their interstate transportation and had not yet begun to be consumed in interstate operation . . . . Practical continuity does not always make an act a part of interstate commerce . . . . "[14]

The use tax upheld in the *Silas Mason Co.* case permitted a credit for a sales or use tax of whatever amount or wherever paid.[15] While the courts recognize and distinguish the two types of use tax,[16] the non-compensatory tax has also been upheld.[17] In so holding the court rejected the contention that the possibility of multiple taxation rendered the tax unconstitutional.[18] This seems inconsistent with the language of other tax cases, where the mere possibility of multiple

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[10] Nashville, etc., Ry. v. Wallace, 288 U.S. 249 (1933); Edelman v. Boeing Air Transport, Inc., 289 U.S. 249 (1933).

[11] Nashville, etc., Ry. v. Wallace, 288 U.S. 249, 268 (1933).

[12] Henneford v. Silas Mason Co., 300 U.S. 577, 582 (1937).

[13] Southern Pacific Co. v. Gallagher, 306 U.S. 167 (1939); Pacific Telephone and Telegraph Co. v. Gallagher, 306 U.S. 182 (1939); Oklahoma Tax Comm. v. Stanolind Pipe Line Co., 113 F (2d) 853 (C.C.A. 10th, 1940).

[14] Southern Pacific Co. v. Gallagher, 306 U.S. 167, 177 (1939).

[15] Wash. Act 1935. ch. 180, §32 (C), 33. This compensatory provision has been eliminated by amendment. Wash. Acts. 1935, ch. 191, §2.

[16] This is apparent in the *Silas Mason Co.* case not only from the emphasis placed upon equality and non-discrimination, but from the following words of Mr. Justice Cardozo: "We have not meant to imply by anything said in this opinion that allowance of a credit for other taxes paid to Washington made it mandatory that there should be a like allowance for taxes paid to other states. A state, for many purposes, is to be reckoned a self-contained unit, which may frame its own systems of burdens and exemptions without heeding systems elsewhere. If there are limits to that power, there is no need to mark them now. It will be time enough to mark them when a taxpayer paying in the state of origin is compelled to pay again in the state of destination." 300 U.S. 577, 587.

[17] Southern Pacific Co. v. Gallagher, 306 U.S. 167 (1939).

[18] *Id.* at 172. The court repeated the "time enough" formula set forth in the *Silas Mason Co.* case. See note 16 *supra.*

taxation on interstate commerce was held to invalidate the tax.[19] The question as to the validity of such a tax in a case where multiple taxation was actually proved was expressly reserved.[20]

In addition to the legal aspects of the use tax, consideration must be given to economic problems created by this method of taxation. Only the non-compensatory use tax is regarded as a barrier to interstate trade,[21] yet it would seem that even a use tax with compensatory provisions might so operate as to restrict trade between the states. The restriction from such a statute might arise in any one of three ways, or possible combinations thereof. Administrative discrimination in enforcement of the tax act is one ever-present potential barrier. Such a restriction is of course extra-legal. A second possibility whereby the compensatory use tax may operate as a barrier is suggested by the question of incidence of taxation.[22] The sales tax is paid by the seller; the use tax is frequently if not usually collected from the consumer.[23] Unless, then, the sales tax is shifted in its entirety,[24] there will be no equivalent burden on the two classes of consumers and there will be a consequent discrimination against out-of-state merchants. There is a plethora of economic authority contradicting the inevitability of such a shift in its entirety,[25] and if true it would seem that in some cases where the use tax is collected from the purchaser an unseen barrier exists. The court has, however, held that this was not a constitutional objection, as "this is not a discrimination in the law."[26]

The third barrier which may arise from even a compensatory use tax is found in provision for collection of the tax by the out-of-state seller maintaining an office within the state or doing business in the state.[27] Here again the question of incidence of taxation is presented. If there is not an equivalent shift to both user and buyer, there is a discrimination which would tend to interfere with interstate trade. But assuming this question disposed of, a more important question

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[19] "Unlawfulness of burden depends upon its nature, measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to like burden . . . . ." Gwin, White and Prince v. Henneford, 305 U.S. 434, 439-40 (1939); Adams Manufacturing Co. v. Storen, 304 U.S. 307 (1938).

[20] See note 18 *supra.*

[21] Melder, *Trade Barriers and States Rights* (1939) 25 A.B.A.J. 307; Moore, Address—*Interstate Trade Barriers . . . A Challenge to Our Economy* (1939), N.A.M., New York.

[22] Warren and Schlesinger, *Sales and Use Taxes* (1938) 38 Col. L. Rev. 49.

[23] *Id.* at 70.

[24] "A tax is, as it were, a sticky substance, and like pitch or shoemaker's wax, some of it may adhere to every hand or thread that touches it." PLEHN, INTRODUCTION TO PUBLIC FINANCE (1926) 24-25.

[25] Warren and Schlesinger, *supra* note 23 at 71. (Footnote 104).

[26] Southern Pacific Co. v. Gallagher, 306 U.S. 167, 172. (1939).

[27] For a discussion of jurisdiction to compel collection, see note (1939) 27 Calif. L. Rev. 360.

remains. Is the burden of collection imposed upon the out-of-state dealer a barrier? The United States Supreme Court has taken the position that it is not, on the theory that the state makes the distributor its agent for that purpose.[28]

But the contention is made that despite the decisions of the court, compelling collection by out-of-state dealers burdens interstate commerce in two ways. First, the additional economic burden of accounting and reporting expense. Second, the subjection of the out-of-state dealers' books to the examination of the officials of the collecting state. It is not claimed that this subjection discriminates between the in-state dealers and the out-of-state dealers, as both are equally subject to the state's auditors. The contention is that it discriminates between two out-of-state competitors, one of whom has an agent or office within the taxing state so as to be "doing business within the state," while the other sells within the taxing state by mail orders or non-resident salesmen, and is not "doing business" therein. The former is subject to examination of books while the latter is not. As a result of this discrimination, the tendency is for the dealer subject to examination to withdraw from the taxing state to an extent sufficient to avoid tax jurisdiction.

It is to be doubted whether the first contention is of a serious nature, as the additional expense cannot be substantial. And the answer to the second objection, so far as the use tax is concerned, is that it is not the collection of a tax which gives jurisdiction to examine books, but the doing business within the state. If the taxing state may compel collection of a use tax, it also has the power to examine books for purposes of determining sales tax evasions even in the absence of a use tax.

Regardless of the merits of these contentions, by the analysis of barriers elsewhere discussed,[29] neither the additional accounting expense nor the subjection to examination of books is, on the face of the law, a barrier. Neither is a discrimination as between states. Hence it seems that even if a burden on interstate commerce actually exists, it is not properly termed a barrier.

In view of its widespread operation, the gasoline use tax requires special attention. Every state levies this tax.[30] The validity of these taxes involves a resolution of two conflicting principles. A state may tax interstate commerce to compensate for the use of its highways by interstate carriers.[31] "Interstate commerce must pay its own

[28] Monamotor Oil Co. v. Johnson, 292 U.S. 86 (1934); Felt and Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62 (1939). *But cf.* Sears, Roebuck & Co. v. Roddewig, 292 N.W. 130 (Iowa 1940).

[29] See, Melder, *supra*, p. 127.

[30] Commonwealth v. Dixie Greyhound Lines, 255 Ky. 111, 72 S.W. (2d) 1032, 1035 (1934), The Indiana tax, IND. STAT. ANN. (Burns 1933) §47-1501 *et seq.*, was upheld in *Gafill v. Bracken*, 195 Ind. 551, 145 N.E. 312 (1924).

[31] Morf v. Bingaman, 298 U.S. 407 (1936); Aero Mayflower Transit Co. v. Georgia Public Service Comm., 295 U.S. 285 (1935); Hicklin v. Coney, 290 U.S. 169 (1933); Clark v. Poor, 274 U.S. 554 (1927).

way."[32] Opposed to this is the hoary immunity doctrine—that a tax on the use of an instrumentality in interstate commerce is an unconstitutional burden.[33]

In an early case an excise tax on the consumption of gasoline by an instrumentality engaged solely in interstate commerce was held unconstitutional as a direct burden.[34] Although this case is still cited as authority,[35] later decisions have made substantial inroads upon the immunity provided by this decision.[36] The present position of the court seems to be that a use tax may be imposed on motor fuel if it is exacted as compensation for the use of highways or other facilities provided by the state.[37] On this rationale a use tax on gasoline consumed by airplanes engaged in interstate commerce has been upheld.[38] But if the statute imposes an excise tax for the use of an instrumentality of interstate commerce it contravenes the commerce clause.[39]

Insofar as the gasoline use tax is imposed solely upon fuel actually consumed within a state, it seems unquestionable that the tax is not a trade barrier, regardless of its constitutionality. No discrimination against out-of-state carriers exists on the face of the law, as it operates equally upon local commerce. But the practical problem of enforcement presents difficulty. How much gasoline is actually consumed within the state? If the only criterion is fuel purchased within the state, the simple expedient of loading up before entering the state not only avoids the tax, but favors out-of-state gas dealers over local dealers. One attempted remedy came before the court in *McCarroll v Dixie Greyhound Lines.*[40] An Arkansas statute[41] required the payment of the state tax upon all gasoline in excess of twenty gallons carried into the state in motor vehicle fuel tanks. The court

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[32] Mr. Justice Holmes dissenting in *New Jersey Bell Telephone Co. v. Tax Board,* 280 U.S. 338, 351 (1930).

[33] Helson v. Kentucky, 279 U.S. 245 (1929). But see Mr. Justice Stone concurring, p. 253.

[34] *Ibid.*

[35] Bingaman v. Golden Eagle Lines, 297 U.S. 626 (1936); Southern Pacific Co. v. Gallagher, 306 U.S. 167 (1939).

[36] Warren and Schlesinger, *supra* note 23. A sales tax on gasoline used only in interstate commerce is valid. Air Transport, Inc. v. Tax Commission, 285 U.S. 147 (1932). Although a sales tax may be distinguishable from a use tax on a temporal or geographical basis, from an economic viewpoint the burden on interstate commerce seems the same. That the court is not concerned with economic burdens is suggested by the language of Mr. Justice Reed in *Southern Pacific Co. v. Gallagher,* 306 U.S., at 177-78 (1939). "It is true, the increased cost to the interstate operator from a tax on installation is the same as from a tax on consumption or operation. This is not significant. The prohibited burden . . . . is created by state interference with that commerce, a matter distinct from the expense of doing business."

[37] Bingaman v. Golden Eagle Lines, 297 U.S. 626 (1936); McCarroll v. Dixie Greyhound Lines, 309 U.S. 176 (1940).

[38] Varney Air Lines v. Babcock, 1 F. Supp. 687 (S.D. Idaho, 1932).

[39] Bingaman v. Golden Eagle Lines, 297 U.S. 626 (1936).

[40] 309 U.S. 176 (1940).

[41] Arkansas Acts 1933, Act 67. Indiana has a similar statute with a 15 gallon limit. IND. STAT. ANN. (Burns 1933). §47-1504.

held that the imposition of the tax in this particular case was an unconstitutional burden on interstate commerce. Both the majority and the minority agreed that the use of gasoline within the state might be taxed as compensation for the use of its highways. Likewise both agreed to a limitation of this principle. "It must appear on the face of the statute or be demonstrable that the tax as laid is measured by or has some fair relationship to the use of the highways for which the charge is made."[42] But the court split on the application of this rule to the facts of the case, the majority holding that no such relationship existed.[43]

Of perhaps greater significance than the decision in this case is the theory expressed by the three dissenting justices,[44] that it is better to leave the whole matter of interstate trade barriers to Congress rather than to depend upon the "spasmodic and unrelated instances of litigation" in the courts.[45]

As was pointed out above, the use tax was conceived to remedy the defects in sales tax laws. *McGoldrick v. Berwind-White Co.* sustained a statute which imposed a tax by the buyer's state on the transfer of possession of goods purchased for consumption even though the delivery was a necessary part of interstate commerce.[46] As the court failed to make a point as to whether interstate commerce had ended, it would seem that the decision extended the state's taxing power over interstate commerce. It has been stated that this case, with a companion case,[47] "appears to completely overrule the doctrine of tax immunity of interstate sales."[48] Since the decision in the *Berwind-White* case it is at least questionable whether the use tax is still needed to complement the sales tax.[49] It seems doubtful, however, in view of the favor with which the courts have regarded the use tax, that legislatures will repeal existing use tax laws and risk decisions under sales tax laws.

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[42] 309 U.S. 176 (1940).

[43] *Ibid.* "It is not enough that the tax when collected is expended upon the state's highways."

[44] Mr. Justice Black, Mr. Justice Frankfurter, and Mr. Justice Douglas.

[45] 309 U.S. at 188-89.

[46] 309 U.S. 33 (1940).

[47] McGoldrick v. A. H. Dugrenier, 309 U.S. 70 (1940).

[48] Note (1940) 15 Ind. L. J. 316, 319.

[49] The Committee on Uniform Sales Taxation of the National Association of Tax Administration has proposed that a sale for consumption within the state is taxable when (1) the seller is engaged in the business of selling such goods in the state and (2) delivery is made in the state. Delivery is made within the state (1) when physical possession is transferred therein or (2) when placed in the mails or on board a carrier outside the state and directed to a buyer in the state. Engaging in business includes not only the usual legal meaning of the term, but also merely having a salesman subject to authority within the state, whether permanently or temporarily. It is immaterial that the contract of sale is closed outside the state. Goods sold within the state for shipment out by the seller are exempt from the tax, provided they are not returned to a point within the state. This regulation has been adopted by Missouri, effective on and after the 1st day of October, 1940.