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Gross Receipts Taxes on Interstate Transactions, (Ain't God Tough on Indiana?)

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GROSS RECEIPTS TAXES ON INTERSTATE TRANSACTIONS

(AIN'T GOD TOUGH ON INDIANA*)

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In recent years the Supreme Court has been reconsidering the effect of the commerce clause on the power of the state either to regulate or tax interstate commerce. Whatever bases the Court has suggested for the results—and there have been many—an examination of the cases since 1938 indicates that, with few exceptions, greater freedom has been allowed the states under the commerce clause than was heretofore thought possible. Unfortunately for Indiana, the major exceptions appear in 1938 and 1946 in two cases[1] which deny that State important sources of revenue under its gross income tax law. Between those two dates only one non-discriminatory transaction tax has been invalidated.

The late Chief Justice Stone, first as a dissenter, then as a majority spokesman, evidenced considerable interest in this problem and made major contributions by use of his eminently practical approach[2] to the learning on the effect of the commerce clause on state tax activities. For some years a sharp debate has divided members of the Court on the judicial function under the commerce clause.[3] As re-examination of this question has pressed forward, differences in the views of individual justices haye developed and sharpened.[4]

There is nothing requiring adverse comment in the divergence of opinion over the proper approach to judicial review of state taxing activities under the commerce clause. However, it is unusual that within a year after Chief Justice Stone's death the majority of the Supreme Court should not only discard recently developed doctrines but should so quickly return the Court to the

* With apologies to William Herschell and his poem entitled "Ain't God Good to Indiana."

1. Adams Mfg. Co. v. Storen, 304 U. S. 307 (1939), and Freeman v. Hewitt, 67 Sup. Ct. 274 (1946). McLeod v. Dilworth Co., 322 U. S. 327 (1944), which invalidated an Arkansas sales tax, appears more properly classifiable as a due process case rather than a commerce clause case.

2. *See* Cheatham, *Stone on Conflict of Laws* (1946) 46 COLUMBIA LAW REV. 719; Wechsler, *Stone and the Constitution* (1946) 46 COLUMBIA LAW REV. 764, 785.

3. See majority and dissenting opinions in Adams Mfg. Co. v. Storen, 304 U. S. 307, 316 (1939); Gwinn, White & Prince, Inc. v. Henneford, 305 U. S. 434, 442 (1939); Southern Pacific v. Arizona, 325 U. S. 761, 784 (1945); Nippert v. Richmond, 327 U. S. 416, 435 (1946); *cf.* Black, J., concurring in Morgan v. Virginia, 66 Sup. Ct. 1050, 1058 (1946).

4. Compare the views of Mr. Justice Frankfurter in McCarroll v. Dixie Greyhound Lines, 309 U. S. 176, 183 (1940) with his views in McLeod v. Dilworth, 322 U. S. 327 (1944) and Freeman v. Hewitt, 67 Sup. Ct. 274 (1946).

position it held when he came to the Supreme Court in 1925. Discarding old doctrine or terminology for new is commonplace; abandoning new for thoroughly criticized old is unusual.

Freeman v. Hewitt, decided December 16, 1946,[5] involving a gross income tax on an interstate transaction presents such a unique situation. It is the first case in the writer's recollection in which the late Chief Justice has been in effect overruled.[6] The majority dismisses his approach in a brief reference to "fashions" in judicial writing.

It is not the purpose of this paper to speculate on how Chief Justice Stone would have voted in the *Freeman* case, but, in light of doctrines recently developed, to examine the varying approaches to the problem advanced by the three opinions in the case and to consider the direction in which Stone's approach was leading the Court prior to this case.

On the facts the *Freeman* situation is different from any other recent interstate commerce case. It does not involve a transaction growing out of ordinary commercial or business activity, nor marketing of manufactured or processed goods by a manufacturer, processor, or buying and selling agency. Neither does it deal with receipts from transportation or interstate communication, as did the first gross receipts tax cases. As far as the taxpayer is concerned, the interstate transaction taxed here was an isolated sale unrelated to the taxpayer's ordinary business.

A trustee, domiciled in Indiana, in managing the investment portfolio of a testamentary trust created and administered under the laws of Indiana, placed an order to sell certain stocks and bonds at a specified price with his Indiana broker. Through the New York correspondent of the Indiana broker the securities were offered for sale on the New York Stock Exchange. When a purchaser was found, the Indiana broker was notified and in turn informed the trustee, who delivered the certificates to the broker for transmission to New York. Upon receipt by the New York correspondent, the certificates were delivered to the purchaser who paid the purchase price. After deduction of expenses and commissions the proceeds were transmitted to the Indiana broker who delivered the proceeds, less his commission, to the trustee. Indiana assessed a 1% tax on the amount received by the trustee from this transaction. The Supreme Court of Indiana sustained the tax in a suit for refund on the ground that the situs of the securities was Indiana.[7]

The case was first argued in November, 1944, but apparently the Court was unable to reach an agreement and the case was set down for reargument,

5. 67 Sup. Ct. 274 (1946).
6. *Cf.* Gardner, *Mr. Chief Justice Stone* (1946) 59 HARV. L. REV. 1203, 1209.
7. 221 Ind. 675, 51 N. E.(2d) 6 (1943).

with direction to counsel to argue the commerce clause question.[8] That the Court directed reargument with attention of counsel so directed may indicate that the Court desired to re-examine the basic principles of state taxation of interstate transactions.

Such a re-examination—if not actually required by the cases—was at least desirable. To all appearances there were conflicting lines of authority before the court. Those seeking to uphold state taxes turned to *American Mfg. Co. v. St. Louis,*[9] *Western Livestock v. Bureau of Internal Revenue*[10] and *McGoldrick v. Berwind-White Coal Co.*[11] for support. Those seeking to strike down such taxes turned to *Adams Mfg. Co. v. Storen.*[12]

The *Adams* case was the first test of the Indiana gross income tax to reach the Supreme Court. The Court held that the Indiana tax could not constitutionally reach the gross proceeds received by an Indiana manufacturer from out-of-state sales of his goods. Perhaps this case, without more, could have been the basis of a reversal of the Indiana Supreme Court here. But to have so used it would have been to ignore some embarrassing authorities.

Although the *Adams* case, when compared with the use tax cases[13] and the *Berwind-White* decision, is the basis for the belief among commentators[14] that the state of the seller may not tax proceeds of interstate sales but the buyer's state may, the *Freeman* case is the first since *Adams* to strike down a tax by a state of origin on the proceeds of an interstate transaction. Some cases since *Adams* have upheld the tax on facts scarcely distinguishable in the economic effect of the tax on interstate commerce.[15]

In dissenting in *Freeman v. Hewitt,* Justice Douglas thought that the *Adams* situation could be distinguished as involving a serious threat of multiple taxation of interstate commerce. Although in disagreement on this point,

8. 66 Sup. Ct. 19 (1945). The opinion of the Indiana Supreme Court had rested the validity of the tax on the ground that intangible property was located at the domicile of the owner. Hewitt v. Freeman, 221 Ind. 675, 51 N. E.(2d) 6 (1943). The Indiana Attorney General had continued this argument in the Supreme Court. On reargument his brief, while answering the questions posed by the Court, again emphasized the intangible nature of the property. The majority correctly disposed of this argument summarily. A tax imposed on the proceeds of a sales transaction of intangible property is no different from a sales transaction of tangible property.

9. 250 U. S. 459 (1919).

10. 303 U. S. 250 (1938).

11. 309 U. S. 33 (1940).

12. 304 U. S. 307 (1938).

13. Henneford v. Silas Mason Co., 300 U. S. 577 (1937); Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62 (1939); Nelson v. Sears Roebuck Co., 312 U. S. 359 (1941); General Trading Corp. v. Tax Comm., 322 U. S. 335 (1944).

14. See Lockhart, *The Sales Tax in Interstate Commerce* (1939) 52 HARV. L. REV. 617; Lockhart, *State Tax Barriers to Interstate Trade* (1940) 53 HARV. L. REV. 1253; Powell, *New Light on Gross Receipts Taxes* (1940) 53 HARV. L. REV. 909; McNamara, *Jurisdictional and Interstate Commerce Problems in the Imposition of Excises on Sales* (1941) 8 LAW & CONTEMP. PROB. 482; Morrison, *State Taxation of Interstate Commerce* (1942) 36 ILL. L. REV. 727.

15. Discussed *infra* pp. 224, 225.

the majority viewed recent cases as sufficiently damaging to the *Adams* authority to require something more to strike down the tax.

But the something more which Justice Frankfurter provided as a basis for limiting the reach of the Indiana gross income tax, is, if not surprising, at least disturbing to all state taxing authorities. The Court does not lessen the disturbance by stating that opinions in this field "must be read in the setting of the particular cases and as the product of preoccupation with their special facts." For, as the concurring opinion points out, if the basis of the decision is to be applied only to dispose of the present case it is an "arbitrary formula" which is tough only on Indiana.

PRIOR APPROACHES

The majority starts, as it must, with the proposition that the commerce clause "of its own force" places restrictions on state power to tax or regulate interstate commerce.[16] But this century-old doctrine, stemming from *Cooley v. Board of Wardens*[17]—that the commerce clause prohibits some but not all state regulation or taxation—is only the first hurdle and the one easiest to take. If there is a negative implication to the commerce clause—that *some* state action affecting interstate commerce is not permissible—how can Mr. Hewitt of the Indiana gross income tax division know or determine *which* is valid and which unconstitutional?

The *Cooley* case said that if the "subjects of this power" are "national," "exclusive legislation by Congress" alone is permissible; if "local," the states may act—at least, until Congress acted contradictorily.

This approach seemed to suggest that in resolving a commerce clause controversy involving state legislation the Court should focus its attention on the need for uniformity and should weigh local interests against interference with national interests. Perhaps because this involved an open policy judgment unobscured by legal terminology, later justices began to speak of the "subject" of state activity as the controlling factor, without considering the effect of the state law on interstate commerce. This "subject-measure" approach required a determination of the "incidence" of the tax; *i.e.*, on what was it imposed? To determine this, the Court began by denying controlling effect to the language of the statute and then went on to inquire more deeply; however, it failed to develop a workable standard to guide it in deciding when a tax was "on" a local rather than an interstate activity. Then new terminology evolved. The Court spoke of "direct" and "indirect" effects or burdens

16. The concurring opinion agrees and the dissent does not deny this negative implication of the commerce clause. See Dowling, *Interstate Commerce and State Power* (1940) 27 VA. L. REV. 1, for a general discussion of this question.
17. 12 How. 298 (U. S. 1851).

on interstate commerce—the latter being valid. However, this terminology was merely a statement of result,[18] useless in determining which taxes were valid. Finally, in 1938, Justice Stone attempted to re-state commerce clause law. For gross income tax cases he advanced the now famous "multiple burden" theory as an explanation of the cases:

> "The vice characteristic of those [taxes] which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed . . . or added to . . . with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce."[19]

The majority opinion discards this new terminology and the factual approach that went with it. The factual approach, at least in tax cases, is irrelevant, says Justice Frankfurter, a mere "fashion in judicial writing." While the negative implication doctrine applies to all state policy no matter what state interest gives rise to its legislation, different points of departure are to be taken by the Supreme Court, depending on whether the state legislation is regulatory or revenue-raising.[20] If the former, Justice Frankfurter says: "The incidence of a particular type of State action may throw the balance in support of the local need because interference with the national interest is remote or unsubstantial." If a tax statute, the incidence of the tax is controlling. If the tax is a "direct tax upon" interstate commerce or a "levy upon the very process of commerce" or a "direct tax on interstate sales," the commerce clause strikes down the tax however remote or insubstantial the interference with commerce.

Why this distinction between police power and tax cases? Because, say the majority, "vital local interests" may be involved in regulatory measures, but everyone knows that a state can get its revenue from other sources if one particular source is cut off. Denying a state one source of revenue, it is said, cannot "impose a crippling limitation on a State's ability to carry on its local function."

But to carve out of existing sources of state revenue so substantial a slice as that represented by taxes on interstate sales of securities may be more crippling than the unsupported edict of Justice Frankfurter would lead us to believe. Transaction taxes first appeared in volume after 1932 because of increasing demands upon government and diminishing returns from the usual

18. See Stone, J., dissenting in DiSanto v. Pennsylvania, 273 U. S. 34, 43 (1927).
19. Western Livestock v. Bureau of Int. Rev., 303 U. S. 250, 255 (1938).
20. Compare Mr. Justice Stone's suggestion in his dissent in DiSanto v. Pennsylvania, 273 U. S. 34, 43 (1927), that "other considerations" may apply with respect to state taxation. What these were he did not develop. The case material does not yield much evidence that this classification has had any bearing on the problem.

sources of state revenue. In 1940 39.5% of the state tax dollar came from such taxes.[21] The reports of the National Tax Association abound with material on the difficult problems facing state legislatures in raising revenue.[22] To dismiss the revenue-raising problem of state governments so cavalierly is to say, "Let them eat cake."

Even assuming that the alternatives available to a state in its search for revenue warrant the different treatment accorded to tax cases, does a tax administrator, a taxpayer, a lower court, or even the Supreme Court know any better now how to determine the validity of a tax than before *Freeman v. Hewitt?* The validity of any terminology must be tested by asking: Does it convey any meaning to those who must use it? Does it show its reason on its face?[23]

DIFFICULTIES WITH JUSTICE FRANKFURTER'S NEW STYLE

Justice Frankfurter's terminology is a new version of old labels. Where Justice Strong and his contemporaries in the 1870's said that a state tax is invalid if "on" interstate commerce[24] and Justice Butler and his colleagues in the 1920's held the tax invalid if it was a "direct burden" on interstate commerce,[25] Justice Frankfurter strikes down a tax if it is "directly on" interstate commerce. This is a return to the old subject-measure approach in not even slightly disguised form. The great controlling principle of constitutional law now revolves around the meaning of the preposition "on."[26] "On" must mean "on" something. To the drafter of legislation a tax is "on" the subject or object upon which the statute says the tax is imposed. If this meaning were religiously followed, the users of tax materials would know how to administer Justice Frankfurter's currently stylish terminology even though the terminology would not reveal the reason for its use. The judicial function would become nothing more than advice on legislative drafting.[27]

21. BUREAU OF THE CENSUS, 10 STATE AND LOCAL GOVERNMENT SPECIAL STUDY (1940) 2.

22. See, *e.g.*, 30 PROC. NAT. TAX. ASS'N (1937). For a general collection of materials, see the symposium on consumption taxes in (1941) 8 LAW & CONTEMP. PROB. 415, especially at 430 *et seq.*

23. Llewellyn, *On the Good, the True, the Beautiful in Law* (1942) 9 U. OF CHI. L. REV. 224, 250: "Only the rule which shows its reason on its face has ground to claim maximum chance of *continuing* effectiveness. . . ."

24. Case of the State Freight Tax, 15 Wall. 232, 272 (U. S. 1872); Philadelphia & So. S. S. Co. v. Pennsylvania, 122 U. S. 326, 341 (1887).

25. DiSanto v. Pennsylvania, 273 U. S. 34, 37 (1927) overruled by California v. Thompson, 313 U. S. 109 (1941); New Jersey Bell Tel. Co. v. State Board, 280 U. S. 338, 346 (1929).

26. *Cf.* Cardozo, J., dissenting in Carter v. Carter Coal Co., 298 U. S. 238, 327 (1936): "But a great principle of constitutional law is not susceptible of comprehensive statement in an adjective."

27. *Cf.* Powell, *Contemporary Commerce Clause Controversies over State Action* (1928) 76 U. OF PA. L. REV. 773, 774: "[T]he states can tax interstate commerce if they go about it in the right way."

We are told, for example, that the seller state is not frozen out of lucrative revenues by this decision because the state can levy a tax "on" the privilege of manufacturing or of residence. It can measure the tax by net income from interstate sales, and even by the gross income of a manufacturing plant if the formula of *American Mfg. Co. v. St. Louis* is used.

It should follow, therefore, that the mysteries of the commerce clause would disappear with changes in the wording of tax statutes from a tax "upon gross income" or "upon the proceeds of any sale" to a tax "upon the privilege" of manufacturing, residence, severance or some other activity, even though calculated at the same rate on the same gross income from the same transactions as before. If Justice Frankfurter means this, Indiana could tax the gross receipts of the Adams Manufacturing Co. by slight changes in the wording of the challenged act.

But when this terminology was in vogue before, the situation was not so simple. The process of determining when a tax is "on" interstate sales or "on" the very process of commerce and not "on" something else bedeviled the Court when it used this terminology seventy years ago and it bedevils Justice Frankfurter today. For example, we are told that *U. S. Glue Co. v. Oak Creek*[28] involved a tax on "the privilege of residence" measured by net income derived from interstate transactions and that such a tax is valid but that in the *Freeman* case it is bad because it is "on" the very sale in interstate commerce. This difference cannot be discerned from the statutory language. In the *Oak Creek* case the Wisconsin statute provided that a tax was to be "assessed, levied and collected upon all income . . . received by every person residing within the state. . ." The Indiana tax is "imposed . . . upon the receipt of gross income . . . of all persons resident and/or domiciled in . . . Indiana."[29] Neither can the distinction be found in different characterizations by the state courts, for the Indiana Supreme Court has called the tax a levy "on the privilege" of domicile.[30]

There are other difficulties with this terminology. It is said that the *Freeman* case involved a tax which was a "direct imposition" on interstate sales but that the same tax in *International Harvester v. Dep't of Treasury*[31] was "a tax on the transfer of property within the state." Hence a tax "on" a sale is not "on" the transfer of property and vice versa, even though the transfer of property occurs as a result of a sale!

If Justice Frankfurter does not attach the same meaning to "on" as the state legislator, what does he mean? An economist might insist that a

28. 247 U. S. 321 (1918).
29. IND. STAT. ANN. (Burns, 1943) § 64-2602.
30. Miles v. Dep't of Treasury, 209 Ind. 172, 199 N. E. 372 (1935).
31. 322 U. S. 340 (1944).

tax "on" gross income is a tax on interstate commerce, but he would also say that a tax on net income is a tax on interstate commerce or that a tax on the privilege of manufacture is on the proceeds of the interstate sales of manufactured goods. But the economist's definition cannot be used because Justice Frankfurter declares that the economic burden of the tax is irrelevant in determining its validity. Nor does the fact that the Court cites with approval cases sustaining taxes on the privilege of manufacture measured by gross income resolve the problem.

One other possible meaning is suggested by Justice Frankfurter's distinction of the *International Harvester* case and by his opinion in *McLeod v. Dilworth.*[32] A tax is "on" an interstate sale when the property interest in the goods passes without the state but not if the property interest passes within. This introduces "title-passing" questions of sales law into the commerce clause[33] and satisfies neither requirement for good terminology—it neither helps its users[34] nor conveys its reason.

Justice Rutledge Hesitantly Concurs

The concurring opinion sharply attacks this terminology and asks how a tax "on" net income from interstate transactions is any less "direct" or any less "on" interstate commerce, or how the free flow of commerce is any less deterred by a tax on the privilege of manufacturing goods for commerce when measured by the gross income from that commerce. We are left to guess the answers to these questions. The majority does give one explanation. In making a statesman-like decision accommodating both state and national interest the Court will allow the state to divide up a business and give the manufacturing part "detached relevance for the purpose of local taxation." Why manufacturing is entitled to "detached relevance" more than domicile or other incidents in this case is ignored by the majority, apparently because the tax is not "on" those incidents but "on" gross income from interstate sales.[35]

Having attacked the grounds of the majority opinion, Justice Rutledge is left to explain (1) why he concurred and (2) what principles he would use to tell Mr. Hewitt when he can tax income from interstate commerce and when not.

Justice Rutledge explains that he concurs because it is necessary to prevent "the cumulative and therefore discriminatory tax burden which would vest on or seriously threaten interstate commerce if more than one state is al-

32. 322 U. S. 327 (1944).
33. *Cf.* Holmes, J., in Rearick v. Pennsylvania, 203 U. S. 507, 512 (1906): "'Commerce among the several States' is a practical conception not drawn from the 'witty diversities' (Yelv., 33) of the law of sales."
34. *Cf.* Llewellyn, Cases and Materials on Sales (1930) 561 *et seq.*
35. *But see* Miles v. Dep't of Treasury, 209 Ind. 172, 186, 199 N. E. 372, 378 (1935).

lowed to impose the tax, as does Indiana, upon the gross receipts from the sale without apportionment or credit for taxes validly imposed elsewhere."

His principle causes him difficulty. He states that the *Adams* case is not a proper solution because it went too far in discriminating in favor of interstate commerce in so far as it forbids both states to tax. He recognizes the logical and practical difficulty of allowing one but not both states to tax when both may have "equal or substantial due process connections with the transaction." He therefore rejects the buyer-seller state distinction as a solution. He further concludes that a solution by factual determination in particular cases of the actual or probable incidence of both taxes is open to objection because it fills the Court with litigation.

As a judge, he is forced to decide, even if among evils and even if there is no ideal solution. A Solomon-like practical decision is hesitantly made: the state of the market should have full power to tax "subject to power in the forwarding state also to tax by allowing credit to the full amount of any tax paid or due at the destination." This, he says, would relieve the Court of volumes of litigation.

The proposal for a credit of tax paid in the state of market rather than apportionment of income among the interested states is the new item which Justice Rutledge introduces into the literature on this subject. *Adams* and subsequent cases talked of apportionment of income. The idea of a "credit" is admittedly not founded on any constitutional principle; it is a "legislative" conclusion.[36]

At several places in his opinion, however, Justice Rutledge speaks of "credit" and "apportionment" in the same breath, as if synonymous. At other times he refers to apportionment as an allocation of income among the interested states. It is in this latter sense that the word was used in the *Adams* case. Perhaps this commingling and confusion of terms is deliberate, because, as he indicates, the *Berwind-White* case makes even an apportioned tax in the seller state produce a double tax burden. It is apparent Justice Rutledge would like to approve the principle of apportionment of income as a way out of the muddle but he is worried that *Berwind-White* stands in his way. Thus he proposes a new alternative—the credit device—and reserves judgment whether an apportioned tax by the seller state can be sustained if the buyer state also imposes a tax.

36. Whether this "credit" is of any value to any state revenue department remains to be seen. While there may be more, 461 C. C. H. 1946 Fed. Tax Serv. ¶ 181.815 lists 23 states that have general sales, occupational or gross income taxes. Three of these are at 3%, one at 2½%, sixteen at 2% and three at 1%. All of these 23 states could collect taxes from sales to the other 25 states. But among themselves only the 3% states would get any substantial advantage from the credit system. This might well produce a race for non-standard rates such as 2.8% or 3.4% in order to get at least some tax, after credit for the buyer state tax.

International Harvester Co. v. Evatt,[37] decided Jan. 6, 1947, apparently answers Justice Rutledge's reservation. There Ohio imposed a tax on "the privilege of doing business." The tax was computed in part by apportioning the value of the business done according to a fraction representing in the numerator, sales of goods manufactured in the Ohio plants no matter where sold or delivered, and in the denominator, the value of the country-wide business. Goods manufactured in Ohio but sold by out-of-state branches to out-of-state customers with direct deliveries from the Ohio plant constituted 38% of the business of the Ohio plant. Where the Indiana branch of International Harvester sold to an Indiana customer with delivery direct to the Indiana customer from the Ohio plant, the sales were taxable in Indiana under *International Harvester v. Department of Treasury.*[38] Thus the problem worrying Justice Rutledge was present. The state of the buyer imposed its tax and the same sale was included for apportionment in calculating the tax in the seller state. To some extent, at least, there was a multiple tax burden. The Court unanimously upheld the tax under both the commerce clause and the 14th Amendment.

A Reconciliation of State Gross Receipts Tax Cases

Since the "multiple burden" theory of striking down a gross receipts tax unless apportioned has been so widely discussed, an examination of the cases since *Western Livestock,* particularly the opinions of Chief Justice Stone, may shed some light on the application of this principle.

In the *Western Livestock* case, the late Chief Justice attempted to derive from the past cases principles underlying the ever-changing judicial terminology or "styles", if you will. Two principles were thought evident: (1) that interstate commerce should pay its way; *i.e.,* that the commerce clause should not be interpreted to discriminate in favor of interstate commerce; (2) that when state transaction taxes have been struck down it was because they did or could result in a multiple tax burden on the interstate transaction which did not exist as to the intrastate transaction.

As Chief Justice Stone was first to recognize, when either one of these principles is used as *ratio decidendi* in deciding new cases rather than as an explanation of old cases, a conflict between these principles may well develop. If the danger of a multiple tax burden is so emphasized that state taxation of an interstate transaction is prohibited at any stage of the transaction, then interstate commerce may be placed at a competitive advantage over other commerce. If the principle that commerce must pay its way is applied to uphold all taxes non-discriminatory on their face, a competitive disadvantage to inter-

37. 67 Sup. Ct. 444 (1947).
38. 322 U. S. 340 (1944).

state commerce might result in some situations. Stone recognized that the conflict could be reconciled neither by resort to a syllogism nor by resort to labels. "Practical rather than logical distinctions must be sought."

In the *Western Livestock* case, the preparation, binding and publication of the advertising matter and receipt of the sums paid for it all occurred in New Mexico. Nothing occurred in any other state on which that state could lay its hands for taxes; therefore no multiple tax burden could result. There was no possibility of conflict between the two principles. New Mexico had a substantial relationship to the taxpayer and the performance of the transaction taxed. Making a practical judgment, the Court could not say it was unreasonable to permit New Mexico to tax the receipts on the interstate transaction arising from the sale of advertising space. As Stone had pointed out in *South Carolina State Highway Dep't v. Barnwell Bros.*[39] earlier in the same term, state activity is invalidated only when there is an "unreasonable interference with national interest." The number of local activities involved in the performance of the interstate transaction is the basis for the Court's practical judgment as to the reasonableness of the burden on interstate commerce. It is not to prove that the tax is "on" those incidents rather than "on" the interstate elements of the transaction.

Chief Justice Stone referred to situations where gross receipts taxes had been struck down and those where they had been sustained "when fairly apportioned to commerce carried on within the taxing state." He also referred *with approval* to cases such as *Ficklen v. Shelby County*[40] and *American Mfg. Co. v. St. Louis*,[41] where the tax was sustained as a fair means of measuring a local privilege or franchise even though it was imposed upon the entire gross receipts of the taxpayer derived from the exercise of the franchise, including those arising from interstate transactions. *Western Livestock Co. v. Bureau of Internal Revenue* recognized, therefore, that there were some situations where an unapportioned gross receipts tax would be sustained and some where apportionment was necessary. In the former the multiple burden which might result was not an unreasonable interference with national interests; in the latter it was.

It is doubtful that Stone had clearly determined at this time where he was going with the multiple burden test. Further developments would determine the applicability of the multiple burden theory. As he clearly indicated, the reconciliation of the two principles of the *Western Livestock* case required practical policy judgments, and believing that this was a proper function of the judiciary, Stone was not averse to making them.

39. 303 U. S. 177 (1938).
40. 145 U. S. 1 (1892).
41. 250 U. S. 459 (1919).

Except for *Adams*, in which Stone joined and which he later explained, the only case in which the multiple burden theory has been used to strike down a gross income tax without apportionment is *Gwinn, White & Prince v. Henneford.*[42] The facts of this case may indicate at least one of the situations in which Stone regarded apportionment as a controlling element. The taxpayer was a marketing agent for fruit growers in Washington. As to some transactions, the taxpayer received the fruit from the seller and forwarded it to out-of-state buyers from which it had solicited business. But more often the fruit was shipped from the Washington sellers to the taxpayer's branches at out-of-state points where it was then diverted to buyers. These branch offices negotiated the sale of the fruit, made delivery and collected the purchase price. The opinion emphasizes the fact that the taxpayer was performing service in the aid of interstate communication and transportation and it also emphasizes the substantial out-of-state activities performed by the branch houses.

Prior to *Western Livestock*, the gross receipts taxes which had been denied application to interstate transactions without apportionment were taxes on transactions of a telephone company,[43] a railroad company,[44] a steamship-stevedoring company,[45] a wholesaler-exporter,[46] and a radio station[47]—all of which obtained their revenues from servicing or actually carrying on the processes of interstate commerce. By the very nature of the activities involved most of them were businesses having far-flung and multi-state relations with respect to each transaction. Thus the receipts from an interstate telephone communication can hardly be fairly attributed in full to the state of the caller, the state through which the message is sent or the state of the recipient. The receipts are attributable to use of property and to substantial activities of persons in many states. Each state has substantial connections with the transaction, yet to allow each to tax in full is to impose a multiple burden on the processes of interstate commerce to its potential disadvantage. And since the disadvantage might be in the processes of commerce, it would be reflected throughout the entire economy. *Gwinn, White & Prince v. Henneford* is consistent on its facts with these cases, since it requires apportionment by the distributing state of the gross receipts of a commercial broker among the states in which substantial activities, property and branch offices were located.

The *Adams* opinion, written by Justice Roberts, in which Chief Justice Stone joined, does seem to apply the same principle to taxes on gross receipts

42. 305 U. S. 434 (1939).

43. New Jersey Bell Tel. Co. v. State Board, 280 U. S. 338 (1930); Western Union Tel. Co. v. Alabama, 132 U. S. 472 (1889).

44. Fargo v. Michigan, 121 U. S. 230 (1887); *cf.* Philadelphia & So. S. S. Co. v. Pennsylvania, 122 U. S. 326 (1887); see Wisconsin & M. Ry. v. Powers, 191 U. S. 379 (1903), where an apportioned tax was upheld.

45. Puget Sound Stevedoring Co. v. Tax Comm., 302 U. S. 90 (1937).

46. Crew Levick Co. v. Pennsylvania, 245 U. S. 292 (1917).

47. Fisher's Blend Station v. Tax Comm., 297 U. S. 650 (1936).

from interstate sales of a manufacturer having his plant in one state and only an extra-state sales force to facilitate performance of the interstate movement of goods, but no far-flung business activities such as those involved in *International Harvester v. Evatt.*

At this point, therefore, Stone's views on the unapportioned gross income tax were reflected as follows: (1) He had cited with approval the pre-*Western Livestock* cases invalidating unapportioned gross income taxes when applied to the processes of interstate commerce, such as transportation services; (2) he had written an opinion invalidating an unapportioned gross receipts tax in a distributing state on receipts derived from activities in far-flung operations which had substantial connections, including branch houses, in many states, and an activity that serviced interstate transactions in the manner of transportation companies; (3) he had cited with approval cases upholding unapportioned gross income taxes where the total gross income was considered a fair measure of the state's exaction for activities within a state of a business that did not have substantial out-of-state connections; yet (4) he had joined in an opinion which seemed to require the application of the apportionment doctrine to all transactions in interstate commerce when a gross receipts tax was sought to be imposed. Three and four seem to represent inconsistent positions, but *Berwind-White* sets *Adams* in its proper perspective and permits reconciliation of these positions.

The *Berwind-White* and related cases recognized that the multiple burden theory could be carried so far as to obliterate the other principle of *Western Livestock*—that interstate commerce is not to be given a free ride. Where the tax was imposed on a transaction or receipts of the transaction by the state of market and paid by citizens of that state the Court could look to numerous decisions upholding such a tax in similar situations, and by emphasizing the equality of treatment of all transactions performed in the state, could say that it was not an unreasonable interference with national interests for the state of market to impose a tax on receipts from the interstate transactions—unless the multiple burden test of *Adams* required a different result.

Of course a multiple burden results in any case only if the Court allows it. To fear a multiple burden in *Adams* is to imply that the state of market can tax. But perhaps *Adams* was a mistaken or misunderstood application of the doctrine.

In distinguishing *Adams*, the *Berwind-White* decision seemed to suggest limitations upon it, pointing out that in *Adams* the Court had "found" that receipts "from activities in interstate commerce . . . were included in the measure of the tax, the sales price, without segregation or apportionment." This is not the same as saying "receipts from interstate transactions," but it suggests that at least part of the sales price in *Adams* represented value attributable to interstate activities distinct from interstate sale such as transportation costs or marketing costs attributable to branch houses in many states; and that had the Court found otherwise, a different result might have followed. But it also emphasized that had this part of the sales price been segregated or a part of the sales price apportioned to the interstate activity, the tax would have been sustained. Manufacturing, like marketing, gives the state substantial connections with the transaction and makes it difficult for the Court to conclude that it is unreasonable for the seller state to tax.

The cases subsequent to *Berwind-White* indicate that there is nothing in the catch-phrase that the seller state cannot tax without apportionment.[48] It appears in *Dep't of Treasury v. Wood Preserving Co.*[49] that it was not unreasonable to attribute the entire proceeds of interstate transactions to the seller state where the proceeds arose from the sale of railroad ties produced in Indiana but sold to an out-of-state railroad by a non-resident seller which received the proceeds at its out-of-state office. But the proceeds attributed to Indiana included only the charges for untreated ties. Indiana did not attempt to tax charges for the creosoting treatment given to all ties at the seller's out-of-state creosoting plant. Only as explained in *Berwind-White* is *Adams* consistent with the result in this case, unless the commerce clause is to turn on the "witty diversities" of sales law.

This case was followed by *Dep't of Treasury v. Ingram-Richardson Mfg. Co.*[50] in which Indiana was permitted to tax the proceeds from the process of enameling products of out-of-state manufacturers brought into the state for processing on orders solicited out-of-state and returned to the out-of-state manufacturer. The taxpayer did not claim properly that Indiana could not tax that part of the proceeds attributable to the transportation of the products from and to the customers' plants in other States. Only if that issue had been before the Court would the *Adams* case, as explained in the *Berwind-White* case, have been involved. Otherwise, even though interstate commerce was essential to the performance of the enameling process, it was not unreasonable to attribute the entire proceeds to Indiana for tax purposes because substantial activities occurred there and nowhere else.

International Harvester Co. v. Dep't of Treasury[51] even upheld the Indiana tax as applied to out-of-state sales of goods manufactured in Indiana where the only difference on the facts from *Adams* was that because the articles were trucks, the buyer could and did go to Indiana to drive his purchase home. If *Adams* is treated as explained in *Berwind-White*, this case may not

48. McLeod v. Dilworth [322 U. S. 327 (1944)] implies that where the sale is F.O.B. seller's plant or has other indicia that the property interest passes in the seller state, the seller state can tax.
49. 313 U. S. 62 (1941).
50. 313 U. S. 252 (1941).
51. 322 U. S. 340 (1944).

be inconsistent with the *Adams* case. Thus, it is not unreasonable to attribute the entire proceeds of a transaction to the state of manufacture for tax purposes even though the proceeds are again taxable in the state of market.

Finally, a *per curiam* opinion in 1941[52] sustained the Mississippi privilege tax measured by gross income as applied to the receipts of a taxpayer who manufactured the goods in Mississippi, accepted the orders solicited by his out-of-state sales force, and shipped the goods, most of which went to New York, where they would be subject to sales tax under the *Berwind-White* case! Of course the correct "ritual" was used in Mississippi—it was a tax on the privilege of manufacture measured by gross income. The Court cited two cases in support of its conclusion: *American Mfg. Co. v. St. Louis* and *Dep't of Treasury v. Ingram-Richardson Mfg. Co.* The latter involved the Indiana gross income tax, which both Justice Frankfurter and Justice Roberts have said, although they joined the *per curiam* opinion, did not constitute a "privilege" tax but one "on" gross income from interstate sales.

The explanation of *Adams* given in *Berwind-White*, together with the subsequent cases, puts the multiple burden theory in its proper perspective: The danger of a multiple burden on interstate transactions requires the Court to scrutinize carefully the operation of any transactions tax. It never required a tax in the buyer state to be struck down because unapportioned; it did require an unapportioned gross receipts tax to be struck down (1) in the distributing state when the receipts included not only that part of the price attributable to the activities of the distributor in the taxing state but also a part clearly attributable to activities more substantial than selling in other states; (2) in a producing state where it was found that the tax was imposed on a price which included sums attributable to the processes of interstate commerce or other substantial extra-state activity; (3) in any state where the tax was imposed on transportation or communication companies or other processes of national commerce. Otherwise apportionment was not necessary and any multiple burden that resulted was no more than an added cost of doing business in the same sense as a property tax on the instruments employed in commerce.

The multiple burden theory is, therefore, to be used only to strike down unapportioned gross receipts taxes on business engaged in the process of interstate commerce on a national scale. *International Harvester Co. v. Evatt* involved activities other than transportation, which require gross receipts taxes to be apportioned.

CONCLUSION

That the cases since *Adams v. Storen* support the proposition that the multiple burden theory has had only the restricted force indicated is not to say

52. Aponaug Mfg. Co. v. Stone, 190 Miss. 805, 1 So.(2d) 763 (1941), *aff'd per curiam*, 314 U. S. 577 (1941).

that such restriction is proper. The justification for confining the multiple burden theory stems rather from the need for an "appraisal and accomodation of the competing demands of the state and national interests involved." Unless the activity burdened is of a "national character," the fiscal interest of the states should be a weighty enough factor to dissuade the Court from finding an unreasonable interference with national commerce. Where such an approach would result in sustaining state taxes, it is far from clear that double taxation will automatically follow.

Justice Rutledge correctly concluded that in at least some situations involving taxation of gross receipts from interstate transactions apportionment is the teaching of the recent cases. He rightly saw that no aid in identifying these situations is given by recourse to the slippery words "direct tax on interstate commerce," which the majority unearthed in *Freeman v. Hewitt*. If the quoted language meant merely to indicate one of the phrases forbidden to state tax draftsmen, it reduces constitutional principle to a formulary riddle; if advanced as a sincere attempt at judicial statement of the constitutional principle, it merely reinstates an ancient stumbling block and forsakes both goals of good terminology: utility and clear purpose.

Unfortunately, Justice Rutledge's suggested credit offset is scarcely more helpful as a statement of constitutional principle. A seller state would have the alternatives of adjusting its gross receipts taxes to credit those of numerous sister states, or of attempting to avoid the need for a credit by moving the point of tax incidence to an earlier stage of the production-distribution process. The latter alternative, which would certainly have greater appeal, would again leave the courts with no guiding principle to answer the recurring question of the constitutionality of each legislative attempt.

An unapportioned gross receipts tax was sustainable on the facts of *Freeman v. Hewitt*, even though New York could and did tax, because of: (1) the substantial local incidence of the transaction in Indiana (domicile of the trustee); (2) the fact that this is an isolated sale—not in the ordinary course of the taxpayer's commercial activity; and (3) the elimination, before taxation, of that part of the receipts attributable to the processes facilitating the interstate sale.

The continuing search by states for needed revenues from taxes upon transactions with multi-state contacts necessitates clear guide-posts in this constitutional field. It is unfortunate that a case which had such extended and serious consideration did not produce the needed guidance. The Supreme Court will doubtless have an early opportunity to re-examine its conclusions in *Freeman v. Hewitt*, and it is to be hoped that reconsideration may result in a more useful formulation of the Court's views.