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State Franchise Tax on Foreign Interstate Commerce Corporations

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COMMENT ON RECENT CASES

FEDERAL CASES

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—STATE FRANCHISE TAX ON FOREIGN CORPORATIONS ENGAGED IN.—[United States] In *Ozark Pipe Line Corporation* v. *Monier,*[1] appellant, a Maryland corporation, owned and operated a pipe line for oil extending from Oklahoma, through Missouri, to a point in Illinois. No oil was received or delivered in Missouri. Appellant had charter powers (from Maryland) to operate telegraph and telephone lines, and to deal in and transport merchandise, as well as to pipe oil, and could conduct these activities in both intra- and interstate commerce. It paid for and obtained from Missouri a license to engage exclusively in the business of piping crude oil (which apparently gave the right to do this in both intra- and interstate commerce), and this license, under Missouri law, carried with it the power of eminent domain. The company maintained its principal office in Missouri and never did or attempted to do anything but an interstate oil pipe line business in Missouri. It paid general property taxes on all of its assets in Missouri. A Missouri statute[2] required every foreign corporation engaged in business in Missouri to pay an annual franchise tax of one-tenth of one per cent of the proportion of its capital stock and surplus that its assets in the state bore to all of its assets. Appellant, having refused to make to the state tax commission such a required report as would give the data for this assessment, was threatened with revocation of its license and tax proceedings that would encumber its property. Its bill for an injunction was dismissed by the federal District Court for the Western District of Missouri, and an appeal was taken to the Supreme Court, which reversed the dismissal, Mr. Justice Brandeis dissenting.

The majority proceeded upon the familiar ground that a tax upon the mere franchise or right to do interstate business is invalid, which, properly understood, has been respectable law since *Gloucester Ferry Co.* v. *Pennsylvania*[3] and *Philadelphia S. S. Co.* v. *Pennsylvania.*[4] The real question of course was whether the case fell within the "proper understanding" of the general proposition.

(a) If the franchise is that of a domestic corporation and the tax is measured by the corporate property (even if property outside of the state be included) the tax is valid. See *Kansas City, etc., Ry.* v. *Botkin*[5]—where there was a maximum limit to the tax; and *Kansas City, etc., R. R.* v. *Stiles*[6]—where there was no maxi-

1. (1925) 45 Sup. Ct. 184.
2. (1919) Mo. Rev. Stats. secs. 9836-48.
3. (1885) 114 U. S. 196.
4. (1887) 122 U. S. 326.
5. (1916) 240 U. S. 227.
6. (1916) 242 U. S. 111.

mum. This distinction between the franchises of domestic and foreign corporations—even though both be solely engaged in interstate commerce—was early noticed in *Philadelphia S. S. Co.* v. *Pennsylvania.*[7]

(b) Or, if the franchise be that of a domestic corporation, it may be measured in at least any reasonable manner by the amount of business done by the use of such franchise (including interstate business).[8]

(c) Or, if the franchise, whether domestic or foreign (not being granted by the United States) and whether used to carry on interstate or intrastate business, is used in the taxing state and is valued as a part of the corporation's property there, it may be subjected to a property tax.[9]

(d) Or, if the tax, though in terms on the privilege or franchise of doing business (even of a foreign corporation), is in fact a tax on the corporate property within the state (as indicated by the method of its ascertainment, and particularly if it is in lieu of all other property taxes), it is valid, even though the business done and included in the mode of measurement of the tax is in whole or part interstate commerce.[10]

Mr. Justice Brandeis's dissent went on the ground that the tax was really on the privilege of doing business in corporate form under the Missouri license, with the added power of eminent domain; that the license conferred the power to do intrastate business, though none was in fact done; and that the amount of the tax was too small appreciably to burden interstate commerce. So far as the mere privilege of doing interstate business in corporate form is concerned it may be said that Missouri could not interfere with this and that the license gave no power not already possessed. So far as it purported to give intrastate powers it was effective, though appellant made no use of such powers in fact. If appellant had obtained a license in this form, in order that it might be enabled to do intrastate business should it so desire, it could be argued that the Missouri tax was valid within the case of *Ficklin* v. *Shelby Co. Taxing District*,[11] where Tennessee was allowed to tax the business of a broker for a particular year in which he obtained a license to do a general (state and interstate) business, though in that year he chanced to do only interstate business. On the other hand, if appellant sought to do and did no intrastate business it could not be

7. (1887) 122 U. S. at 342 ff.

8. *Maine* v. *Grand Trunk Ry.* (1891) 142 U. S. 217; *Wisconsin & Mich. R. R.* v. *Powers* (1903) 191 U. S. 379 (tax on "property and business").

9. *Atlantic & Pacific Teleg. Co.* v. *Philadelphia* (1903) 190 U. S. 160; *Western Union Teleg. Co.* v. *Gottlieb* (1903) 190 U. S. 412; *St. Louis S. W. Ry* v. *Arkansas* (1914) 235 U. S. 350, 365; *St. Louis-San Fran. Ry.* v. *Middlekamp* (1921) 256 U. S. 226, 231; *St. Louis, etc., Elec. Ry.* v. *Missouri* (1921) 256 U. S. 314, 318.

10. *Postal Teleg. Co.* v. *Adams* (1895) 155 U. S. 688; *United States Express Co.* v. *Minnesota* (1912) 223 U. S. 335; *McHenry* v. *Alford* (1898) 168 U. S. 651; *Wisconsin & Mich. R. R.* v. *Powers* (1903) 191 U. S. 379.

11. (1892) 145 U. S. 1.

made to pay for a license to do both kinds.[12] The facts of the principal case do not show any purpose of appellant to do local business if opportunity offered, and probably the license was in a single standard form covering both. The majority of the court put Missouri's power to tax "upon what was done and not upon what might have been done."[13]

The majority also denied that Missouri's grant of the power of eminent domain could be a foundation for the tax. Perhaps it is enough to say that the tax law did not purport to tax this privilege. Compare *American Smelting, etc., Co.* v. *Colorado*[14] where a form of state taxation of a foreign corporation that could have been enacted by way of amendment of its charter was held bad because not purporting to operate as such an amendment but as a general law violating the obligation of contracts. If Missouri's law had purported to tax or to impose a condition upon the power of eminent domain (which the state could arbitrarily withhold), and had measured the impost as it did (by the amount of property in the state) it would be difficult to deny its validity.[15]

Were it not for the decisions of the Missouri courts, a very respectable case could be made for the validity of the Missouri tax under proposition (d), above. If, though the business were solely interstate commerce, the tax on the franchise to do it (being measured solely by property in the state) had been in lieu of all other taxes (and so construable as really a property tax) it would have been valid.[16] Nor would it have been objectionable that, construed as a property tax, it was levied at a higher rate on pipe lines than on other property, for the state's power to classify for taxation includes the right to make the rates different on different sorts of property;[17] and this inequality of rate may take the form of double taxation.[18] For the same reason, if the state had levied two separate ad valorem property taxes upon the Missouri assets of the appellant, it would not have violated the Constitution if their total amount was not greater than one such tax could have been. Why, then, may the state not levy one property tax in the ordinary ad valorem form, and another in the form of a franchise tax measured by property in the state—the sum of the two taxes not being more than could have been exacted either (1) by a franchise tax in lieu of all other taxes, or (2) by two separate ad valorem taxes? In *St. Louis S. W.*

12. *Stockard* v. *Morgan* (1902) 185 U. S. 27.
13. 45 S. Ct. at p. 187.
14. (1907) 204 U. S. 103, 114.
15. *California* v. *Cent. Pacific R. R.* (1888) 127 U. S. 1, 40-42; *Cent. Pacific R. R.* v. *California* (1896) 162 U. S. 91; *Railroad Co.* v. *Maryland* (1875) 21 Wall. 456; *Horn Silver Mining Co.* v. *New York* (1892) 143 U. S. 305; *Ashley* v. *Ryan* (1894) 153 U. S. 436; *Interstate Consol. St. Ry.* v. *Massachusetts* (1907) 207 U. S. 79; *Kansas City, etc., R. R.* v. *Stiles* (1916) 242 U. S. 111; *J. P. Hall* (1907) in ILL. LAW REV. 2:21.
16. See note 10 above.
17. *Mich. Cent. Ry.* v. *Powers* (1906) 201 U. S. 245, 300; *Ohio Tax Cases* (1914) 232 U. S. 576.
18. *Patton* v. *Brady* (1902) 184 U. S. 608. As to more subtle forms of double taxation, see *Hall* "Cases on Const. Law" 606 note.

Ry. v. *Arkansas*[19] an ordinary property tax and a franchise tax (measured by property within the state) on the doing of intrastate business were both upheld as against the Fourteenth Amendment. Should they not also be upheld as against the commerce clause, provided only that the franchise tax can be fairly construed as in substance only an additional property tax (being measured in a way appropriate for a property tax)? It might even be urged that if the Missouri property tax here was only upon the local assets of the appellant, without regard to their increased value as a going concern, the franchise tax was not even double taxation, but was merely designed to reach this surplus property value. See the reasoning in *Galveston, etc., Ry.* v. *Texas*.[20]

The practical difficulty with such a view is of course chiefly one of interpretation, and in the principal case this seems insuperable in view of the explicit decision of the Missouri Supreme Court that this tax is on the right to do business and not on property.[21] Nor was it on the privilege of exercising the power of eminent domain, which might also have been valid. On this ground, then, the case is readily defensible, leaving still open some of the possibilities suggested above for upholding a similarly worded tax whose interpretation is not unfavorably foreclosed by state decisions.

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SALES—INTEREST RETAINED BY ALLEGED SELLER ON BANKRUPTCY OF ALLEGED BUYER.—[Federal] In a recent federal case in the Southern District of Illinois[1] the question is once more raised as to the respective rights of the unpaid seller who has attempted to retain some hold on the goods on the one hand and the claims of the creditors of the alleged bankrupt buyer on the other. The petitioner, a manufacturer of wire, had sent a quantity of its product to the bankrupt under a contract in which these parties were always respectively referred to as the seller and the buyer. Storage and insurance charges were to be met by the buyer, who was also to have the risk of loss. In the event of loss the reimbursement should be on the basis of the market price prevailing at the time of the loss. Sales reports were to be made monthly and the amounts due were to be based on the prices in effect at the time such sales were made. If the buyer wished to terminate the arrangement he could only do so by purchasing the stock then in his possession at the then prevailing prices. It was also expressly stated that the wire should remain the property of the seller, who was to be at liberty to reclaim it in the event of the buyer's insolvency. The court adopts as its opinion the report of the special master, holding the petitioner not entitled to reclaim the goods.

The discussion is opened by the statement that the question is whether this contract is one of bailment or agency, or whether it is

19. (1914) 235 U. S. 350, 364-68.
20. (1908) 210 U. S. 217, 226.
21. *Missouri* v. *State Tax Commission* (1920) 282 Mo. 213, 218, 234.

1. In re *United States Electrical Supply Company* (1924) 2 F. (2d) 378.