

### **Constitutional Law—New York City Sales Tax—Effect on Interstate Commerce (Matter of Compagnie Generale Transatlantique v. McGoldrich, 279 N.Y. 172 (1938); Matter of Sears, Roebuck & Co. v. McGoldrich, 279 N.Y. 184 (1938))**

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## RECENT DECISIONS

CONSTITUTIONAL LAW—NEW YORK CITY SALES TAX—EFFECT ON INTERSTATE COMMERCE [TWO CASES].—[First case] Plaintiff contracted in New York City with the Standard Oil Company of New Jersey for the purchase of fuel oil stored in New Jersey and to be delivered to steamships at wharves in New York City. A two per cent tax upon the purchase price of such oil, pursuant to the New York City Sales Tax Law,<sup>1</sup> has been set aside in the Appellate Division. On appeal, *held*, affirmed. Such tax constitutes a *direct* burden on interstate commerce, and is, therefore, violative of the Federal Constitution.<sup>2</sup> *Matter of Compagnie Generale Transatlantique v. McGoldrich*, 279 N. Y. 172, 18 N. E. (2d) 28 (1938).

[Second case] Plaintiff kept samples of bulky articles at its store in New York City which it manufactured and stored in other states. The contract of sale was consummated in New York but the merchandise was shipped from the extrastate warehouse direct to the customer. At the time of the sale, the customer was specifically informed that the goods would be shipped from without the state. The two per cent sales tax<sup>3</sup> has been sustained by the Appellate Division. On appeal, *held*, affirmed. The New York City Sales Tax is not here a direct burden on interstate commerce and is, therefore, valid. *Matter of Sears, Roebuck & Co. v. McGoldrich*, 279 N. Y. 184, 18 N. E. (2d) 25 (1938).

The regulating power of Congress over interstate commerce while paramount whenever exercised,<sup>4</sup> is not exclusive.<sup>5</sup> The Supreme Court has consistently upheld the doctrine that reasonable state laws for the protection of public health,<sup>6</sup> safety,<sup>7</sup> and morals<sup>8</sup> are valid

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<sup>1</sup>Local Law No. 24 (publ. as No. 25) (N. Y. C. 1934), N. Y. ADMIN. CODE § E41-221.0FF (1937), enacted pursuant to authorization granted by the State Legislature (Laws of 1934, c. 873). The City of New York imposes a tax of two per cent upon every sale of tangible personal property sold at retail within the city. Although ordinarily the tax is collected by the vendor from the purchaser, the comptroller may collect the tax directly from the purchaser.

<sup>2</sup>U. S. CONSTITUTION Art. I, § 8, cl. 3: "Congress shall have power to regulate commerce \* \* \* among the several states \* \* \*."

<sup>3</sup>See note 1, *supra*.

<sup>4</sup>*Railroad Commission v. Worthington*, 255 U. S. 101, 32 Sup. Ct. 653 (1912); *Chicago, etc. R. R. v. Fuller*, 17 Wall. 568 (U. S. 1873).

<sup>5</sup>*Gilman v. Philadelphia*, 3 Wall. 727 (U. S. 1865) (whether the power in any given case is vested exclusively in the Federal Government depends upon the nature of the subject to be regulated. States regulate matters of local interest only incidentally affecting interstate commerce).

<sup>6</sup>*Amos Bird Co. v. Thompson*, 274 Fed. 702 (D. C. Wash. 1921); *Western Union Tel. Co. v. Piper*, 191 S. W. 817 (Tex. Civ. App. 1916).

<sup>7</sup>*Pennsylvania R. R. v. Hughes*, 191 U. S. 488, 24 Sup. Ct. 132 (1903); *Morris v. DUBY*, 274 U. S. 135, 47 Sup. Ct. 548 (1927) (a regulation limiting the use of a highway to loads of not more than 16,500 lbs. was held to be valid, as not discriminating against trucks used in interstate commerce).

<sup>8</sup>*Hannibal, etc. R. R. v. Husen*, 95 U. S. 472 (1877); *Corfield v. Coryall*, 4 Wash. (U. S.) 371 (C. C. Pa. 1823).

even though they operate to restrain interstate commerce. This principle also holds true with reference to the taxing power of the states, so long as the interference is an *indirect*, incidental one.<sup>9</sup> The question then remains—when is a state tax a direct burden on interstate commerce? The courts have said, in attempting to answer this ever-perplexing problem, that regard must be had to the substance of the exaction;<sup>10</sup> to its operation and effect as enforced,<sup>11</sup> and that the test cannot depend solely upon the manner in which the taxing scheme has been characterized.<sup>12</sup> Also whether this burden should be deemed direct depends upon the character of the plaintiff's occupation and his relation to interstate commerce.<sup>13</sup> Whether in the contract of sale, interstate commerce was contemplated by the parties, or is necessarily required, has, of late, been decided upon as a test in determining whether or not interstate commerce has been directly burdened.<sup>14</sup> It may well be noted that the strict application of the dogma that state taxes may not directly burden interstate commerce has been considerably narrowed in the field of sales taxes<sup>15</sup> especially since the famous dissenting observation of Mr. Justice Holmes that "Even Interstate Commerce must pay its way."<sup>16</sup>

In spite of the many general rules and the long line of cases on this problem,<sup>17</sup> the courts do not at all times render consistent decisions. The court distinguished the *Sears* case from the *Compagnie* case by ruling<sup>18</sup> that in the *Sears* contract interstate commerce was not contemplated by the parties and was not necessary in order for the contract to be carried out; that the delivery from outside the state of New York was simply for the convenience and economy of the seller. Whereas, in the *Compagnie* case, the court stated that the oil kept in the tanks in New Jersey was the thing bargained for by the

<sup>9</sup> *Louisville, etc. R. R. v. Kentucky*, 183 U. S. 518, 22 Sup. Ct. 95 (1902); 2 WILLOUGHBY, CONSTITUTION (2d ed. 1922) § 622.

<sup>10</sup> *Kansas City v. Botkin*, 240 U. S. 227, 36 Sup. Ct. 261 (1916).

<sup>11</sup> *Wagner v. City of Covington*, 251 U. S. 95, 40 Sup. Ct. 93 (1919).

<sup>12</sup> *Ibid.*; *Spalding Bros. v. Edwards*, 262 U. S. 66, 43 Sup. Ct. 485 (1922) (a tax which burdens directly interstate commerce is not saved from invalidity because of its generality and nondiscriminatory character).

<sup>13</sup> *Texas Transportation Co. v. New Orleans*, 264 U. S. 150, 44 Sup. Ct. 242 (1924).

<sup>14</sup> *Wiloff Corp. v. Commonwealth*, 294 U. S. 169, 55 Sup. Ct. 358 (1935); *Matter of National Cash Register Co. v. Taylor*, 276 N. Y. 208, 11 N. E. (2d) 881 (1937); *Sears, Roebuck & Co. v. McGoldrich*, 279 N. Y. 184, 18 N. E. (2d) 25 (1938).

<sup>15</sup> *Eastern Air Transportation Co. v. Tax Commission*, 285 U. S. 147, 52 Sup. Ct. 340 (1934); *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U. S. 249, 53 Sup. Ct. 345 (1933); *Morf v. Bergman*, 298 U. S. 407, 56 Sup. Ct. 756 (1936).

<sup>16</sup> *New Jersey Bell Telephone Co. v. Tax Board*, 280 U. S. 338, 351, 50 Sup. Ct. 111 (1930).

<sup>17</sup> *Brown v. Maryland*, 12 Wheat. 419 (U. S. 1827) (first tax case under commerce clause).

<sup>18</sup> Lockhart, *The Sales Tax in Interstate Commerce* (1938) 52 HARV. L. REV. 640.

parties and hence interstate commerce was contemplated, and thus the tax became a direct burden. Judge Finch in his dissent,<sup>19</sup> however, points out that the oil contracted for in the *Compagnie* case was procurable in New York and elsewhere in the open market and in a few instances had been furnished from those other sources. It might just as reasonably have been argued that the grade and quality of merchandise kept in the foreign states was the thing bargained for in the *Sears* case. The true reason for the distinction seems to be the court's feeling that in the *Sears* situation there was more probability of deliberate avoidance of the tax by the use of extrastate warehouses. In addition the court is influenced by the fact that local stores, warehousing their merchandise in New York, would be discriminated against if the plaintiff in the *Sears* case were not taxed.

In *National Cash Register v. Taylor*<sup>20</sup> a situation similar to that in the *Sears* case was presented with the exception that in the former the orders taken in New York were made "subject to acceptance \* \* \* at Ohio."<sup>21</sup> Yet, the same court held the sales tax as a direct interference with interstate commerce on the grounds that interstate commerce was contemplated by the parties. It would seem to follow that a method of avoiding the sales tax is to consummate the sales contract without the state. Then, to be consistent, the court must hold that interstate commerce was contemplated by the parties.<sup>22</sup>

J. Z.

CRIMES—LARCENY BY TRICK AND DEVICE—SUFFICIENCY OF EVIDENCE TO SUSTAIN A CONVICTION OF LARCENY BY TRICK AND DEVICE.—The defendant told complainant that he had a controlling interest in "Vancouver Island Gold Mine Stock" and could get for him 2,000 shares at ten cents per share, delivery to be made as soon as a transfer fee was paid. The complainant handed over to defendant \$200, with the idea in mind, so he testified, that the money

<sup>19</sup> *Matter of Compagnie Generale Transatlantique v. McGoldrich*, 279 N. Y. 192, 199, 18 N. E. (2d) 28, 30 (1938).

<sup>20</sup> *Matter of National Cash Register Co. v. Taylor*, 276 N. Y. 208, 11 N. E. (2d) 881 (1937).

<sup>21</sup> *Id.* at 211, 11 N. E. (2d) at 882 (1937).

<sup>22</sup> It will be interesting to note what steps the Sears Company will now take in merchandising their goods and what decisions the court will render to justify their perplexing precedents.

Suggestions to overcome difficulties caused by state sales tax and interstate commerce include (a) a federal sales tax with proceeds distributed to states, and a prohibition on local sales taxes, and (b) federal legislation enabling taxation of interstate sales by the state of the destination. See Warren & Schlesinger, *Sales and Use Taxes* (1938) 38 COL. L. 49; Perkins, *The Sales Tax and Transactions in Interstate Commerce* (1933) 12 N. C. L. REV. 99; Legis. (1936) 9 So. CAL. L. REV. 259; Note (1936) 45 YALE L. J. 708.