

June 2014

State Taxation–Interstate Peddling

Philip Adelman

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

This Comment is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

"A distinction between stocks and bonds for the essentially practical purposes of taxation is more fanciful than real. Certainly, for such purposes, the differences are not greater than the differences between tangible and intangible property, or between bonds and credits. When things so dissimilar as bonds and household furniture may not be subjected to contrary rules in respect to the number of states which may tax them, there is a manifest incongruity in declaring that bonds and stocks, possessing for the most part the same or like characteristics, may be subjected to contrary rules in that regard."³⁰

The court points out that "the reciprocal inheritance statutes now in force in a preponderating number of states of the Union make no distinction between the various classes of intangible personal property."³¹

The chain of decisions fixing one situs for the taxation of intangibles, that situs being the domicile of the owner, seems now to be almost complete. The last link will have been added when the court considers the situs of intangibles which have been given by the owner a business situs in a state other than that of the owner's domicile, the lack of agreement among the members of the court making this an extremely speculative question. Even if complete prohibition of multi-state taxation be taken as already achieved, there remains the question of how the court will determine future cases which may present the problem of whether a single economic interest is presented for review, and whether some single economic interests may be treated as supporting a series of legally recognized interests therein.³²

THEODORE S. WECKER.

STATE TAXATION—INTERSTATE PEDDLING.

From early times in England and America there have been statutes regulating the occupation of itinerant peddlers and requiring

DEWING, FINANCIAL POLICY OF CORPORATIONS (1929) c. I. Another argument is that the state, having created the corporation and protected it, it should be allowed to tax its own creature.

³⁰ *Supra* note 24 at 177.

³¹ *Ibid.* at 177, citing the GEN. LAWS OF N. Y. 1930, Sec. 249-m (g) which includes "deposits in banks, mortgages, debts, receivables, *shares of stock*, bonds, notes, credits, evidences of an interest in property, evidences of debt, and choses in action generally." (Italics ours.)

³² This problem is analyzed very closely by Rottschaeffer, *Power of the States to Tax Intangibles*, *supra* note 13 at 748 *et seq.*

them to obtain licenses to practice their trade.¹ Legislatures have always felt that a license tax on peddlers would not only contribute to a great extent to the treasuries of their respective states, but also such a tax being in conformity with the traditions and beliefs of their predecessors, would hold forth few, if any, constitutional difficulties.

It is not surprising, therefore, that the State Legislature of North Carolina passed a statute² providing in substance that any person, firm or corporation who or which shall carry on the business of selling or offering for sale fresh fruits, fish or vegetables and who or which does not maintain a permanent place of business in the state, shall first obtain a license and pay therefor the sum of fifty dollars for each truck operated. Subsequent subdivisions provide that the section *shall not apply to persons selling the products of the state of North Carolina*, and make the violation of the statute a misdemeanor.

The United States Supreme Court has held that a tax imposed in order to obtain a license to sell goods is in effect a tax on the goods authorized to be sold, and that discrimination in favor of goods of one state against the products of another cannot be sustained on the principle that the tax imposed is not a tax on merchandise but a tax on occupations.³ Even conceding that a tax is based on occupation and not on merchandise, the doctrine has further been extended⁴ so that an occupation or calling cannot be taxed if the tax imposed is so specialized as to operate as a discriminating burden against the introduction and sale of the products of another state.

However, the courts have recognized the rule that a state may impose a tax on those carrying on the business of peddlers even though the goods sold may have been brought into the state in interstate commerce so long as the tax does not discriminate against the goods of other states;⁵ and a tax making such a discrimination is in violation of clause 3 of section 8 of Article 1 of the Constitution of

¹ STATS. 8 and 9, WILLIAM III c. 25; STATS. 9 and 10, WILLIAM III c. 25; STAT. 29, GEORGE III c. 26; STAT. 50, GEORGE III c. 41; MASS. STAT. of 1846 c. 1846 imposed a penalty on "every hawker, peddler going from town to town, or from place to place, or from dwelling house to dwelling house, either on foot, or with one or more horses, or otherwise carrying for sale, or exposing to sale any goods, wares or merchandise, * * * without first obtaining a license as provided."

² Secs. 121 and 121½ of the REVENUE ACT OF NORTH CAROLINA of 1931.

³ *Welton v. Missouri*, 91 U. S. 275 (1875); *Machine Company v. Gage*, 100 U. S. 676 (1879); *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. 454 (1886); *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829 (1894); *Boyce v. French*, 293 Fed. 43 (C. C. 4th Wash., 1923).

⁴ *Welton v. Missouri*, *ibid.*; *Walling v. Michigan*, *ibid.*; *Machine Company v. Gage*, *ibid.*; *Webber v. Virginia*, 103 U. S. 344 (1880); *Darnell v. Memphis*, 208 U. S. 113, 28 Sup. Ct. 247 (1908).

⁵ *Einert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367 (1895); *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. 365 (1904); *Kelner v. Stewart*, 197 U. S. 60, 25 Sup. Ct. 403 (1905).

the United States because it constitutes a burden upon interstate commerce.⁶

*Wagner v. Covington*⁷ is a leading case on the subject. Plaintiffs were manufacturers of "soft drinks," their factory and bottling works being located in the City of Cincinnati in the State of Ohio on the opposite side of the Ohio River from Covington, Kentucky. They carried on the business of selling soft drinks to retailers in Covington by sending their drivers across the river to Covington with fully laden trucks to call on retail dealers, who were steady customers. The driver would go in, ascertain the amount wanted and would deliver it. However, a small amount of the merchandise on the truck was carried for delivery in response to particular orders received at plaintiffs' place of business in Cincinnati.

Plaintiffs contended that the license tax imposed on all vendors of soft drinks in the City of Covington was unconstitutional as to them in that it violated the "commerce clause"⁸ of the Constitution of the United States.

Pitney, *J.*, writing for a divided⁹ court held that plaintiffs' objection was valid only as to that portion of the deliveries made in Covington pursuant to orders previously received in Cincinnati, but that the balance of plaintiffs' business did not constitute interstate commerce; and that as to those sales the tax in question was a valid one, since it taxed alike products of Kentucky and of other states.

The latest statute¹⁰ passed in North Carolina was soon subjected to a court test. Plaintiff, the owner of a large peach orchard in South Carolina and operator of over one hundred trucks peddling peaches in the western part of North Carolina, refused to pay the tax and commenced an action in equity to restrain the operation of the statute as against himself and those similarly situated. Pursuant to the Judicial Code¹¹ a court of three Federal Judges was convened.

Applying the principles previously enunciated by the United States Supreme Court, the specially constituted tribunal held¹² that a law which requires a license to be taken out by peddlers who sell articles produced in other states and which requires no such license with respect to those who sell in the same manner products of the taxing state is in conflict with the power of Congress to regulate commerce among the several states.

The decision constitutes a vehement and proper condemnation of an attempt by a state to burden and impede interstate commerce,

⁶ *Guy v. Baltimore*, 100 U. S. 434 (1879); *Bethlehem Motor Co. v. Flint*, 256 U. S. 421, 41 Sup. Ct. 571 (1921).

⁷ 251 U. S. 95, 40 Sup. Ct. 93 (1919).

⁸ ART. I SEC. 8.

⁹ Justices Holmes and McKenna dissenting.

¹⁰ *Supra* note 2.

¹¹ 28 U. S. C. A. §380.

¹² *B. M. Gramling, et al. v. A. J. Maxwell*, Commissioner of Revenue of the State of North Carolina, 52 F. (2d) 256 (1931).

and even the most ardent supporter of state's rights will admit that to have decided otherwise would have been to encourage the building up of a protective tariff wall between the states. It is a situation as presented by this case that the authors of our Constitution must have borne in mind when they wrote Article 1, Section 8, into that document.

PHILIP ADELMAN.

TAXABLE INCOME—RETIREMENT OF CORPORATE BONDS AT DISCOUNT.—During 1923, the respondent corporation purchased and retired for \$940,779, certain of its own bonds which it had previously issued at their par value of \$1,078,300. The Commissioner of Internal Revenue declared the difference of \$137,521 to be income and taxable as such. Upon a contrary ruling by the Board of Tax Appeals, the case was brought on behalf of the government to the Supreme Court. *Held*, that the repurchase of the bonds at a discount created taxable income. *United States v. Kirby Lumber Company*, 283 U. S. 814, 52 Sup. Ct. 4 (1931).

Taxable income has been judicially defined as the gain resulting from the employment of capital, labor or both combined,¹ provided that the profit gained through the sale or conversion of capital assets be included.² In the case of *Bowers v. Kerbaugh-Empire Company*,³ the Supreme Court held that, where the proceeds of a loan had been lost by the borrower, repayment of the debt in depreciated currency did not constitute taxable income. The Board of Tax Appeals, in a subsequent series of cases,⁴ relied upon a strained and rather illogical⁵ interpretation of the ruling in the *Bowers* case to declare

¹ *Towne v. Eisner*, 245 U. S. 418, 38 Sup. Ct. 158 (1918); *Peabody v. Eisner*, 247 U. S. 347, 38 Sup. Ct. 546 (1918); *Eisner v. Macomber*, 252 U. S. 189, 40 Sup. Ct. 189 (1920); *Walsh v. Brewster*, 255 U. S. 536, 41 Sup. Ct. 392 (1921).

² *Goodrich v. Edwards*, 255 U. S. 527, 41 Sup. Ct. 390 (1921); *Burnet v. John F. Campbell Co.*, 50 F. (2d) 487 (C. C. A. D. C. 1931).

³ 271 U. S. 170, 46 Sup. Ct. 449 (1926).

⁴ *Appeal of Independent Brewing Company of Pittsburgh*, 41 B. T. A. 870 (1926); *Appeal of New Orleans, Texas and Mexico Railway Co.*, 6 B. T. A. 436 (1927); *National Sugar Mfg. Co. v. Comm.*, 7 B. T. A. 577 (1927); *Douglas County Light and Water Co. v. Comm.*, 14 B. T. A. 1052 (1929); *Consolidated Gas Company of Pittsburgh v. Comm.*, 24 B. T. A. (1931).

⁵ KLEIN, *FEDERAL INCOME TAXATION* (1929) p. 1039: "In a recent decision, it (the Board of Tax Appeals) held flatly that no taxable income or deductible loss could be derived by a corporation from the retirement of its own bonds. The convincing dissent of Mr. Sternhagen from the decision implies that the majority relied on the holding of the Supreme Court in *Bowers v. Kerbaugh-Empire Company*. A careful reading of the *Kerbaugh* case furnishes no warrant for the Board's ruling which will probably be overruled by the courts."