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Constitutional Law—Interstate Commerce—Discriminatory Taxation

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RECENT CASES

Constitutional Law—Interstate Commerce—Discriminatory Taxation. P, a Delaware corporation, carried on interstate and intrastate business in Washington, selling steel products manufactured by itself or others. The state levied a deficiency assessment against *P* on its interstate sales, based on the Business and Occupation Tax, REM. REV. STAT. § 8370-4 *et seq.* (Supp. 1943) [P.P.C. § 965-1 *et seq.*], imposed on persons engaged in the business of making sales at wholesale, at the rate of .25 per cent of gross sales. *P* brought suit to recover the taxes paid. *Held*. REM. REV. STAT. § 8370-4 (Supp. 1943) violates the commerce clause of the Constitution in levying a tax upon wholesale activities because § 8370-6 exempts from the wholesale tax goods which are manufactured in Washington by the wholesale seller and upon which a manufacturers' tax has been paid under § 8370-4. Any tax subjecting goods of extrastate origin to the possibility of a burden not borne by goods of intrastate origin discriminates against interstate commerce. *Columbia Steel Co. v. State,* 130 Wash. Dec. 614, 192 P (2d) 976 (1948). The same result was reached in *Weyerhauser Sales Co. v. State,* 130 Wash. Dec. 621, 192 P (2d) 979 (1948), decided the same day.

The commerce clause protects goods of extrastate origin, even after they have entered the state, from any discriminating legislation by reason of their foreign origin. *Welton v. Missouri,* 91 U. S. 275 (1876). The only problem is of the test of discrimination. The court in the principal cases uses a practical, economic approach to this question. If a tax discriminates against sales of foreign goods in favor of sales of domestic goods, the fact that a manufacturers' tax is imposed on the domestic goods does not remove the discrimination, as a similar tax may also be imposed on the foreign goods by the state of their origin.

The principal cases are squarely contrary to the early case of *Hinson v. Lott,* 8 Wall. 148 (U.S. 1869), which was not mentioned by counsel in the instant cases. In that case a state statute imposing a tax on liquors introduced into the state, and by another section imposing a similar tax on liquors manufactured within the state, was upheld as nondiscriminatory. The court overlooked the obvious discriminatory effect of the tax if a manufacturers' tax on the out of state goods had to be paid elsewhere. It is doubtful whether the Supreme Court would follow the *Hinson* case in view of the tendency to look to the practical effect of the tax. In passing on the constitutionality of a tax statute, the court is concerned only with its practical operation, not with its definition or precise form. *Nelson v. Sears Roebuck & Co.,* 312 U. S. 359 (1941), *Best & Co. v. Maxwell,* 311 U. S. 454 (1940). The unlawfulness of the burden depends on capacity to obstruct interstate commerce and not on the contingency that some other state may first have subjected the commerce to a like burden. *Gwin, White & Prince v. Henneford,* 305 U. S. 434 (1938).

Although the *Hinson* case has never been overruled, several similar cases have come to opposite results. The case of *Robbins v. Shelby County Taxing District,* 120 U. S. 489 (1887) supports the Washington view. A tax on those selling by sample who did not have a regularly licensed place of business was held discriminatory against merchants of other states although domestic sellers were taxed for their licensed houses, because out of state merchants would presumably be taxed for their licensed houses in their home-states. This case was recently reaffirmed after being fully reconsidered by the Supreme Court in *Nippert v. Richmond,* 327 U. S. 416 (1946). *Walling v. Michi-*

gan, 116 U. S. 446 (1886) held that a tax on the agents or drummers of nonresidents selling or soliciting orders for liquors to be imported into the state is discriminatory, and is not validated by a law taxing dealers and manufacturers within the state, as it is not a tax on the same thing. *Henneford v. Silas Mason Co.,* 300 U. S. 577 (1936) approved the Washington Use Tax as nondiscriminatory, although it exempted all those paying a retail sales tax. Washington purchasers had to pay a sales tax, and, as the possibility of discrimination was recognized, the statute exempted all those paying a sales tax in any state.

Under the holding of the *Columbia Steel Co.* and the *Weyerhauser Sales Co.* cases, the Business and Occupation Tax is entirely invalid as to goods of extrastate origin. The tax could be validated by removing the immunity of the local manufacturer, thus taxing him for both manufacture and sale, or by extending the immunity to goods of extra-state origin, thus not taxing any goods on which a manufacturers' tax has been paid in any state This would make the statute valid as to local sales, because the commerce clause does not prohibit nondiscriminatory taxes on local sales merely because the goods have been imported from another state. *Rast v. Van Deman & Lewis Co.,* 240 U. S. 342 (1916). The above discussion has reference to sales of extrastate goods completed by delivery from a warehouse in this state. Sales completed by direct shipment from without the state to a buyer within the state may enjoy a greater immunity from state excise taxation. See *Freeman v. Hewit,* 329 U. S. 249 (1946).

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