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VALIDITY OF STATE COMPENSATING TAX ON USE WITHIN STATE OF CHATTELS PURCHASED OUTSIDE STATE. *HENNEFORD V. SILAS MASON COMPANY, INC.*[1]

The State of Washington, after imposing a tax of 2% of the selling price on all retail sales made in the State, levied an additional "compensating" tax of 2% of the purchase price for the privilege of using within the State any article of tangible personal property purchased by the user. It was provided that the compensating tax did not apply except as to property bought at retail, and, where the sale or use of such property had already been subjected to a tax under the laws of any State of the United States, it was abated to the extent of any tax so paid.[2] Plaintiffs-appellees brought suit in a Federal court to enjoin the collection of the tax with reference to materials purchased outside the State and used within it. A three-judge court granted the injunction (one judge dissenting), and held the tax invalid as a burden on interstate commerce.[3] On appeal, HELD (two justices dissenting): Reversed; such a tax is neither a tax upon the operations of interstate commerce nor a burden thereon because of any hampering or discriminatory effect.

The obvious purpose of the taxing statute was to meet the objections normally raised by merchants near State lines to a retail sales tax—namely, that the sales tax works unfairly upon them in that it either drives prospective customers across the State line or forces the merchants to absorb the tax instead of passing it on to their customers. In view of the strenuous and heretofore successful opposition to a sales tax in Maryland, founded on such considerations, the case assumes considerable local importance.

It is well established that a State may not tax the sale to a buyer within the State of goods which at the time of sale are in another State nor the solicitation within the State of orders for goods which are at the time in another State.[4] It is equally well established that a State may val-

[1] 57 S. Ct. 524 (1937).

[2] Washington Laws, 1935, Ch. 180.

[3] Silas Mason Company, Inc. v. Henneford, 15 F. Supp. 958 (E. D. Wash.). The State Supreme Court, also by a divided court, had held the tax valid in Vancouver Oil Co. v. Henneford, 183 Wash. 317, 49 Pac. (2d) 14 (1935).

[4] Robbins v. Shelby County Taxing District, 120 U. S. 489, 30 L. Ed. 694, 7 S. Ct. 592 (1887); Real Silk Hosiery Mills, Inc. v. Portland, 268 U. S. 325, 69 L. Ed. 982, 45 S. Ct. 525 (1925). But cf. Wiloil Oil Corp. v. Pennsylvania, 294 U. S. 169, 79 L. Ed. 838, 55 S. Ct. 358 (1935).

idly tax the sale of goods brought into the State, whether in the original package or not, if such goods, prior to their sale, have come to rest and become mingled with the general mass of property within the State;[5] provided always that the tax does not discriminate against such goods because of their origin.[6] And a line of recent cases has sustained also the power of a State to tax the use within the State of goods brought in from outside, where such goods have come to rest within the State prior to the use.[7] These last decisions are considered as controlling by the Supreme Court in the present case.

The lower court, in holding the tax unconstitutional, relied primarily on *Baldwin v. Seelig*,[8] and emphasized that the purpose of the statute was to protect local merchants against the competition of interstate commerce. In that case, the Supreme Court had said:[9] "Neither the power to tax nor the police power may be used by the State of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so construed are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in results . . . The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended."

In the present case, the Supreme Court distinguishes *Baldwin v. Seelig* upon the ground that there the New York statute in effect regulated the price at which milk subsequently sent to New York could be sold outside of New York, by prohibiting the sale in New York of milk produced and sold outside the State to New York dealers, unless such

[5] Woodruff v. Parham, 8 Wall. 123, 19 L. Ed. 352 (1869); Sonneborn Bros. v. Cureton, 262 U. S. 506, 67 L. Ed. 1095. 43 S. Ct. 643 (1923).

[6] Welton v. Missouri, 91 U. S. 275, 23 L. Ed. 347 (1876).

[7] Hart Refineries v. Harmon, 279 U. S. 499, 73 L. Ed. 475, 49 S. Ct. 188 (1929); Gregg Dyeing Co. v. Query, 286 U. S. 472, 76 L. Ed. 1232, 52 S. Ct. 631 (1932); Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249. 77 L. Ed. 730, 53 S. Ct. 345 (1933); Edelman v. Boeing Air Transport, 289 U. S. 249, 77 L. Ed. 1155, 53 S. Ct. 591 (1933); Monamotor Oil Co. v. Johnson, 292 U. S. 86, 78 L. Ed. 1141, 54 S. Ct. 575 (1934). But a tax on the use within the State of gasoline purchased outside is invalid as applied to gasoline used as fuel upon an interstate ferry line, since the tax here is directly upon the operations of interstate commerce. Helson v. Kentucky, 279 U. S. 245, 73 L. Ed. 683, 49 S. Ct. 279 (1929).

[8] 294 U. S. 511, 79 L. Ed. 1032, 55 S. Ct. 497 (1935).

[9] Ibid, 294 U. S. 527.

outside sale was at a price fixed by New York; whereas the Washington statute left the outside seller free to charge any price he wished and to ship his goods into Washington in such amounts as he desired. That the motive behind the adoption of the statute was to lessen interstate competition for local retailers was stated to be immaterial, the tax being valid apart from its motives.

It is difficult completely to reconcile the holding here with the broad language quoted above from the *Baldwin* case, and it would seem that the doctrine there enunciated must be materially limited. Both the purpose and effect of the compensating tax were certainly to protect the local merchant against the lower prices of outside competitors by taking away from local buyers the saving effected by buying outside the State. Indirectly, at least, Washington was enabled to project its sales tax outside the State and make it apply to interstate sales. Yet it was the attempt of New York to project its policy with respect to sales prices of milk across State lines that was condemned in the *Baldwin* case as an attempt to "place itself in a position of economic isolation;" and it was there stated that this was not made justifiable by reason of a desire to "protect her inhabitants from the cut prices and other consequences of Vermont competition."

It would seem that, under the instant case, the States are to be regarded as having power to protect their merchants against injurious competition from without, to the extent that interstate sellers may be forced, indirectly at least, to compete on equal terms with local sellers. In other words, that interstate commerce is only to be regarded as burdened where it is placed at a disadvantage as compared with local merchants. Whether adopting the compensating tax will in practice enable the States to overcome the difficulties rising out of their inability to tax interstate sales directly, would seem at least questionable. The difficulty of administration is obvious, except as to large buyers or as to property whose ownership would be a matter of record in the taxing State.[10]

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[10] See note (1936) 11 Washington L. R. 54.