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CONSTITUTIONALITY OF STATUTE IMPOSING BURDENSOME TAX ON PARTICULAR KINDS OF BUSINESS—CLASSIFICATION FOR PURPOSES OF TAXATION

Brown v. State[1]

Appellant was indicted and convicted for selling ice cream from a truck without having obtained the license required by statute.[2] On appeal he alleged that the license fee exacted by the statute was unconstitutional, in that: (1) The license law was, in effect, a police regulation and the fees exacted were so large so as to be destructive of business; (2) The act worked an arbitrary and unreasonable classification, which improperly discriminated against those affected by it; and (3) The section requiring those buying locally for sale outside the state to obtain a license was an unconstitutional attempt to regulate buying here according to the nature of the disposal of the goods outside the state.

The Court of Appeals affirmed the lower court and upheld the constitutionality of the statute in its application

[1] 9 A. (2d) 209 (Md. 1939).

[2] Md. Code Supp. (1935) Art. 56, Sec. 26-30, providing that hawkers and peddlers must obtain a license to "buy for sale out of the State, or buy to trade, barter or sell, or offer to trade, barter or sell within the State any goods, wares or merchandise . . . (there is an exemption as to) hawkers and peddlers of oysters and fish in their unpreserved and natural condition, or of fruits and vegetables perishable in their nature that are sold in their natural conditions in this State". The amount of the fees exacted varies; for peddlers using motor vehicles, like the appellant in the instant case, the fee is $300.00.

to the appellant. The Court stated that the act was a revenue measure[3] and not an exercise of the police power, and that any "collateral purposes or motives of a Legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry." A revenue measure, the Court went on to say, is not open to judicial inquiry merely because it would destroy the activity taxed. It is only when a license fee is exacted as a police regulation that the Court may consider whether it is so unreasonable as to amount to a prohibition.

As to the claim of unreasonable classification, the Court stated that the exemptions as to peddlers of perishable foods had existed for a long time (since 1856) without ever having been questioned.[4] This alone was held to be a strong argument in support of its recognized and established reasonableness; and, in any event, it was said that the legislature had the power to grant exemptions from taxation, according to the views of public policy.[5] It was said, however:

> "Of course, if such discrimination were purely arbitrary, oppressive or capricious and made to depend on differences of color, race, nativity, religious opinions, political affiliations, or other considerations having no possible connection with the duties of citizens as taxpayers, such exemptions would be pure favoritism and a denial of the equal protection of the laws to the less favored classes."

The Court observed that, whenever possible, classifications for purposes of taxation made by the legislature are

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[3] Citing Banks v. McCosker, 82 Md. 518, 34 A. 539, 51 Am. St. Rep. 478 (1896). In this case the Court held that the object of the same statute was to raise revenue as distinguished from a police regulation to protect the public. The Court stated that, in seeking the legislative intent as to whether a statute is a revenue measure or a police regulation, it is material to inquire into whether the penalty for its violation is a recurring one or not. If so, then the legislature probably intended it as a police regulation. See also Crout v. State, 157 Md. 387, 146 A. 241 (1929); and State v. Amick, 171 Md. 536, 545, 189 A. 817 (1937), for other cases arising out of the same statute.

[4] According to appellee's brief, it was questioned on this point in the lower court in State v. Amick, *supra* n. 3, but this point was abandoned on appeal.

[5] The Court apparently had Article 15 of the Maryland Declaration of Rights in mind. The clause is restricted to taxes that are not property taxes. See State v. Shapiro, 131 Md. 168, 101 A. 703, An. Cas. 1918E 196 (1917) holding that occupational taxes and licenses are to be levied under the political view clause and are not affected by the uniformity provisions.

sustained; and, recognizing that taxation presents a practical problem which makes exact equality impossible to attain, stated that one who has assailed the classification has the burden of proving its unreasonableness.

The Court disposed of the question of the constitutionality of the section requiring those buying for sale outside the state to obtain a license by stating that, even if it were assumed to be invalid, this did not prevent the enforcement of the law against the appellant, who did not himself buy, and who sold within the state. As the appellant's rights were not affected by the provision, even though it were invalid, he had no standing to question its constitutionality.

On the question as to whether or not the excise tax is a violation of due process of law because of its destructive effect, the decision is in accord with the holdings of the United States Supreme Court. In *McCray v. United States*[6] the Supreme Court, in upholding the validity of the Federal tax involved, stated that the act on its face was a revenue measure and, even though it in effect regulated the oleomargarine industry, the Court must assume its primary purpose to be to raise revenue. Being a revenue measure, the Court reasoned, the act was a valid excise tax. This validity was not affected by the fact that its enforcement would practically destroy or restrict the manufacture of the product taxed. Thirty years later, in *Magnano Co. v. Hamilton*,[7] the same approach was used with respect to a State tax. The Court stated that the due process clause would be violated only if the tax were so unreasonable as to compel the conclusion that the act did not involve the exertion of the taxing power, but was in substance and effect a confiscation of property.[8] The

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[6] 195 U. S. 27, 24 S. Ct. 769, 49 L. Ed. 78, 1 An. Cas. 561 (1904). Here the Court upheld a Federal tax of ten cents a pound on oleomargarine artificially colored, against the contention that this was confiscatory and intended so to be.

[7] 292 U. S. 40, 54 S. Ct. 599, 78 L. Ed. 1109 (1934). Here the Court upheld a state tax of 15¢ a pound on butter substitutes, again alleged to be confiscatory in purpose and effect; the product involved was assumed by the Court to be not only harmless, but of definite dietary value.

[8] The Court cited and quoted, among other cases, Alaska Fish Co. v. Smith, 255 U. S. 44, 48, 41 S. Ct. 219, 65 L. Ed. 489 (1921), upholding a statute of Alaska levying a heavy license tax upon persons manufacturing fish oil against the contention that it would prohibit and confiscate plaintiff's business, where it was said "Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk. . . . The Acts must be judged by their contents not by the allegations as to their purpose in the complaint."

Supreme Court has followed this reasoning, with but little variation, in numerous other cases,[9] and has recently said in *Great Atlantic and Pacific Tea Co. v. Grosjean:*[10]

> "Much broader considerations touching the state's internal policy of police sustain the exaction. The tax is laid solely upon intrastate commerce. In the exercise of its police power the state may forbid, as inimical to the public welfare, the prosecution of a particular type of business, or regulate a business in such a manner as to abate evils deemed to arise from its pursuit. Whatever a state may forbid or regulate it may permit upon the condition that a fee be paid in return for the privilege, and *such a fee may be exacted to discourage the prosecution of a business or to adjust competitive or economic inequalities.*"[11]

The Supreme Court cases, in effect then, allow legislative bodies to impose confiscatory or prohibitive taxes destroying or suppressing the particular activity or product taxed, as long as the tax is on its face one for revenue. In determining whether a tax is for revenue or is an exercise of the police power, the Court has refused to search for hidden motives or to find them in the mere fact of a burdensome or even confiscatory effect. Some authorities[12] see in this reasoning a misconception of Mr. Chief Justice Marshall's dictum in *McCulloch v. Maryland*[13] that "the power to tax involves the power to destroy". This was made in holding a tax to be invalid. It has been suggested that its true application is only where there exists no power at all to tax a particular subject, and not in a case where that power actually exists but (as here) its constitutionality is assailed because it is alleged to be so excessive as to violate due process of law.

In some cases in which the Supreme Court has sustained tax laws alleged to be destructive, we find that it was within the power of the legislature, so far as due process of law was concerned, to accomplish the same re-

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[9] See generally, Brown, *The Excise Tax As a Regulatory Device* (1938) 23 Corn. L. Q. 45; Sholley, *Equal Protection in Tax Legislation* (1938) 24 Va. L. Rev. 229, 388.

[10] 301 U. S. 412, 57 S. Ct. 772, 81 L. Ed. 1193, 1201 (1937).

[11] *Ibid.* Italics supplied.

[12] 1 COOLEY, TAXATION (4th Ed. 1924) Sec. 72; Brown, *supra* n. 9.

[13] 4 Wheat. 316, 431, 4 L. Ed. 579, 607 (1819).

sult by direct prohibition or regulation.[14] In others, however, this has not been true and the use of the taxing power for regulatory or prohibitive purposes has been upheld in the absence of a showing of such purposes on the face of the statute, even though legislation directly seeking such results would have been unconstitutional.[15]

Many of the state courts on the other hand, have distinguished between the two situations and have looked with disfavor upon tax laws falling in the second group mentioned.[16] Where the occupation or thing oppressively taxed is something that the state may under its police powers suppress, the tax has been of course sustained.[17] On the other hand, if the activity or thing oppressively taxed is of an innocent character, many of the state courts hold the tax to be void under the due process clause.[18]

In Maryland, the Court of Appeals has repeatedly made a distinction as to whether the tax is levied as a revenue

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[14] E. g., Veazie Bank v. Fenno, 8 Wall. 533, 19 L. Ed. 482 (1869); Sonzinky v. United States, 300 U. S. 506, 57 S. Ct. 554, 81 L. Ed. 772 (1937).

[15] E. g., McCray v. United States, *supra* n. 6; Magnano v. Hamilton, *supra* n. 7.

[16] See Chaddock v. Day, 75 Mich. 527, 42 N. W. 977 (1889) where the Court held an ordinance regulating and taxing peddlers of fresh meat to be invalid; and State v. Osborne, 171 Iowa 678, 154 N. W. 294 (1915) where the Court held invalid an annual state license tax of $200 on transient merchants in each county in which they did business. The Court said: "The first section of our Bill of Rights assures to every man protection in his natural right to acquire, possess, and enjoy property. This necessarily includes the right to buy, sell, and exchange, and in so far as the traffic is of a harmless and useful character the state may not impose an occupation tax which shall operate as a prohibition or as a burden of magnitude sufficient to render the right valueless." See also: Fiscal Court v. F. & A. Cox Co., 132 Ky. 738, 117 S. W. 296, 21 L. R. A. (N. S.) 83 (1909); Morton v. City of Macon, 111 Ga. 162, 36 S. E. 627, 50 L. R. A. 485 (1900); People v. Wilson, 249 Ill. 195, 94 N. E. 141 (1911); Cache County v. Jensen, 21 Utah 207, 61 Pac. 303 (1900); Hushfield v. City of Dallas, 29 Texas A. Rep. 242, 15 S. W. 124; Ex parte Burnett, 30 Ala. 461 (1857); Caldwell v. City of Lincoln, 19 Neb. 569, 27 N. W. 647 (1886); Pacific Rys. Adv. Co. v. Conrad, 168 Cal. 91, 141 Pac. 916 (1914).

[17] See Hale v. State, 217 Ala. 403, 116 So. 369 (1928); Indianapolis v. Bieler, 138 Ind. 30, 36 N. E. 857 (1894); Commonwealth v. McCray, 250 Ky. 182, 61 S. W. (2d) 1043 (1933); State v. Wilson, 101 Kan. 789, 168 Pac. 679 (1917); Stalick v. Gallup, 23 N. M. 405, 168 Pac. 707 (1917).

[18] See State v. Kartus, 230 Ala. 352, 162 So. 533 (1935); In re Dees, 50 Cal. App. 11, 194 Pac. 717 (1920); Miami Transit Co. v. McLin, 101 Fla. 1233, 133 So. 99 (1931); Shellnut v. City Council, 163 Ga. 502, 136 S. E. 446 (1927); People v. Wilson, 249 Ill. 195, 94 N. E. 141 (1911); State v. Osborne, 171 Iowa 678, 154 N. W. 294 (1915); Fiscal Court v. F. & A. Cox Co., 132 Ky. 738, 117 S. W. 296 (1909); City of Louisville v. Pooley, 136 Ky. 286, 124 S. W. 315 (1910); In re Opinion of Justices, 123 Me. 573, 121 A. 902 (1923); Peterson Baking Co. v. Freemont, 119 Neb. 212, 228 N. W. 256 (1929); Grantham v. Chickaska, 156 Okla. 56, 9 P. (2d) 747 (1932).

measure or merely as a police regulation.[19] The Court is in accord with some other state courts[20] in holding that the amount of a license or occupation tax, as distinguished from a fee imposed in the exercise of the police power, is within the discretion of the legislature and cannot be reviewed by the courts. Its approach seems to have been substantially that of the Supreme Court heretofore discussed. Though the refusal to go behind statutes may be in theory criticized,[21] yet it is submitted that sound considerations of policy support it. The obvious difficulties attendant upon any judicial inquiry into undisclosed legislative motives and questions as to proper and improper measures of taxation give ample reason for the rule as stated.

On the question of discrimination in taxation, the Supreme Court, since the case of *Bells Gap Railroad Co. v. Pennsylvania*,[22] has taken the position that the equal protection clause of the fourteenth amendment is a limitation upon the taxing power of the states, and has stated as the guiding principle that a proper classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis".[23] While this test is obviously so vague and general as to be difficult of application and comparatively meaningless, the Court has been extremely cautious in holding a classification for revenue purposes to be invalid.[24]

When we consider the Supreme Court cases, it is difficult to find any arbitrary or unreasonable classification

[19] Banks v. McCosker, 82 Md. 518, 34 A. 539, 51 Am. St. Rep. 478 (1896); State v. Shapiro, 131 Md. 168, 101 A. 703, Ann. Cas. 1918E 196 (1917); Jones v. Gordy, 169 Md. 173, 180 A. 272 (1935); State v. Applegarth, 81 Md. 293, 300, 31 A. 961, 28 L. R. A. 812 (1895); Meushaw v. State, 109 Md. 84, 91 A. 457 (1908).

[20] Stull v. De Mottos, 23 Wash. 71, 62 Pac. 451 (1900); McKnight v. Hodge, 55 Wash. 289, 104 Pac. 504 (1909); Bradley & Co. v. City of Richmond, 110 Va. 521, 66 S. E. 872 (1910); Woodall v. City of Lynchburg, 100 Va. 318, 40 S. E. 915 (1902); State v. Roberson, 136 N. C. 587, 48 S. E. 595 (1904); State v. Hunt, 129 N. C. 686, 40 S. E. 216, 85 Am. St. Rep. 758 (1901); Pryor v. State, 130 So. 855 (Miss. 1932).

[21] See Brown, *supra* n. 9.

[22] 134 U. S. 232, 10 S. Ct. 533, 33 L. Ed. 892 (1890).

[23] Gulf, C. & S. F. Ry. Co. v. Ellis, 165 U. S. 150, 155, 17 S. Ct. 255 41 L. Ed. 666 (1897).

[24] Sholley, *supra* n. 9, points out that, aside from the cases dealing with special taxes on corporations, the Supreme Court has held only eight statutory classifications in revenue legislation to be invalid because of a violation of the equal protection clause; all of these cases have been since 1921 and half of them since 1933.

in the statute in question, in the instant case. Here the tax places the same burden on all of those dealing in the sale of ice cream and other commodities, in the same way, and the exemptions allowed by the statute are on entirely different products. Here we are not concerned with a classification between competitive articles of a similar physical character, and thus are not confronted with the argument that the taxpayer must pay a heavier tax burden than his competitor, who is exempted. Even in cases of this nature the Supreme Court has upheld the classification.[25] As against the contention that the act discriminates against sellers of ice cream from motor vehicles in favor of those selling in stores, the Court has also upheld classifications based on different methods of conducting the same business or occupation, even though the persons taxed are in competition and unable to pass the tax on to the consumer.[26] The cases involving the discriminatory taxation of chain stores show clearly the difficulty in drawing the line between reasonable and arbitrary classifications based on methods of doing business, and the tendency to seize upon even small differences to justify a legislative difference in treatment.[27] In the recent case of *Madden v. Commonwealth of Kentucky,*[28] the Supreme Court, in upholding the tax said:[29]

> ". . . Classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burdens . . . [thus,] in taxation, even more than in other fields, legislatures possess the greatest freedom in classification."

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[25] Heisler v. Thomas Colliery Co., 260 U. S. 245, 43 S. Ct. 83, 67 L. Ed. 237 (1922); Magnano Co. v. Hamilton, 292 U. S. 40, 54 S. Ct. 599, 78 L. Ed. 1109 (1934).

[26] American Sugar Refining Co. v. Louisiana, 179 U. S. 89, 21 S. Ct. 43, 45 L. Ed. 102 (1900); Quong Wing v. Kirkendall, 223 U. S. 59, 32 S. Ct. 192, 56 L. Ed. 350 (1912); Singer Sewing Machine Co. v. Brickell, 233 U. S. 304, 34 S. Ct. 493, 58 L. Ed. 974 (1914); Armour & Co. v. Va., 246 U. S. 1, 38 S. Ct. 267, 62 L. Ed. 547 (1918).

[27] State Board of Tax Commissioners v. Jackson, 283 U. S. 527, 51 S. Ct. 540, 75 L. Ed. 1248 (1931); Louis K. Liggett Co. v. Lee, 288 U. S. 517, 53 S. Ct. 481, 77 L. Ed. 929 (1933); Fox v. Standard Oil Co., 294 U. S. 87, 55 S. Ct. 333, 79 L. Ed. 780 (1935); Great A. & P. Tea Co. v. Grosjean, 301 U. S. 412, 57 S. Ct. 772, 81 L. Ed. 1193 (1937).

[28] 60 Sup. Ct. 406 (U. S. 1940). Here a Kentucky statute placing an ad valorem tax on deposits in Kentucky banks at the rate of 10¢ per $100.00 as compared with 50¢ per $100.00 on deposits in banks outside the state was held to be valid.

[29] 60 S. Ct. 406, 408 (U. S. 1940).

The Court went on to state that, as the legislature was familiar with local conditions, there exists a presumption of validity, and the burden is on the one who attacks a classification to negative any conceivable basis which might support it.

The holding of the Court of Appeals in this case as to classification is supported amply by the Supreme Court cases and also by the decisions of other State Courts.[30]

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[30] See Ex parte Case, 70 Ore. 291, 135 Pac. 881 (1913), 141 Pac. 746, An. Cas. 1916B 490 (1914), where the license on peddlers exempted those peddling nursery and farm products was held to be a reasonable classification. People v. Smith, 147 Mich. 391, 110 N. W. 1102 (1907), where a license tax on peddlers, except those selling vegetables, fish, meat or farm produce, and bakers delivering bread and pastry to customers was held to be valid. Also see McKnight v. Hodge, 55 Wash. 289, 104 Pac. 504 (1909), where an almost identical statute was upheld, and Ruggles v. State, 120 Md. 553, 87 A. 1080 (1913).