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USE TAX NEED NOT BE COLLECTED BY OUT-OF-STATE VENDOR LACKING MATERIAL CONTACT WITH TAXING STATE

Miller Brothers Co. v. Maryland[1]

The Supreme Court of the United States, in this case, considered the application of the collection provision of the Maryland Use Tax Statute[2] to an out-of-state retailer neither engaged in a mail order business with Maryland residents nor employing solicitors in that state.

Miller Brothers, appellant, was a corporation engaged in the retail furniture trade, chartered and physically located in Delaware, and not licensed to do business in Maryland. Newspaper, radio and television advertising was utilized which, although it reached Maryland residents, was not directed at them.[3] When Maryland residents purchased items from the corporation's retail store it was necessary for them to enter the state of Delaware. Some of the items were carried away by these purchasers and others were delivered to the purchasers in appellant's truck or by common carrier. The Maryland use tax levies an exaction on the "use, storage, or consumption" in Maryland of tangible personal property "purchased from a vendor within or without this State".[4] The tax is to be collected from the purchaser by the vendor and remitted to the State.[5] The appellant refused and failed to collect or remit this tax on goods sold to Maryland residents in its store in Delaware. Consequently, when appellant's truck was in Maryland making deliveries it was attached by the State in a proceeding to collect the tax due; and the Maryland court held appellant liable for the tax on all merchandise sold to Maryland residents, regardless of the method of delivery.[6] The Maryland Court of Appeals held that this

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[1] 347 U. S. 340, reh. den. 964 (1954).

[2] Md. Code (1951), Art. 81, Secs. 368-396.

[3] Appellant had utilized no radio or television advertising since January 1, 1951, over three years prior to the present decision. The newspaper advertising was limited to Delaware publications and the radio and television advertising was accomplished by a station in Delaware. Appellant's radio slogan was "Furniture Fashion Makers for Delaware".

[4] Md. Code (1951), Art. 81, Sec. 369.

[5] *Ibid*, Sec. 371. This collection is limited in the statute to those vendors "engaging in business" in Maryland, but this is defined in Sec. 368(k) as "selling or delivering in this State, or any activity in this State in connection with the selling or delivering in this State, of tangible personal property for use, storage or consumption within this State".

[6] Miller Brothers Co. v. Maryland, 201 Md. 535, 95 A. 2d 268 (1953).

involved no violation of either the Commerce Clause or the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

The Supreme Court of the United States, in a 5-4 opinion, reversed and remanded the decision on the ground that the collection of the tax through the seizure of appellant's truck violated the guarantees of the Due Process Clause of the Fourteenth Amendment.[7] Mr. Justice Jackson, in the majority opinion, reasons that: "The practical and legal effect of the Maryland statute as it has been applied to this Delaware vendor is to make the vendor liable for a use tax due from the purchaser. In economic consequence, it is identical with making him pay a sales tax."[8] He states the question to be "whether this vendor, by its acts or course of dealing has subjected itself to the taxing power of Maryland or whether it has afforded that State a jurisdiction or power to create this collector's liability". Recognizing that it is not constitutionally necessary for a taxpayer to be physically located in the taxing state in order to be subject to a state imposed exaction, the opinion points out that "due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax",[9] and concludes that the necessary link was absent here. The opinion reasoned that more substantial contacts existed with the collecting state in the earlier cases which had sustained compulsory collection of use taxes by out-of-state vendors.

The case owes much of its significance to the fact that it was the first time a litigant questioning the collection of a general use tax[10] had prevailed in the United States

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[7] *Supra*, n. 1, 342.

[8] *Ibid*, 344. The Opinion fails to make it clear whether there could be a difference in result according to whether appellant is to be considered as paying a sales tax or a use tax, and also whether there is any difference between the contacts necessary to support a power to tax and those necessary to support a collector's liability. It cites McCleod v. J. E. Dilworth Co., 322 U. S. 327 (1944), a sales tax case, to demonstrate the inapplicability of a sales tax to the appellant in the present case, and concludes (p. 346) that "it would be a strange law that would make appellant more liable for another's tax than to a tax on itself". But there is no conclusion that can fairly be drawn from the McCleod case that a use tax would not have withstood assault in that case. See note 57 Harv. L. Rev. 1086 (1944), and *infra*, *circa*, n. 12.

[9] *Ibid*, 344-5. The paucity of "constructive discussion" in "responsible commentary" concerning a state's power to reach extraterritorial transactions and non-residents with tax liabilities is noted. Consider *infra*, *circa*, ns. 39, 46.

[10] General use taxes are those use taxes which are not limited in their application to a specific commodity or class of commodities. General use taxes were preceded by use taxes on gasoline and railway equipment. See Monamotor Oil Co. v. Johnson, 292 U. S. 86 (1934); Southern Pac. Co. v.

Supreme Court over the taxing state. The general use tax came into the Court in 1937, in *Henneford v. Silas Mason Co.*,[11] which established its constitutionality against Commerce Clause objection. Both Commerce Clause and Due Process objections were met and answered in *Southern Pac. Co. v. Gallagher*,[12] the Court emphasizing that it was a reasonable exercise of the State's taxing power over a taxable event within the state, namely, the use of the property, which was not to be made invalid by the argument that as to property purchased outside the State it was in effect the same as a sales tax on an out-of-state sale. These two cases, however, did not deal with the right of the state to force an out-of-state vendor to collect the tax, which was first presented in *Felt & Tarrant Co. v. Gallagher*.[13] In a brief opinion by Mr. Justice McReynolds for a unanimous court, a foreign corporation selling comptometers through local solicitors was held validly forced to collect the California Use Tax, the court relying on the *Henneford* case, *supra*, *Bowman v. Continental Oil Co.*,[14] and *Monamotor Oil Co. v. Johnson*.[15] The latter two decisions had sustained respectively the right of a State to require: (a) local distributor to report amounts of all gasoline received, sold, or used, whether in interstate commerce or not, for information purposes in collection of excise taxes; and (b) local distributor of motor oil received from another state to collect tax on motor vehicle fuel used or otherwise disposed of in the state.

The problem next came before the Court in *Nelson v. Sears, Roebuck & Co.*[16] The Sears corporation both maintained retail stores and conducted mail-order business in Iowa, the taxing state, and was licensed to do business there. The Iowa general use tax statute was essentially the same as the present Maryland Act, and though the Sears corporation collected a sales tax from the vendees and remitted it to the state in the course of the business of its retail stores, it neither collected nor remitted a use tax from its mail-order business. The Court concluded that, although payment of the tax possibly involved con-

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Gallagher, 306 U. S. 167 (1939), cases decided on Commerce Clause grounds. See also CRIZ, THE USE TAX; ITS HISTORY, ADMINISTRATION, AND ECONOMIC EFFECTS, (Public Administration Service, #78, 1941).

[11] 300 U. S. 577 (1937).

[12] *Supra*, n. 10, discussed in 87 U. of Pa. L. Rev. 712 (1939).

[13] 306 U. S. 62, 66-68 (1939).

[14] 256 U. S. 642, 650 (1921).

[15] *Supra*, n. 10, 93, 95; *cf.* the text thereof.

[16] 312 U. S. 359 (1941), noted in 41 Col. L. Rev. 915 (1941). See WOOD, DUE PROCESS OF LAW (1951), 376.

siderable expense to the out-of-state vendor,[17] the exaction did not contravene the Due Process Clause of the Fourteenth Amendment. The opinion couched its reasoning in rather well established due process language, that benefits accruing to the corporation by nature of its maintenance of retail stores in the taxing state rendered it subject to the taxing power of the state. The Court reasoned that Iowa having extended to the corporation the privilege of qualifying to do business there:

> ". . . Iowa can exact this burden (collecting its use tax on the corporation's mail-order business) as a price of enjoying the full benefits flowing from its Iowa business . . . these mail orders . . . are not unrelated to respondent's course of business in Iowa. . . . Hence to include them in the global amount of benefits which respondent is receiving from Iowa business is to conform to business facts."[18]

In declaring that no unjust situation was created by the fact that Sears was forced, by the decision, to compete with mail-order organizations without retail stores, and therefore free of the use tax burden, the Court pointed out that these corporations solely of a mail-order nature enjoyed not the benefits of the taxing state as did *Sears.*[19]

The *Sears* case was closely followed by *Nelson v. Montgomery Ward,*[20] in which the fact situation was practically identical with that of the *Sears* case. The Court rested its entire opinion on that earlier case; therefore, the *Montgomery Ward* case offered no new considerations.

The strong, and rather clear, *dicta* in the *Sears* case might have led the hasty to conclude that retail stores, or a license to do business, in the taxing state were a *sine quo non* of use tax liability of out-of-state vendors.[21] Such a supposition would have been proven erroneous by *General Trading Co. v. Tax Commission.*[22] In this case the corporation was not licensed to do business in the taxing state and its activity there was confined to the presence of salesmen who solicited orders to be mailed out of the taxing

[17] The Sears Corporation, basing its judgment on Illinois experience, estimated that, assuming an Iowa business on which the tax amounted to $100,000, it would be able to collect only $68,000, and that this would cost approximately $13,000 a year. *Ibid,* 365.

[18] *Ibid,* 364.

[19] *Ibid,* 365.

[20] 312 U. S. 373 (1941).

[21] Not so hasty was the author of a note in 41 Col. L. Rev. 915 (1941).

[22] 322 U. S. 335 (1944), noted in 57 Harv. L. Rev. 1086 (1944); See also Wood, *op. cit., supra,* n. 16, 378.

state to the corporation's headquarters. The goods ordered were then sent by mail to the vendee in the taxing state. To establish the propriety of compelling the vendor to collect and remit a use tax in the light of the Due Process Clause, Mr. Justice Frankfurter termed the tax an "exaction . . . made against the ultimate consumer",[23] and briefly dismissed the attack on the means of collecting the tax by stating that it was a "familiar and sanctioned device",[24] citing the *Monamotor*[25] and *Felt & Tarrant* cases.[26] He justified the tax burden by noting the obvious benefits enjoyed by the residents of the taxing state, the "ultimate consumers". Mr. Justice Jackson, in his dissent, pointed out what he considered an anomalous situation.[27] He noted that the majority would allow the state to make a person a tax collector for the state when the state lacks the power to tax that person.

Thus, the cases which offered guiding *ratio decidendi* upon which the question in the *Miller* case turns are the *Felt & Tarrant,*[28] *Sears, Roebuck,*[29] *Montgomery Ward,*[30] and *General Trading Company*[31] cases. In each of these, as in the *Miller* case, the propriety of making an out-of-state vendor a mandatory tax collector was considered. Each discussed the right of the state to tax in the light of well-founded precedent; namely, that the state derives its power to tax by reason of benefits which the state has conferred upon the persons who furnish the exaction. This benefits theory, though dating back many years,[32] was pronounced

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[23] *Ibid*, 338.
[24] *Ibid.*
[25] 292 U. S. 86 (1933), *supra, circa*, n. 10.
[26] 306 U. S. 62 (1939), *supra, circa*, n. 13.
[27] *Supra*, n. 22, dis. op. 339, 340. He said:

"I can imagine no principle of states' rights or state comity which can justify what is done here. Nor does the practice seem conducive to good order in the federal system."

[28] 306 U. S. 62, 66-68 (1939), *supra, circa*, n. 13.
[29] 312 U. S. 359 (1941), *supra, circa*, n. 16.
[30] 312 U. S. 373 (1941), *supra, circa*, n. 20.
[31] 322 U. S. 335 (1944), *supra, circa*, n. 22.
[32] For applications of the benefits theory in various factual contexts, see Union Transit Co. v. Kentucky, 199 U. S. 194 (1905); Baldwin v. Missouri, 281 U. S. 586 (1930); Connecticut General Co. v. Johnson, 303 U. S. 77 (1938); Curry v. McCanless, 307 U. S. 357 (1939); Wisconsin v. J. C. Penney Co., 311 U. S. 435 (1940). It might be observed that the limitations of state taxation were based upon concepts of sovereignty and elemental law rather than due process until Louisville &c. Ferry Co. v. Kentucky, 188 U. S. 385 (1903); see McCulloch v. Maryland, 4 Wheaton 316 (U. S. 1819), and Hays v. The Pacific Mail Steamship Co., 17 Howard 596 (U. S. 1854), decided prior to the adoption of the Fourteenth Amendment, and also Railroad Company v. Jackson, 7 Wallace 262 (U. S. 1868); St. Louis v. The Ferry Co., 11 Wallace 423 (U. S. 1870); State Tax on Foreign Held

with clarity by Mr. Justice Frankfurter in *Wisconsin v. J. C. Penney Co.* as being,

> ". . . whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return."[33]

Though this particular concept of due process and state taxation was applied in the three earlier cases involving collection of use taxes from out-of-state vendors, there was no clear cut indication of its separate relation to: (a) the imposition of the use tax on the intra-state user, and (b) the imposition of the collector's liability on the out-of-state vendor. In the *Sears*[34] and *Montgomery Ward*[35] cases the benefits conferred upon the *vendor* were considered, thereby suggesting the same basic criteria in determining the constitutionality of compelling a person to collect a tax for the state and in causing a person to become a taxpayer. However, the majority in the *General Trading Company* case[36] referred to the "ultimate consumer"[37] as the sole person for whom an accrual of benefits must be demonstrated in order to support constitutionality of *imposing* a use tax, but offered no analysis of the facts of benefit to the seller so as to support the state's authority to make him the tax collector. It was this absence of sufficient due process basis for reaching the seller to which Mr. Justice Jackson objected in his dissent.[38] It is possible, however, that the majority, although not explicit on this subject, felt that the solicitation of the mail orders in Iowa

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Bonds, 15 Wallace 300 (U. S. 1872). In Union Transit Co. v. Kentucky, 199 U. S. 194, conc. op. 211 (1905), Mr. Justice Holmes, concurring with the invalidation of a state tax because of a paucity of state conferred benefits, is grieved and somewhat bewildered by the majority's invocation of the Fourteenth Amendment. See also COOLEY, TAXATION (4th Ed., 1924), Sec. 89. For more exhaustive treatment of the evolution of the concept of due process limitations on state tax power see Hellerstein and Hennefeld, *State Taxation in a National Economy*, 54 Harv. L. Rev. 949 (1941); CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953), Ch. XXXII; Comment, *Withdrawal of Due Process Limitations on State Tax Jurisdiction*, 50 Yale L. J. 900 (1941).

[33] 311 U. S. 435, 444 (1940).

[34] *Supra*, n. 29.

[35] *Supra*, n. 30.

[36] *Supra*, n. 31.

[37] *Ibid*, 338.

[38] *Ibid*, dis. op. 339, 340.

was sufficient contact by the seller with Iowa to supply the necessary support for the majority's conclusion.[39]

Referring to these earlier related decisions, as well as earlier more general cases relating to jurisdiction to tax, the majority opinion in the *Miller* case said "we are unable to find in any of our cases a precedent for sustaining the liability asserted by Maryland here".[40] Finding the *General Trading Co.* case, *supra,* to be "the nearest support for Maryland's position" (and noting his dissent even under the facts of that case), Mr. Justice Jackson reasoned in distinguishing it:

> "That was the case of an out-of-state merchant entering the taxing state through traveling sales agents to conduct continuous local solicitation followed by delivery of ordered goods to the customers . . . there is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising."[41]

The brief dissenting opinion by Mr. Justice Douglas,[42] concurred in by Mr. Justice Black, Mr. Justice Clark and The Chief Justice, reasons: (a) that use taxes increasingly play important roles in the tax programs of States and may be easily avoided if out-of-state vendors cannot be called on to be collectors; (b) the principles of the *General Trading Co.* case support Maryland's position herein; (c) the Maryland law imposed only a "minimal burden" on the vendor, who "will be paid for its trouble" in collecting the tax;[43] (d) the case was not one of "minimal contact" since the appellant knew where the goods were to be consumed, that its advertising reached Maryland consumers, and that it regularly made deliveries in Maryland with its own delivery trucks and common carriers. The dissent, after noting that jurisdiction was obtained by attaching appellant's truck while it was in Maryland, further observes that if

[39] Compare to the doing of a single act as basis for the jurisdiction of courts over non-resident individuals or corporations: Hess v. Pawloski, 274 U. S. 352 (1927); Doherty & Co. v. Goodman, 294 U. S. 623, 627 (1935); International Shoe Co. v. Washington, 326 U. S. 310, 318 (1945); Compania de Astral S.A. v. Boston Metals Co., 107 A. 2d 357 (Md. 1954); and see, Reiblich, *Jurisdiction of Maryland Courts over Foreign Corporations*, 3 Md. L. Rev. 35, 67-72 (1938).

[40] 347 U. S. 340, 345 (1954).

[41] *Ibid*, 346-347.

[42] *Ibid*, dis. op. 357-358.

[43] The Maryland Statute allows the vendor-collector 3% of the gross tax as compensation, Md. Code (1951), Art. 81, Sec. 384.

appellant should choose to stay out of Maryland "the Maryland courts will of course have no jurisdiction over it".

It is a matter of some probability, because of numerous use tax statutes[44] and divers tax situations created by nuances of business practice, that *Miller Brothers v. Maryland* will not be the last case of its type to come under the deliberation of the Court.[45] Also, with the sudden and lamented death of Justice Jackson, his successor will swing the balance of power as to whether the *Miller* case continues long to be the law as to its very facts or others closely analogous to them. However, that may be resolved, the question in each future case would seem to be one of how much contact with the state by an out-of-state vendor is sufficient to support the State's making him its tax collector. Realistically considered, if a State may subject a non-resident individual or corporation to suit in the courts of that State on causes of action arising out of single acts done within the State, or contracts made within the State,[46] it might be considered just as reasonable to require a non-resident individual or corporation to collect a use tax related to any use that grew out of any activity done in the State by the non-resident individual or corporation. Lacking any such contact with the State as to the use which is taxed, the foreign corporation, or non-resident individual might validly expect constitutional exemption from the taxing State's jurisdiction.

[44] There were thirty states with use tax statutes on October 5, 1953. CCH ALL STATES SALES TAX REPORTER (1953), 601, *et seq.*

[45] The Arkansas Supreme Court on May 24, 1954, gave prompt but restricted application to the *Miller* case in deciding five cases by one opinion finding the Supreme Court rule applicable to two situations but inapplicable to the other three, where solicitation in the State by a salesman or maintenance of a salesroom there were held sufficient to support the collector's liability; Thompson v. Rhodes-Jennings Furn. Co., 268 S. W. 2d 376 (Mo., 1954).

[46] See n. 39, *supra*.