

"act."<sup>24</sup> The defendant is not a mere supplier of a commodity; this newspaper is an essential link between the plaintiff and his prospective customers, and the nature of the defendant's business is such that even so-called "non-feasance" on his part will have an effect on the business decisions of prospective land buyers. The refusal to run an advertisement which has customarily appeared might be considered a form of persuasion.

The American Law Institute expresses no opinion as to liability in circumstances covered by the exceptions to section 762.<sup>25</sup> It is safe to assume that the Institute took this position because of the scarcity of case law on the issue of how far the prima facie tort doctrine has extended into this refusal to deal area. Had the plaintiff marshalled his facts and framed his declaration on a prima facie tort theory, however, it would seem that this court would, at least, have been required to discuss the area<sup>26</sup> and it could not have dismissed the case as an ordinary "refusal to deal."

H. WAYNE JUDGE

**Constitutional Law—Commerce Clause—State Occupation Tax as Measured by Gross Receipts.—*Washington-Oregon Shippers Coop. Ass'n, Inc. v. Schumaker*.**<sup>1</sup>—Respondent, Washington-Oregon Shippers Coop. Ass'n, Inc. (hereinafter referred to as WOSCA), a non-profit corporation<sup>2</sup> domiciled in the state of Washington, was formed to gain the advantages of carload or volume rates for its members<sup>3</sup> by providing services to consolidate shipments. As each member is engaged in a business involving the purchase and transportation of products from extra-state sources, WOSCA handles *only* interstate shipments.

Shipping procedure is as follows: the out of state vendor, upon receiving an order from a purchasing member of WOSCA, ships the commodities in care of WOSCA to consolidators who arrange the commodities in carload lots and ship them to Washington distributors. The latter segregate the shipments and make delivery to the purchasing members. Another contractor, who pays the carriers and others out of WOSCA's operating capital as

<sup>24</sup> See Legislation, *supra* note 9, at 692.

<sup>25</sup> Restatement, *op. cit.* *supra* note 8, § 762, caveat.

<sup>26</sup> It may be, then, that courts, even without the aid of statutes, will be more disposed than they were previously to scrutinize the motive of the intentional infliction of harm by non-feasance, as well as by affirmative acts. They may perhaps place legal limits on bargaining power when it is based on a corporation's threat of non-feasance in the form of a refusal to buy, sell or employ as well as when it is based on a threat by individual workers to do the affirmative act of combining, followed by the non-feasance of a refusal to work.

Hale, *supra* note 10, at 217.

<sup>1</sup> 367 P.2d 112 (Wash. 1961).

<sup>2</sup> WOSCA is exempt from regulation by the ICC as a freight forwarder under 56 Stat. 284 (1942), as amended, 49 U.S.C. 1002(c) (1958).

<sup>3</sup> Corporate membership consists of 119 business entities, with principal places of business in Washington or Oregon. This appeal did not concern transactions involving Oregon members.

charges come due, then bills the individual members for the services performed by WOSCA.<sup>4</sup> All consolidators and distributors, and the contractor, are under contract with WOSCA.

The state of Washington levied an occupation tax on WOSCA, using as its basis the gross receipts received from the members for services performed.<sup>5</sup> The superior court found the taxes to be a direct burden on interstate commerce and enjoined their collection. The Tax Commissioner, abandoning his claim that the actual transportation charges by carriers should be included in the measure of the tax, limited its appeal to that portion of the trial court's judgment that enjoined collection of taxes measured by gross receipts obtained from members for services rendered to them by WOSCA. On appeal, the Supreme Court of Washington reversed.<sup>6</sup> HELD: The tax did not place an extra burden on interstate commerce not borne by intrastate commerce, nor did it create the risk of multiple exactions of the same nature from other states.

From the beginning of our constitutional system it has been a recognized principle that the free flow of commerce between the states may not be burdened by any form of state taxation.<sup>7</sup> However, the reports are replete with decisions involving state attempts to breach or by-pass the barrier of immunity surrounding those engaged in interstate activity. The attacks have come on three fronts: income or license taxes arising out of gross or net income; franchise and privilege taxes based upon the privilege of doing business within the taxing state; and property taxes imposed upon the property used within the taxing state.<sup>8</sup>

Traditionally, a tax was struck down when its effect on interstate commerce was held to be "direct"<sup>9</sup> and was upheld when the effect was only

<sup>4</sup> A per hundredweight charge was placed on the following items: loading and consolidation; railroad stop-off; all-risk insurance; WOSCA overhead; administration and billing; unloading and segregation; store-door delivery.

<sup>5</sup> There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be. Wash. Rev. Code Ann. § 82.04.220 (1961).

<sup>6</sup> The railroad stop-off charge was exempted from the measure of the tax on the grounds that it was inseparable from the actual transportation charges of carriers.

<sup>7</sup> See, e.g., *Ozark Pipe Line Corp. v. Monier*, 266 U.S. 555 (1925); *Brennan v. Titusville*, 153 U.S. 289 (1894); *Leloup v. Port of Mobile*, 127 U.S. 640 (1888); *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489 (1887); *State Freight Tax Cases*, 82 U.S. (15 Wall.) 232 (1872); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827).

<sup>8</sup> There are innumerable articles on this general topic, tracing the historical development of these categories of state taxation. The following are of particular interest: *Hartman, State Taxation of Interstate Commerce* (1953); *Barrett, State Taxation of Interstate Commerce—"Direct Burdens," "Multiple Burdens," or What Have You?*, 4 Vand. L. Rev. 496 (1951); *Brown, State Taxation of Interstate Commerce—What Now?*, 48 Mich. L. Rev. 899 (1950); *Powell, Indirect Encroachment on Federal Authority by the Taxing Powers of the States*, 31 Harv. L. Rev. 321, 572, 721, 932 (1921); *Powell, More Ado About Gross Receipts Taxes*, 60 Harv. L. Rev. 501, 710 (1947); and see a Symposium, *State Taxation of Multistate Business*, 18 Ohio St. L. J. 3, 9, 22, 43, 57, 69, 84 (1957).

<sup>9</sup> See, e.g., *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292 (1917); *Western Union*

"indirect."<sup>10</sup> Thus gross receipts taxes were among those that fell by the interstate roadside under this standard.<sup>11</sup> However, cases of more recent vintage seem to permit gross receipts taxes if they are either apportioned to intrastate activity<sup>12</sup> or incapable of duplication by any other state.<sup>13</sup> The requirement of apportioning gross receipts from interstate commerce among the states is analogous to the requirement in the property cases, where, in addition to the commerce clause, due process prevents taxation of extra-territorial values.<sup>14</sup> Thus gross receipts or gross income taxes may be regarded as essentially *in rem* as compared with the net income taxes which may have a personal basis.<sup>15</sup> On the one hand, the net income tax cases allow a state to reach all net income of its residents, including that arising from activities beyond its borders although those activities are as a matter of due process beyond the taxing power of the state.<sup>16</sup> On the other hand, a gross receipts tax, including receipts from interstate commerce, will be upheld only if the taxpayer's activities occur in the taxing state.<sup>17</sup>

In recent years there has been a wealth of decisions where the courts have upheld franchise and business privilege taxes measured by gross income when the taxpayer was engaged in substantial local business activities which were not deemed to be an integral part of interstate activity.<sup>18</sup> However, where the courts found the local activity inseparable from interstate activity, the validity of the tax has been denied, on the basis that a state may not

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Tel. Co. v. Kansas ex rel. Coleman, 216 U.S. 1 (1910); *Leloup v. Port of Mobile*, supra note 7.

<sup>10</sup> See, e.g., *Wiloil Corp. v. Pennsylvania*, 294 U.S. 169 (1935); *Postal Telegraph-Cable Co. v. City of Richmond*, 249 U.S. 252 (1919).

<sup>11</sup> See, e.g., *United States Glue Co. v. Oak Creek*, 247 U.S. 321 (1918), where a gross receipts tax was held to impose a direct and immediate burden on commerce because it was imposed without reference to the profitability of the business and hence might so diminish the profit as to impede interstate commerce.

<sup>12</sup> See *Illinois Central R.R. v. Minnesota*, 309 U.S. 157 (1940). For apportionment formulas used and approved in income taxation see, *Bass, Ratcliffe & Gretton, Ltd. v. State Tax Comm'r*, 266 U.S. 271 (1924); *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920). For a formula disproved, see *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123 (1931).

<sup>13</sup> See, e.g., *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940); *Gwin, White and Prince, Inc. v. Henneford*, 305 U.S. 434 (1939); *Western Livestock v. Bureau of Revenue*, 303 U.S. 250 (1938). But cf. *Freeman v. Hewitt*, 329 U.S. 249 (1946), where Mr. Justice Frankfurter repudiated the multiple taxation test.

<sup>14</sup> *Fargo v. Hart*, 193 U.S. 490 (1904).

<sup>15</sup> See *Guaranty Trust Co. of N.Y. v. Virginia*, 307 U.S. 247 (1938); *New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937); *Lawrence v. State Tax Comm'r*, 286 U.S. 276 (1932).

<sup>16</sup> See note 15 supra. Non-residents can only be taxed upon receipt of income from sources within the state, *Hans Rees' Sons, Inc. v. North Carolina*, supra note 12.

<sup>17</sup> See *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77 (1938); *Comp nia Gen. de Tabacos de Filipinas v. Collector*, 275 U.S. 87 (1927).

<sup>18</sup> See, e.g., *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80 (1948); *Eastern Air Transp., Inc. v. South Carolina Tax Comm'r*, 285 U.S. 147 (1932); *Atlantic Coast Line R.R. v. Doughton*, 262 U.S. 413 (1923). The theory of a separate intrastate event has found its greatest application in the field of use taxes—see, e.g., *Nelson v. Sears Roebuck Co.*, 312 U.S. 359 (1941); *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937).

grant the privilege of engaging in interstate activity and therefore may not tax such privilege.<sup>19</sup> But not all cases are clear-cut, nor are the activities susceptible of dissection.<sup>20</sup> The instant case is a striking example of the dilemma.

The court properly disposed of the due process question in holding that the activity of procuring services is a local activity which may form the subject of state taxation, albeit, that such services are rendered in connection with an interstate transaction. However, the balance of the opinion, leaves much to be desired. In an attempt to add more revenue to the state coffers, the Washington court dismissed the commerce clause implications of *Puget Sound Stevedoring Co. v. Tax Commissioner*<sup>21</sup> and *Gwin White and Prince, Inc. v. Henneford*<sup>22</sup> as not controlling in the instant situation. The former case held that a stevedoring business was subject to the Washington business and occupation tax when it merely supplied workmen to the shipowner, but was not taxable where it directed the work of loading and unloading itself. The approach taken was to determine how closely the taxpayer's business activities were associated with interstate commerce—the latter instance being enough to provide protection. Applying the *Puget* standard to the instant case, it would appear that contractual control over those who provide the actual physical labor should be sufficient to provide the "nexus" necessary for tax immunity.

In *Gwin*, the taxpayer was a Washington corporation whose entire business was that of "marketing agent" for fruit growers in Washington and Oregon. The taxpayer made sales and deliveries of fruit in other states, collected the sales price and remitted the proceeds to its principals after deducting transportation charges and its own compensation. That case is somewhat similar to the case at hand, yet the *Gwin* court in holding the tax levy as unconstitutional did not consider which of the taxpayer's activities were in themselves transportation of the fruit in interstate commerce:

For the entire service for which the compensation is paid is in aid of the shipment and sale of merchandise in that commerce. Such services are within the protection of the commerce clause.<sup>23</sup>

It is submitted that as WOSCA's services might best be characterized as facilitating the movement of goods in interstate commerce *only*, not both transportation and sale, such services are so closely connected with maintaining the free flow of commerce among the states as to be considered as actually engaging in interstate activity.

It would appear that the instant forum, faced with the fact that a tax

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<sup>19</sup> *Spector Motor Serv., Inc. v. O'Connor*, 340 U.S. 602 (1950); *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203 (1925); *Atlantic & Pac. Tel. Co. v. Philadelphia*, 190 U.S. 160 (1903).

<sup>20</sup> Compare the following: *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947); *Fisher's Blend Station, Inc. v. State Tax Comm'n*, 297 U.S. 650 (1936); *Utah Power & Light Co. v. Pfoest*, 286 U.S. 165 (1932).

<sup>21</sup> 302 U.S. 90 (1937).

<sup>22</sup> *Supra* note 13.

<sup>23</sup> *Supra* note 13, at 437.

on the privilege of doing an exclusively interstate business would have to be invalidated, resorted to the use of an "old friend"—legal fiction—previously used in the *Memphis Gas* case.<sup>24</sup> There the taxpayer was operating an interstate pipeline which, the state conceded, was an exclusively interstate business. Despite the language of the state statute which imposed the levy on "doing business" in the state, the Mississippi court held nevertheless that the tax was not levied on doing business, but instead on the local activities in maintaining the pipeline which the court opined to be subject to tax. In a five to four decision the United States Supreme Court upheld the tax as a levy on "local activities" rather than a tax on the "privilege of doing interstate business."<sup>25</sup> Thus in the case at hand, the Washington court, by placing a "local activities" label on the privilege tax,<sup>26</sup> has attempted to use the escape device provided in the *Memphis Gas* case, so as to avoid the implications of *Spector Motor Serv., Inc. v. O'Connor*.<sup>27</sup> Spector in effect reiterated the well settled principle, which was even recognized by Mr. Justice Reed in *Memphis Gas*, that a state may not tax the privilege of engaging in interstate commerce.

However, label changing does not dispose of the case. All that is settled (if the court's view is adopted) is that the Washington statute is not a tax on the privilege of engaging in interstate activity but merely a tax on local activity. Even Mr. Justice Reed recognized that it is not enough to find *any* "local activity" to which to attach a tax for there "are always convenient local incidents in every interstate operation."<sup>28</sup> His views mirror the sentiments of Mr. Justice Rutledge in an earlier decision:

If the only thing necessary to sustain a state tax . . . were to discover some local incident which might be regarded as separate and distinct from . . . the commerce itself . . . all interstate commerce could be subjected to state taxation . . . All interstate commerce takes place within the confines of the states and necessarily involves "incidents" occurring within each state through which it passes . . . and there is no known limit to the human mind's capacity to carve out from what is an entire or integral economic process particular phases or incidents, label them as "separate and distinct" or "local" and thus achieve its desired result.<sup>29</sup>

<sup>24</sup> *Stone v. Memphis Natural Gas Co.*, 201 Miss. 670, 29 S.2d 268 (1947).

<sup>25</sup> *Supra* note 18.

<sup>26</sup> The tax involved herein is not a tax on the privilege of doing interstate business; so *Spector Motor Service* is distinguishable. . . . But a local corporation, organized under the laws of Washington, performing local activities and serving local establishments is subject to the tax.

*Supra* note 1, at 117. However, the very same Washington court had previously said, . . . [T]he business and occupational tax contained in the state revenue act imposes, indiscriminately, an excise tax upon every person for the privilege of doing business in this state.

*Puget Sound Stevedoring Co. v. Tax Comm'r*, 189 Wash. 131, 135, 63 P.2d 532, 533 (1937).

<sup>27</sup> *Supra* note 19.

<sup>28</sup> *Supra* note 18, at 87.

<sup>29</sup> *Nippert v. Richmond*, 327 U.S. 416, 423 (1946).

It is submitted that too often judicial metaphysics is the basis upon which the taxing power of a state is made to stand or fall, rather than the economic and fiscal realities of the situation. The decision at hand is a prime example of such an uneconomic result. By upholding the validity of the Washington levy, the instant court has subjected interstate commerce to the burden of paying the Washington business and occupation tax on the gross revenue of such organizations as WOSCA, *over and above* the tax paid by the various independent contractors doing the actual loading, unloading, and segregation. It must be remembered that WOSCA is a non-profit organization and, therefore, any imposition cannot be absorbed, but must be passed directly and fully to purchasing members by increasing the costs of the interstate shipments.

STUART R. ROSS

**Corporations—Purchase by a Corporation of Its Own Capital Stock—Business Judgment Rule.—***Propp v. Sadacca*.<sup>1</sup>—Textron, Inc., sought to gain control of American Screw Company, a company in which Noma Lites, Inc., held a substantial interest. Textron was unsuccessful because Noma, through the efforts of one Sadacca, the chairman of the board of directors of Noma, bought enough stock to insure its control. The chairman of Textron<sup>2</sup> then informed Sadacca that, though Textron could not gain control of American directly, it could acquire it indirectly by gaining control of Noma, and that it was prepared so to do. Sadacca then purchased on the open market on November 24 and 26, 1958, 199,000 shares of Noma common stock. These purchases of Noma stock were made with the purpose of preventing this acquisition of control by Textron, and without the knowledge or consent of the president or directors of Noma. Three days later, at a special meeting of the board of directors, Sadacca's purchase was ratified and financing arranged. This took place in the approximate time of three and one-half hours. Plaintiff, a shareholder of Noma, brought this action for an accounting. HELD: The business judgment rule is no defense where the purchase and ratification were made in a "precipitate and impulsive manner" without due and careful consideration of the problems involved.

A Delaware corporation may purchase shares of its own capital stock unless such purchase will impair the capital of the corporation.<sup>3</sup> In the instant case the question of capital impairment apparently was not raised. No determination was made by the court whether this purchase did or did not, in fact, impair the capital. The main issue presented, then, was the extent to which the business judgment rule precluded judicial inquiry into corporate decisions. The court reasoned that although a corporation has a

<sup>1</sup> 175 A.2d 33 (Del. Ch. 1961).

<sup>2</sup> Chairman of Textron at that time was Mr. Royal Little, whom defendant claims was a "known liquidator."

<sup>3</sup> Del. Code Ann. tit. 8, § 160 (1953); *In re International Radiator Co.*, 10 Del. Ch. 358, 92 Atl. 255 (1914).