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Constitutional Law—Gross Receipts Tax Applied to Publishing Contract Upheld

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justify its passage,⁶⁶ the Court held that the presumption in favor of constitutionality of statutes had not been overcome.⁶⁷ It was incumbent on the plaintiff to show, beyond a reasonable doubt,⁶⁸ that there was no possible reasonable basis for the classification of the ordinance.

Judge Desmond dissented, agreeing with the plaintiff that there was no rational explanation, but rather that the ordinance was an arbitrary interference with his property interests. This is the position which has been adopted elsewhere,⁶⁹ but the majority rationale would seem preferable.

The Court of Appeals has been reluctant, as demonstrated in a 1956 case, *Defiance Milk Products Co. v. Du Mond*,⁷⁰ to uphold regulatory statutes which have the effect of prohibiting the introduction of goods into commerce even though a legitimate goal of legislative policy was seemingly present.⁷¹ Involved there, however, was regulation and restriction on the movement of marketable goods. Cases such as the instant one present strong arguments which may not be available elsewhere. The regulation of what is by its nature a "necessary evil" should be viewed most liberally by the courts. Although the Court spoke in terms of reasonableness of purpose in the garbage situation, perhaps the result is pointed up by viewing this as simply an area where equal treatment between local and foreign residents is not necessary because of the peculiar interest of the local community in the subject matter. Viewed as such, the result appears analogous to those cases, for example, which allow states to restrict the enjoyment of wild life to residents on a theory of property interest of the sovereign therein.⁷²

Gross Receipts Tax Applied to Publishing Contract Upheld

It is well settled that the liberty of the press is safeguarded by the due process clause of the Fourteenth Amendment.⁷³ Freedom of the press as well as those other "fundamental" liberties essential to "a scheme of ordered liberty" enjoys a unique position⁷⁴ in our society, a position that can not be infringed upon directly.⁷⁵ The press is free from censorship. This is not to say, however,

66. *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938).

67. *Borden's Co. v. Baldwin*, 293 U.S. 194, 209-210 (1934).

68. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 79 (1911).

69. See *Ex parte Lyons*, 27 C.A.2d 182, 80 P.2d 745 (1938); *People v. Marine Products Co.*, 77 C.A.2d 929, 177 P.2d 67 (1947).

70. *Supra* note 64.

71. See *Limitations on Police Power*, 6 BUFFALO L. REV. 42 (1956).

72. *Geer v. Connecticut*, 161 U.S. 519 (1896).

73. *Near v. Minnesota*, 283 U.S. 697 (1931).

74. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Palko v. Connecticut*, 302 U.S. 319 (1937).

75. See *Follett v. McCormick*, 321 U.S. 573 (1944), where the exaction of a tax as a condition to the exercise of the liberties secured by the First Amendment was considered obnoxious.

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that the press is free from all financial burdens of government,⁷⁶ for a charge may be made for the enjoyment of a benefit bestowed by the state.⁷⁷ Therefore, when the effective exercise of this right is allegedly abridged, the courts should evaluate the circumstances and appraise the substantiality of the interests advanced in support of the challenged regulations.⁷⁸

In *Steinbeck v. Gerosa*,⁷⁹ petitioner instituted an action to review a determination of the comptroller that he was not entitled to a refund of a tax levied upon him pursuant to section 24-a of the General City Law.⁸⁰ The petitioner, Steinbeck, was a resident of New York City and wrote novels, motion picture scripts, plays, newspaper and magazine articles. Through agents located in New York City, he negotiated for the licensing of certain rights in his literary works. The agents' principal function was to negotiate such contracts and they had complete authority and discretion in so doing and had executed contracts on his behalf. The agents would receive the money due on the contracts, take their commission and deposit the balance in Steinbeck's bank account. For his books, the consideration to be paid Steinbeck consisted of a percentage of the amount charged by the publisher for all copies sold, less copies returned, but with no deductions for cash discounts or bad debts. For his motion picture scripts, magazine articles and the like, the consideration consisted of a lump sum or a percentage, or a combination of the two. Steinbeck argued that his activity did not fall within the scope of the statute and that even if it did, the tax was unconstitutional as a tax on the privilege of writing and as a tax on interstate commerce. The Court of Appeals rejected his contentions and held unanimously that he was liable for the tax.

The Court interpreted the language of the Gross Receipts Tax Statute in its common and ordinary meaning,⁸¹ since no other meaning was obviously intended, and found the sweep of the statute to be all embracing. Steinbeck had relied upon *People ex rel. Nauss v. Graves*⁸² which held that owners in common of realty were not doing business within the meaning of an unincorporated business tax statute; the owners had employed a real estate agent at an

76. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

77. *State Tax Commission v. Aldrich*, 316 U.S. 174 (1942).

78. See *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Schneider v. State*, 308 U.S. 147 (1939).

79. 4 N.Y.2d 302, 175 N.Y.S.2d 1 (1958).

80. New York City is authorized thereby to impose "a tax . . . upon persons carrying on or exercising for gain or profit . . . any trade, business, profession, vocation or commercial activity . . . or making sales within such city." The tax is "measured by the gross receipts from such activities carried on or annum.

sales made within the city . . ." so long as gross receipts exceed \$10,000 per

81. The Court cited *Business Statistics Organization v. Joseph*, 299 N.Y. 443, 87 N.E.2d 505 (1949), and *Howett v. Street & Smith Pub.*, 276 N.Y. 345, 12 N.E.2d 435 (1938); McKinney's Consolidated Laws, STATUTES, §232.

82. 283 N.Y. 383, 28 N.E.2d 881 (1940).

annual compensation to operate the properties. The Court did not consider the *Nauss* case controlling because (1) Steinbeck was not a passive owner but actively created works bearing his name and (2) the statute involved here was broader in its terms than the statute in the *Nauss* case. It cannot be said, the Court reasoned, that an author actively creating literary works and reaping profits therefrom is not carrying on or exercising for gain or profit an activity within the purview of the statute in question. However, the inability of the city to tax "the press" at all may prevent such an inclusion for taxing purposes.

Steinbeck relied upon the general language found in *Murdock v. Pennsylvania*⁸³ and *Follett v. McCormick*,⁸⁴ suggesting that license taxes may never be imposed upon the exercise of constitutional privileges such as freedom of the press. This general language does give surface support to the petitioner's contention. However, this language was uttered with regard to a flat license tax on the rights of itinerant preachers to distribute religious literature for which a small charge was made; the opinions emphasized the prior restraint feature. In the present case, the Court pointed out that taxation of the press and its writers for the support of the government is a proper function of the taxing power and, absent a showing of arbitrariness or of regulation of the press, such a statute will be upheld. The imposition of the tax here was upheld by the Court on the grounds that it was a general, non-discriminatory tax enacted to provide revenue, which in no way regulated or interfered with those covered by its provisions despite its characterization as a privilege tax. It was also stressed that the tax was not arbitrary or oppressive, or in any way a curtailment of Steinbeck's freedom to write or disseminate his writings. Similar tax statutes have been upheld in other jurisdictions.⁸⁵ Such results are consistent with the idea that "if these guaranties did restrict the power of taxation, the government would soon be insolvent, and powerless to furnish the protection claimed."⁸⁶ The kind of tax on the press that is constitutionally objectionable is illustrated in *Grosjean v. American Press Co.*⁸⁷ In the *Grosjean* case, the tax was graduated in accordance with volume of circulation and applicable only to those papers having a circulation of more than 20,000 copies per week.

Petitioner's final contention was that his granting of licenses to publish induced interstate commerce and that his activities were so closely allied thereto that they should be considered interstate commerce and hence not properly

83. See note 74, *supra*.

84. See note 75, *supra*.

85. *City of Corona v. Corona Daily Independent*, 115 Cal.App.2d 382, 252 P.2d 56 (1953); *Tampa Times Co. v. City of Tampa*, 158 Fla. 589, 29 So.2d 368 (1947), *appeal dismissed* (for want of a substantial federal question), 332 U.S. 749 (1947).

86. *City of Norfolk v. Norfolk Landmark Pub. Co.*, 95 Va. 564, 28 S.E. 959 (1898).

87. See note 76, *supra*.

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subject to state regulation. In analyzing the contracts entered into by petitioner and his publisher, the Court conceded that the publisher might be engaged in interstate commerce but held that this conclusion did not apply to Steinbeck, since there was no joint venture.⁸⁸ Significant to the Court was the fact that there was to be no sharing of losses and no merging of the parties' property, interests, skills, and risks, which are necessary elements of a joint venture. It should be noted also that petitioner had no control over the number of magazines, newspapers, books and plays which were printed and sold. Decisions affecting these matters were solely those of the publishers. Even if there were a joint venture, there is some doubt that this would bring Steinbeck entirely within the coverage of the commerce clause.⁸⁹ The Court, however, found that no such joint adventure existed and further stated that the source of the author's income was not the sales made by the publisher, but the contracts made between him and his publisher in New York City. The gross receipts from interstate sales were simply the measure of the price for the licensing of the author's rights in his literary works. The writings of Steinbeck and the licensing of certain rights thereto were separate and distinct from the subsequent sales by others of his works. A tax, therefore, measured by gross receipts on earnings derived from the contracts, affects interstate commerce so incidentally and remotely as not to amount to a regulation of such commerce.⁹⁰ The Court, citing *Western Live Stock v. Bureau of Revenue*,⁹¹ also stated that since the performance of the contract was not within the protection of the commerce clause, the contract itself was not.

Motion Picture Censorship

The validity of New York's motion picture licensing statute, section 122 of the Education Law, has been raised twice before the United States Supreme Court. In both instances it has been held invalid as applied. In *Joseph Burstyn, Inc. v. Wilson*⁹² the Supreme Court reversed a New York Court of Appeals denial of a license for the picture "The Miracle" because it was a "sacrilegious"

88. *Hasday v. Barocas*, 10 Misc.2d 22, 115 N.Y.S.2d 209 (Sup.Ct. 1952). *Gordon v. Garcia Sugars Corp.*, 241 App.Div. 155, 271 N.Y.Supp. 303 (1st Dep't 1934); *Reynolds v. Searle*, 186 App.Div. 202, 174 N.Y.Supp. 137 (4th Dep't 1919).

89. See *Norton Co. v. Dep't of Revenue*, 340 U.S. 534 (1951); *Central Greyhound Lines Inc. v. Mealey*, 334 U.S. 653 (1948); but see *Joseph v. Carter & Weeks Stevedoring Co.*, 330 U.S. 422 (1947).

90. See *Ficklen v. Shelley County Taxing Dist.*, 145 U.S. 1 (1892).

91. 303 U.S. 250 (1938). The *Western Live Stock* case also settled the question that taxation of a local business or occupation which is separate and distinct from interstate commerce is not forbidden merely because it induces such commerce.

92. N. Y. EDUCATION LAW, §§122 and 124 require that the Board of Regents of State University issue a license for a film unless it is: ". . . obscene, indecent, immoral, inhuman, sacrilegious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime."