September 2005

Volume 12 Number 9

State Tax Return

Supreme Court Upholds Michigan Flat Fee On Intrastate Trucking; Republic Does Not Crumble

Greg Castanias
Washington, D.C.
(202) 879-3639

While the rest of the country was waiting on decisions in cases involving Ten Commandments monuments, takings of private property, and the Grokster file-sharing service, the Supreme Court on June 20 issued a decision in a constitutional state-tax case that fell mostly under the radar of even the most vigilant court watchers. The decision was *American Trucking Associations, Inc. v. Michigan Public Service Commission*, No. 03-1230, 125 S.Ct. 2419, 73 USLW 4532, 05 Cal. Daily Op. Serv. 5289, 2005 Daily Journal D.A.R. 7255, 18 Fla. L. Weekly Fed. S 433.

Michigan imposes a $100 flat annual fee on trucks engaged in intrastate commercial hauling – that is, on any truck that engages in a commercial trucking run that starts and ends in Michigan. A trucking company (USF Holland, Inc.) and a trucking association (American Trucking Associations, Inc.) challenged the fee as a violation of the dormant Commerce Clause, contending that trucks that carry both interstate *and* intrastate loads engage in less intrastate business, and so a flat fee imposes a discriminatory burden on those less-intrastate-traveling trucks. Michigan's courts rejected the claim, and the Supreme Court granted review.

Flat-fee taxes have long been somewhat questionable under the Supreme Court's Commerce Clause jurisprudence. Almost 20 years ago, in *American Trucking Associations, Inc. v. Scheiner,* 483 U.S. 266 (1987), the Court struck down Pennsylvania's $25 "marker fee" and its flat "axle tax" that Pennsylvania imposed on *all trucks* (interstate and intrastate) that used its roads. The flat-fee Pennsylvania taxes were constitutionally infirm because they imposed a disproportionate burden on the trucks involved in interstate commerce – *i.e.*, the trucks that were merely using Pennsylvania's roads to get from one state to another (like the princes of the road who try to run me down at 85 mph when I'm driving on the Pennsylvania turnpike), but not the ones starting and finishing their journeys in Pennsylvania. That fact violated both the Commerce Clause's "antidiscrimination" guarantee and its "internal consistency" requirement.

But the Michigan tax was different than the Pennsylvania tax. It applied only to trucks that made purely in-Michigan trips, and that made all the difference to the Court: The fee was not discriminatory, but neutral, because it "taxes purely local activity; it does not tax an interstate truck's entry into the State nor does it tax transactions spanning

multiple states." Moreover, the trucking companies had presented "little, if any evidence that the $100 fee imposes any significant practical burden upon interstate trade."

For much the same reason, the Court found no "internal inconsistency" in the Michigan tax. The internal-consistency test asks, effectively, "What would happen if all States did the same?" Sure, the Court said, if all 50 states imposed the identical tax as Michigan, an over-the-road interstate truck might be assessed several hundred or even several thousand dollars a year in taxes. But, the Court explained, that wasn't a burden on interstate commerce, because each of those fees would be imposed on the privilege of driving individual *intrastate* routes in each of the taxing states.

Some folks steeped in tax law believe that the Court's 9-0 decision in this case was an outrageous departure from settled constitutional limitations on state taxes – requiring empirical proof of a discriminatory burden on interstate commerce, and upholding a flat-fee tax despite prior cases striking down such flat-fee taxes. But the Michigan decision seems less radical than that. The only state taxes that are *per se* unconstitutional – meaning they'll be struck down under the Commerce Clause without any proof other than the statute itself – are taxes that facially discriminate against *interstate* commerce. But the whole point of the Michigan case is that the tax was imposed on intrastate activity, not interstate activity. Once the Court reached that conclusion, it was incumbent on the petitioners to prove the burden on interstate commerce. Flat taxes like the Pennsylvania tax struck down in *Scheiner* are still impermissible.■

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