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Death of the Salesman: A New Era in Interstate Taxation

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DEATH OF THE SALESMAN: A NEW ERA IN INTERSTATE TAXATION

The recent United States Supreme Court decisions[1] in the field of state taxation of interstate commerce either make new law or advertise an old rule which most tax practitioners were reticent to accept as reality. The new rule or the old principle revived is that states may tax net income of a foreign business engaged exclusively in interstate commerce. The rule is delimited by the following criteria:

(1) The tax may not be discriminatory.

(2) It must be allocated or apportioned fairly to activities carried on within the taxing state.

(3) Local activities must provide a sufficient "nexus" to support the tax.

Business interests view the Court's ruling as a catalyst which will bring about the garroting of many small and medium sized entities which have very slight connection with the taxing state[2]. Professional economists have decreed that if the Court were to reach the decision which is now law, our economy would receive a substantial shock[3]. With the spirit of a blithe apocalypse, the decision has been dispensed for popular consumption; the factor to be determined is will it be digestible by corporations who upon reviewing past activities find that a small sales force with equally meager facilities is going to cost them far more than their attorneys had advised.

The states, says the Court, are now permitted to glean their fair share of taxes to offset the burden of providing benefits and protections for interstate business. This result is proper if one is in favor of expanding state income opportunities re-

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1 Northwestern States Portland Cement Co. v. State of Minnesota; T. V. Williams, as State Revenue Commissioner, v. Stockham Valves and Fittings Inc., 79 Sup. Ct. 357 (1959).

2 Prentice-Hall in its "Corporation News" for March 23, 1959, uses the following lead to describe the symptomatic results: 'Appalling Tax Burden Looms for Corporations'.

3 Studenski, Harvard Business Review, November-December (1958).

gardless of the rigors imposed upon interstate business. A contrary stand demonstrates a philosophy of economic laissez-faire aimed at preventing the Balkanization of commerce[4]. Regardless of the economic position one assumes there can be little satisfaction with the Supreme Court's handling of the net income tax cases. Semantics and antics have forced the average and even the superior tax consultant to give advice which in hindsight appears ill-founded. This situation is deplorable as the Supreme Court has had past opportunities to espouse the rationale of its present holdings; yet, the Court, adhering to a policy of circumspection has deluded both lower courts and tax practitioners into believing the rule to be something less than what it has recently announced.

The Topsy-like growth of the law in this area can be illustrated by viewing the factual entrapments of these new landmark cases against the background of past precedent. In the first case[5] of the bi-partite decision, we find North-Western States Portland Cement Company, an Iowa Corporation, conducting its manufacturing business in Mason City, Iowa. With a sales force of four, plus a full-time secretary working from a three room office in Minneapolis, North-Western solicited orders which were subject to approval, billing and delivery by the Mason City plant. No realty was owned in Minnesota, no bank account was maintained, and no merchandise was kept on hand. Minnesota's net income tax was imposed upon:

> Domestic and foreign corporations whose business within this State within the taxable year consists exclusively of foreign commerce, interstate commerce or both[6].

The *Stockham* circumstances were similar. In Birmingham, Alabama, this Delaware corporation maintained its plant and principal office. In Atlanta, Georgia, an office with a secretary

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[4] See, THE FEDERALIST, Nos. 7, 11, 22, 42; Brown v. Maryland, 12 Wheat. 419, 445; Madison, *Debates in the Federal Convention of* 1787, 10, 11 (1920).

[5] *Supra,* at note 1.

[6] Minn. Stat. Anno. §290.19 (1945).

was provided for the use of a salesman who devoted about one-third of his time to the solicitations of orders from various parts of the State. Orders taken at the office and on the road were subject to approval by the home office. Orders were shipped directly to the customer "f.o.b. warehouse" basis. Georgia levied on net income received by all corporations, foreign or domestic doing business within the State. Doing business is defined as "any activity or transaction (within the State) for the purpose of financial profit or gain." A tax was enacted regardless of the activities' connection with interstate commerce[7].

In both cases, the taxes imposed were parts of general statutory taxing plans and were arrived at by the application of three factor ratios[8].

Prefacing its opinion, the Supreme Court referred to the importance of the question presented by noting that no less than thirty-five states have net income taxes[9]. Although both cases had been separately argued, the Court handed down a consolidated opinion because the factual situations were essentially the same. In neither case was the apportionment challenged. Appellants contended that the state statutes involved violated the commerce clause[10] and the due process clause of the Fourteenth Amendment. Springing the result of its deliberations in the first paragraph of the opinion, the Court said:

> We conclude that net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming a sufficient nexus to support the same[11].

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7 Ga. Code Anno. §92-3113 (1937).

8 Minnesota used the ratio of Minnesota sales to total sales, Minnesota payrolls to total payrolls, and Minnesota tangible property to total tangible property. Georgia's formula included inventories, wages, and gross receipts.

9 79 Sup. Ct. at 359.

10 U. S. Const., Art. 1, Sec. 8, cl. 2.

11 79 Sup. Ct. at 359.

With ensuing blandness the Court thus decrees that the rule is merely what the law has been all along.

The majority opinion continues by stating that there is a need for clearing up the tangled web of past cases[12]. Readily admitting that little in the way of standards has been established by more than three hundred interstate commerce taxation cases decided by the Court, the opinion begins a justification of the rule set forth in the first paragraph of the case. The rule, in result, does reduce the smog in the area of state and local taxation of interstate commerce and provides a rather clear principle and ancillary test, yet, the Court's opinion leaves much "devoutly to be prayed for."

Clearly, the commerce power is vested in Congress[13]. This is a major premise which would be difficult to confuse, but from this appropriate beginning, the Court meanders an unchartered peregrination. Citing *Peck v. Lowe*[14] as the first indication of the new rule, the Court moves to *U. S. Glue* v. *Town of Oak Creek*[15] as its second authority. Here the Court encounters difficulty. This case involved the sustenance of a tax on:

> . . . that portion of income derived from business transacted . . . within the State . . .[16]

The Glue Company, a Wisconsin Corporation, made sales both interstate and intrastate. The applicable tax statute reads as follows:

> Any person engaged in business within or without the State shall . . . be taxed only on that portion of such income as is derived from business transaction within . . . the State, . . . [refer-

12 79 Sup. Ct. at 362.

13 Gibbons v. Ogden, 9 Wheat. 1 (1824).

14 247 U. S. 165 (1918); this case concerned a federal tax on income from exports.

15 247 U. S. 321 (1918).

16 *Ibid.*, p. 329.

> ence it had to a formula prescribed by another statute][17]

The statute of reference was an apportionment statute. The Court in its decision said:

> This formula was applied in apportioning the net business income for the year. Upon the portion thus attributed to the State . . . the tax in question is levied[18].

In concluding the opinion, the Court said:

> The tax was imposed in the same way that other corporations doing business within the State are taxed upon that proportion of their income from business transacted within the State[19].

This case is questionable authority for the present decisions[20]. Intrastate commerce has always been taxable, this is the "arrière pensée" of apportionment statutes[21]. When a business engages in intrastate commerce within the domain of the taxing authority, it should be made to pay its share of governmental expense for the provision of benefits and protections[22]. Apportionment becomes important as a device that approximates the ratio of the corporation's intrastate business to its interstate business; thus, providing an equitable base for tax imposition. The theory of apportionment is here receiving new application.

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17 Wis. Laws, ch. 658, §17706 (1911).

18 247 U. S. at 325.

19 *Id.* at 329.

20 79 Sup. Ct. 357, 375 (1959) (dissenting opinion).

21 For a short but soundly based discussion of the why and how of apportionment, see, Lynn, *Formula Apportionment of Corporate Income for State Tax Purposes: Natura Non Facit Saltum*, 18 Ohio State L. J. 84 (1957).

22 These services are sometimes imaginary. See Greenough v. Tax Assessors of City of Newport, 331 U. S. 486 (1947).

In support of the premise of the *Glue* case, the Court cites *Underwood Typewriter Company* v. *Chamberlin*[23]. In truth, this case does follow the *Glue* case, but not the Court's interpretation of that case. Rather, the *Underwood* case is concerned with a tax "based upon the net profits earned within the State." The situation was again concerned with apportioning income to the taxing state where intrastate commerce had been carried on. The Court's analysis in *Underwood* was that:

> This tax is based upon the net profits earned within the State. That a tax measured by the net profit is valid, although these profits may have been derived in part, are indeed mainly from interstate commerce, is settled. [citations omitted]. The profits of the corporation were largely earned by a series of transactions beginning with manufacturing in Connecticut and ending in sales in other states. In this it was typical of a large part of the manufacturing business conducted in the State. The Legislature in attempt- to put upon this business its fair share of the burden of taxation, was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders. It, therefore, adopted a method of apportionment which, for all that appears in this record, reached, and was meant to reach, only the profits earned within the State[24].

Authorities in the fields of constitutional law[25] and state taxation of interstate commerce[26] regard the *Underwood* opinion as a pure case of apportionment between inter and intrastate business.

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23 254 U. S. 113 (1920).

24 *Id.* at 120-121.

25 See, Corwin, THE CONSTITUTION OF THE UNITED STATES, 1054 (1953).

26 See, Hartman, STATE TAXATION OF INTERSTATE COMMERCE, 115 (1953).

The Court reaches its only really appropriate authority when it cites *West Publishing Co.* v. *McColgan*[27]. This opinion, however, has the indistinction of being a per curium decision. Per curium opinions as well as being anathema to practicing attorneys are often regarded lightly, especially when subsequent decisions appear to be to the contrary. Reading the California Court's opinion in the *McColgan* case, it is clear that the decision is exactly in accord with the *North-Western* and *Stockham* decisions. Net income from purely interstate commerce was held subject to a net income tax.

The California Court declared that net income is a proper subject of taxation whereas the privilege of doing interstate business as a subject measured by the net income would be invalid. The contention in the *McColgan* case that there was neither in personam nor in rem jurisdiction was rebutted by the citation of *International Shoe Co.* v. *Washington*[28]. This famous case involved the requisite due process connection necessary to subject a foreign corporation engaged in interstate commerce to an unemployment compensation tax. International had no office, conducted no intrastate business, had no merchandise in Washington and owned no realty. The only "nexus" was the residence of the Company's salesman in Washington. Due process was considered not to be violated by the tax, jurisdiction being considered present for the purpose. The Court, in the *International Shoe* case, tersely rejected the commerce clause contention posed by the Shoe Company by saying:

> . . . Stat. 1391, 24 U.S.C. Sec. 1606 (A) provides that "no person required under a state law to make payments to an unemployment fund shall be relieved from compliance therewith on the ground that he is engaged in interstate or foreign commerce, or that the state law does not distinguish between employees engaged in interstate or foreign commerce and those engaged in intrastate commerce." It is no longer

27 328 U. S. 823 (1946). The state court's opinion may be found at 27 Cal. 2d 705, 166 P. 2d 862 (1946).

28 326 U. S. 310 (1945).

> debatable that Congress, in the exercise of the commerce power, may authorize the states, in specific ways, to regulate interstate commerce or impose burdens upon it. [citations omitted][29]

The use of this case to satisfy the "nexus" requisite for the taxation of interstate commerce seems anathemic since the contribution for unemployment compensation forced on International Shoe Co. was based on Congressional policy. However, such a policy is undisclosed in the present cases. It would seem that the concept of unemployment insurance is one deserving of more sympathy than the imposition of the net income impost. The transpirance of rules of due process from area to area in the law has created amorphis results inconsistent with the reality of the economic order. The transposal of the rule of *McGee* v. *International Life Insurance*[30] to the area of state taxation of interstate commerce, a logical extension of the Court's latest pronouncements, would certainly be disastrous. Carrying such a proposition to its logical conclusion it would seem to follow that doing business by mail would provide a sufficient taxing "nexus" to subjugate all interstate commerce to the vagaries of the taxing statutes of each individual state[31].

The *McColgan* case at the California level had upheld a net income tax on interstate commerce. However, the case viewed in the light of prior and subsequent decisions seemed to be wrongly decided. The California Court cited the *Berwind-*

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29 *Id.* at 315.

30 355 U. S. 220 (1957). This case held that an insurance contract effected entirely by mail between a Texas insurance corporation and a resident of California afforded the California Court jurisdiction to render an enforceable judgment on the policy in a suit brought in California, service having been obtained only by registered mail to the corporation principal place of business in Texas. The insurance company never had an office or agent in California nor had any other business been done in that State other than that connected with the policy which was the subject of the suit.

31 Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts from Pennoyer to Denckla: A Review,* 25 U. of Chi. L. Rev. 606 (1958).

White[32] case as its authority for the fact that "a tax may be levied on net income wholly derived from interstate commerce." Unfortunately, there is dicta to this effect in the *Berwind-White* case, however, the issue in *Berwind-White* is completely different from that posed in the *McColgan* case. All that *Berwind-White* decided was that the delivery of coal in New York City was a sufficient local activity to subject the transaction to the City sales tax.

In the *McColgan* case, the California Court initially made the point that the taxpayer's activities constituted "substantial income producing activities." Consequently, the benefits and protections afforded deserve an adequate consideration in the way of a tax fee. The dissent in the recent Supreme Court decisions views this factor coupled with the citation of cases which they regard as questionable authority in the majority opinion as indicative that the *McColgan* case was affirmed on the basis of intrastate commerce being carried on within California[33].

The vapid authority of the *McColgan* case seemed tenuous in itself, but the advent of the *Spector* holding[34] had decimated any belief that the *McColgan* case was a valid precedent. The *Spector* case involved a Connecticut tax on corporations "for the privilege of carrying on or doing business within the State", measured by net income allocable to the State. A Missouri corporation maintained trucking depots and pick-up trucks in the State. All business was interstate; the Court denied the validity of the tax:

> This court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was exclusively interstate in character. The Constitutional infirmity of such a tax persists no matter how fairly it is apportioned to a business done within the state. Our conclusion is not in conflict with

32 McGoldrick v. Berwind-White Coal Co., 309 U. S. 33 (1939).

33 79 Sup. Ct. at 377.

34 Spector Motor Service v. O'Connor, 340 U. S. 602 (1944).

> the principle that, where a taxpayer is engaged in both intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of charge by applying the tax rate to the fair proportion of the taxpayer's business done within the state[35].

The *Spector* case was stronger factually for the imposition of the tax than the *McColgan* case. The distinction, it would seem, is the use of the word "privilege". But the Supreme Court said in the *Spector* case that the problem ". . . is not a matter of labels[36]." In disagreement with the Court's legal sophistry, notable authorities demonstrate that, in fact, the development of taxation in this area has been a result of the application of "magic words." Abracadabra will not do, but zibblybo succeeds. Professor Powell expressed it in this way: "States can tax interstate commerce if they go about it in the right way[37]."

The Supreme Court's present position as adduced from the *North-Western* opinion is that a tax named Privilege is invalid, but one "on" net income is proper. The point is not even academic—the economic results are exactly the same, although the label is different.

It is noteworthy that although the present Court did not consider the *Spector* case as creative of a "handle gently mood" the states in general had regarded the *Spector* case as presenting an impasse to the taxation of net income from exclusively interstate commerce[38]. Furthermore, at the time of the *North-Western* case, only ten states had a tax applicable to income

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35 *Id.* at 609-610.

36 *Cf.* Railway Express Inc. v. Commonwealth of Virginia, 347 U. S. 359 (1949), 79 Sup. Ct. 411 (1959).

37 Powell, *Contemporary Commerce Clause Controversies Over State Taxation,* 76 U. of Pa. L. Rev. 773, 774 (1928).

38 See, Roy Stone Transfer v. Messner, 377 Pa. 243, 103 Atl. 2d 700 (1954); Redwine v. Refrigerated Transport Corp., 90 Ga. App. 784, 84 S. E. 2d 478 (1955).

from exclusively interstate commerce[39]. Professor Corwin[40] had contended that the *Spector* case negated any possibilty that net income could be taxed when derived strictly from interstate commerce and this seemed to be the popular consensus, although others have indicated that net income might be so taxed[41].

Another case cited by the majority in the *North-Western* opinion which is difficult to reconcile is *Memphis Gas Co.* v. *Beeler*[42]. This case was also cited in the per curium *McColgan* case and admittedly contains wording which seems to support a possible tax on exclusively interstate commerce. In the *Beeler* case, Chief Justice Stone said:

> In any case, even if taxpayer's business were wholly interstate commerce, a non-discriminatory tax by Tennessee upon the net income of a foreign corporation having a commercial domicile there . . . is not prohibited . . .[43]

Notice the term "commercial domicile" which provides an entirely different basis of decision as indicated by the recent cases. The first clause of Justice Stone's dictum is severely qualified by the addended clause; moreover, Justice Burton in rendering the opinion in the *Spector* case stated that the first clause of Stone's statement was not necessary to the conclusion arrived at by the Court[44].

After examining the precedent cited by the majority Mr. Justice Frankfurter's dissenting statement seems to be well

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39 Arizona, Arkansas, California, Colorado, Georgia, Minnesota, Oklahoma, Oregon, Pennsylvania and Utah.

40 Corwin, THE CONSTITUTION OF THE UNITED STATES, 209 (1953).

41 Stapchinskas, *New Developments in State and Local Taxation,* 10 J. TAXATION, 232 (1959); *Lawyer's Weekly Reports* (Prentice-Hall, Inc.) 14, No. 22 (March 2, 1959), No. 23 (March 9, 1959).

42 315 U. S. 649 (1942).

43 *Id.* at 656.

44 340 U. S. 602 at 609, note 6 (1944).

founded. After recognizing the holding in the *McColgan* case and alluding to its gossamer-like quality as precedent, he says:

> I venture to say that every other decision—I say decision, not talk or dicta—on which reliance is placed, presents a situation where conjoined with the interstate commerce was severable local state business on the basis of which the state taxing power became constitutionally operative[45].

The present situation seems to be another example of judicial expedition into virgin territory couched in the comfort of false precedent. It is an affirmation of Justice Douglas' pragmatic view of constituitonal law that:

> Stare Decisis has . . . little place in American constitutional law[46].

Another way of stating the problem was expressed by Judge Pound:

> I think that lawyers and judges too often fail to recognize that the decision consists in what is done, not what is said by the court in doing it. . . . the court states general principles but the force of their observations lies in their application of them and this application cannot be predicted with accuracy[47].

The present rule is but the finality, a continually transilient finality, of the philosophy of Realist jurisprudence. It is an edifice to the cognizance of astute scholars who have recognized that the individual judge, his preference, predelictions and bias are the tumescence of the law[48].

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45 79 Sup. Ct. at 380.

46 Douglas, WE THE JUDGES, 429 (1956).

47 The words are those of Judge C. W. Pound.

48 The extensive writings of Jerome Frank provide many examples of this theory.

It seems that the personal philosophy and the constituency of the court are the determinate factors, precedent being but a translucent night-shade. Philosophy, sociology, and psychology are requisite for reconciling Supreme Court opinions.

Probably the answer to the present dilemma is the array of the Court. Justice Clark who penned the *Spector* dissent is the author of the majority opinion in the *North-Western* and *Stockham* holdings. Further, Clarke is joined by Justices Douglas, Black, and Warren who dissented with him in *Miller Brothers* v. *Maryland*[49]. This core of laissez-faire-minded savants have captured, metaphorcally, Justices Brennan and Harlan. This leaves only Whittaker, Stewart and Frankfurter to champion interstate commerce.

From an economic standpoint[50] the theory posed by these latest Supreme Court cases would seem to have the following results: (1) Virtually all interstate commerce is taxable. (2) Order-taking within the State on a regular basis is a sufficient "nexus". (3) All that is required of the State is fair apportionment. It would seem that the direct tax on net income will cause such states as Connecticut[51] to discard their privilege taxes on multi-state business in favor of the tax on net income. Other states will no doubt legislate to take advantage of the new-found source of much needed revenue. It is quite probable that the present reciprocity laws will not be used as much as they have been in the past and that the reciprocity system will have to be revamped to some extent[52]. It is also quite probable that corporations will retreat from areas found to be unproductive and will be circumspect in developing new territories through solicitation, unless the profit above the tax conse-

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49 347 U. S. 340 (1953).

50 See, Cohen, *State Tax Allocations and Formulas Which Affect Management Operating Decisions*, 1 J. of Taxation 2 (1954) and Silverstein, *Problems of Apportionment in Taxation of Multi-State Business*, 4 Tax. L. Rev. 207 (1949).

51 *Cf.* the "privilege" distinction of the Spector case, *supra*, note 34, and E. T. and W. N. C. Transportation Co. v. North Carolina, 248 N. C. 560, 104 S. E. 2d 203 (1959) *affirmed* 79 S. Ct. 602 (1959). The removal of the word "privilege" seems to be the key in validating a net income tax.

52 See, Prentice-Hall, STATE AND LOCAL TAXES, para. 1035 (1959).

quences incurred is substantial[53]. The rule of solicitation plus is no longer the norm[54]. As long as there is a regular process of solicitation and the shipment of goods into the state, the tax will be upheld. With the core of the Court disposed to a liberal policy, the *Miller Brothers* dissent[55] will be fused with the due process rule of *McGee* v. *International Life Insurance Co.*[56] and it is probable that the law of substituted service will be unrecognizable as we know it today.

The correlaties of this extension of the area of taxation are the unprecedented burden of keeping literally tons of records and the irrepressible increase in litigation. Justice Frankfurter ably states the problem:

> It will not, I believe, be gainsaid that there are thousands of relatively small or moderate sized corporations doing exclusively interstate business spread over the several states. To subject these corporations to a separate income tax in each of these states means that they will have to keep books, make returns, store records, and engage legal counsel, all to meet the diverse and varigated tax laws of forty-nine states with their different times for filing returns, different tax structures, different modes of determining "net income", and, often conflicting, formulas of apportionment. This will involve large increases in bookkeeping, accounting and legal paraphenalia to meet these new demands. The cost of such a far flung scheme for complying with the taxing requirements of the different states may well exceed the burden of the taxes themselves, especially in the case of small com-

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53 See, Butler Bros. v. McColgan, 315 U. S. 501 (1942); Bass, Ratcliff, and Gretton v. State Tax Commissioner, 266 U. S. 271 (1924).

54 Brown-Forman Distillers Corp. v. Collector of Revenue, 234 La. 651, 101 So.2d 70 (1959) *affirmed* 79 S. Ct. 602 (1959).

55 Miller Bros. v. Maryland, 347 U. S. 357, dissenting opinion (1953).

56 *Supra*, note 30.

panies doing a small volume of business in several states[57].

Of paramount importance will be the complications of applying the theories of allocation and apportionment[58]. Allocation is geographical, that is, income is attributed wholly to a particular state. Apportionment is the division of income by a mathematical process which is based on the average ratio of various factors, e.g., payrolls, sales and property. Both processes in essence are modes of determining what is locally taxable. Both involve the use of statutory formulas.

The allocation and apportionment formulae have been replete with inequity and uncertainty. Unlike the science of elementary mathematics which it purports to use, formula apportionment is not mathematically accurate and need not be[59]. The crux of the problem is the many divergent factors which the states use in reaching a ratio applicable to income tax. Property — tangible and intangible —, business done, sales, gross receipts, and payrolls and manufacturing costs are exemplary of the ingredients of the particular formulas. They appear in various combinations and permutations depending on the efficacy of their utilization in taxing the predominant income sources of the state[60]. It is this fact of non-uniformity which will lead to inequity when the various states apply their formulas for tax purposes. A company has only 100% of its income which it can allow the states to tax, otherwise, the business would be unable to compete in the national emporium. A tax of 200% of one's business income is a distinct possibility

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57 79 S. Ct. at 381.

58 In regard to allocation see, Altman and Kessling, ALLOCATION OF INCOME IN STATE TAXATION (1950) and Ford, THE ALLOCATION OF CORPORATE INCOME FOR THE PURPOSE OF STATE TAXATION (1933). On separate accounting see, Hartfield, ACCOUNTING, ITS PRINCIPLES AND PROBLEMS (1928). On apportionment see, CONTROLLERSHIP FOUNDATION, APPORTIONMENT FORMULAE AND FACTORS USED BY STATE IN LEVYING TAXES BASED ON OR MEASURED BY NET INCOME ON MANUFACTURING, DISTRIBUTIVE AND EXTRACTION CORPORATIONS (1954).

59 Butler Bros. v. McColgan, 315 U. S. 501 (1942).

60 See, Silverstein, *Problems of Apportionment in Taxation of Multi-State Business,* 4 Tax. L. Rev. 207 (1949).

when apportionment runs wild. Progress toward a uniformity of apportionment has not been achieved although many economy foundation studies have attempted to allay its evils[61]. Apportionment is perforce arbitrary; it need not, however, be confiscatory.

The United States Supreme Court has often handled cases involving questionable apportionment. In *Maxwell* v. *Kent-Coffey Mfg. Co.*[62], affirmed by the Supreme Court without opinion, a tax was upheld on a Delaware corporation conducting a manufacturing business in North Carolina. To determine net income attributable to North Carolina, the ratio of the fair cash value of real and personal property within the State to all of its property everywhere was used. As 99.2% of the real and personal property was located in North Carolina the tax was levied on this proportion of its net income. The inequity of this situation is apparent in view of the fact that only .0002% of the company's total sales were made within the State. It is clear that through an adroit use of real and personal measures some states for example, could capture the bulk of the income from the sale and manufacture of automobiles.

In *Butler Brothers* v. *McColgan*[63] and *Bass, Ratcliff and Gretton, Ltd.* v. *State Tax Commission*[64], income was held attributable, for purposes of taxation, to states in which losses were heavy. Justification for the formula applied and the resultant tax was grounded on the economic leverage of unitary business. An attempt to show that a formula violates due process or unduly burdens commerce is almost an insurmountable barrier and is made more difficult by the intricacies of separate accounting[65].

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61 See, Schultz and Harriss, AMERICAN PUBLIC FINANCE (6th Ed. 1954).

62 204 N. C. 365, 168 S. E. 397, *affirmed* 291 U. S. 642 (1934).

63 315 U. S. 501 (1942).

64 266 U. S. 271 (1924).

65 See, Underwood Typewriter Co. v. Chamberlin, 254 U. S. 114 (1920); Norfolk and W. Ry. v. North Carolina ex rel Maxwell, 297 U. S. 682 (1936).

In 1944, the Supreme Court permitted Minnesota, as the domiciliary state, to tax fully all planes of North-Western Airlines although the ships were present in other states much of the taxable year[66]. This case aroused such a furor that Congress was spurred to action. The Civil Aeronautics Board was directed to study the problem. A 158 page report was submitted to Congress, several bills were proposed, but no uniform mode of apportionment was forthcoming.

Unfettered commerce has been the basis of our economic prosperity. While big business may be strong enough to withstand all onslaughts, lesser economic units undoubtedly need protection.

Some scholars have advocated that taxing in this field be done solely by the Federal Government, with a subsequent disposition of proceeds to the states on a meritorious basis[67]. Impossibility seems to deny the practical simplicity of this solution. However, aid to education, highway construction, unemployment aleviation, and other programs incline to this method. Other nations, such as India, have adopted in part such a program to insure a functional Federal system.

Optimum employment and production are absolutely necessary in our present era of international hypertension. Both national and local economic entities must be enhanced. There must be a balance struck to solve economic problems which pervade our Federal system. The United States Supreme Court has been a pragmatic institution, but its decisions are necessarily fettered by the limited knowledge it possesses in certain areas. The present problem can be solved neither by philosophical syllogism without practical perspective nor by legislative inaction based on disagreement stemming from geographic interest. An honest evaluation and solution is compulsory to insure our economic stability, an element which is primary in maintaining our democratic status in the international panoply.

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[66] Northwest Airlines v. Minnesota, 322 U. S. 292 (1944).

[67] Rodell, *A Primer on Interstate Taxation,* 44 Yale L. J. 1166 (1935).