INTERSTATE COMMERCE

INTERSTATE V. INTRASTATE COMMERCE

The Indiana Supreme Court has recently manifested its unwillingness to grapple with the tax problems presented by the imposition of the state gross income tax[1] upon interstate commerce. In *Gross Income Tax Division* v. *J. L. Cox & Son,* 86 N. E. 2d 693 (Ind. 1949) a non-resident taxpayer was employed by War Emergency Pipe Lines Inc. to haul pipe during the construction of the Big Inch pipeline. This pipe had been shipped from out-of-state manufacturers, by rail, to various railheads in Indiana under bills of lading specifying the railheads as the destination of the shipments. Cox then unloaded the pipe and transported it to the pipeline right-of-way by motor vehicle. The Indiana Supreme Court assumed, for purposes of its decision, that the tax would be invalid if Cox were engaged in interstate Commerce.[2] It then proceeded to discuss the various indicia of interstate and intrastate commerce, labelled Cox's activities intrastate, and upheld the tax.

In order to determine whether a given shipment is in interstate commerce one must seek out its essential nature.[3] Among the elements commonly used in this process are the intent of the parties,[4] their general course of dealing,[5] their contractual relations,[6] the continuity of transit,[7] and any other factors

1. IND. STAT. ANN. (Burns Repl. 1943) § 64-2602.

2. The latest United States Supreme Court decision, Interstate Oil Pipe Line Co. v. Stone, 69 Sup. Ct. 1264 (1949), casts much doubt on the validity of the assumption. There the Court was evenly divided between the multiple and direct burden tests of tax validity. The advocates of the multiple burden test upheld a Mississippi tax on interstate commerce because there was no opportunity for another state to tax the same transaction. The dissenters relied upon the direct burden test. And Mr. Justice Burton turned the balance in favor of validity, concurring only because he regarded the activities in question as intrastate commerce.

For a general discussion of the gross receipts tax problem and the various tests proposed, see Powell, *More Ado About Gross Receipts Taxes,* 60 HARV. L. REV. 501, 710 (1947); Lockhart, *Gross Receipts Taxes on Interstate Transportation and Communication,* 57 HARV. L. REV. 40 (1943); Dunham, *Gross Receipts Taxes on Interstate Transactions,* 47 COL. L. REV. 211 (1947).

3. This means simply that the whole group of facts relating to the transaction must be considered in determining the character of the commerce involved. Atl. C. L. R. R. v. Standard Oil Co., 275 U. S. 257 (1927); Hughes Bros. v. Minnesota, 272 U. S. 469 (1926).

4. United States v. Ill. Cent. R. R., 230 Fed. 940 (E. D. La. 1916) (the intent of the parties, formed prior to the initial movement, is of obvious and usually controlling importance.)

5. The general course of dealing between the parties may characterize a shipment as interstate, the true character of which, when taken by itself, is undeterminable. Baer Bros. v. Denver & R. G. Ry., 233 U. S. 479 (1914); La. R. R. Comm. v. Texas & Pac. Ry., 229 U. S. 336 (1913).

6. Gulf, Colo. & S. F. Ry. v. Texas, 204 U. S. 403 (1907) (The contractual relations are used as a guide to the intent of the parties as to the ultimate destination of the shipment.)

7. Missouri Pac. Ry. v. Schnipper, 51 F.2d 749 (E. D. Ill. 1931), *aff'd,* 56 F.2d 30 (7th Cir. 1932).

tending to show the entire scheme of things intended and accomplished.[8] The Indiana court thought the original bills of lading decisive as to the ultimate destination of these shipments and held that they were divested of their interstate character at the railheads.[9] While bills of lading are of some persuasive value, they do not alone control as to the question of ultimate destination.[10] A bill of lading may not show the intent of the parties as to the destination of a shipment,[11] particularly where, as here, the use of succeeding carriers is necessary;[12] nor does it indicate the contractual relations involved,[13] the established course of business between the parties,[14] nor the cause and purpose of stops at intermediate points.[15] Had the court considered these factors it would have discovered a predetermined plan, designed to insure a continuous flow of pipe from point of manufacture to place of intended use.[16] Under these circumstances a single bill of lading is not a reliable guide to the essential nature of the commerce and is not decisive as to its ultimate destination.

Where there is only a single contract of sale and a shipment made thereunder, the contract might well embody the intent of the parties as to the destination of the shipment.[17] Here, however, Cox, with the seller's

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8. See Tarnay, *Methods For Differentiating Interstate Transportation From Intrastate Transportation,* 6 GEO. WASH. L. REV. 553 (1938).

9. Gross Income Tax Division v. J. L. Cox & Son, 86 N. E.2d 693, 698 (Ind. 1949):

> At the time said materials were ordered from the factory by W. E. P. Inc. it was specified in a bill of lading that such materials should be transported by rail to W. E. P. Inc. at the designated railheads. It thus appears from the stipulation of facts that the bills of lading issued for all of the interstate shipments made the railheads the destination for such shipments.

10. Western Oil Ref. Co. v. Lipscomb, 244 U. S. 346 (1917) (What is actually done, not the bill of lading, controls in a case where the shipper intended from the beginning that the journey should be continued past the point shown on the original bill of lading.)

11. United States v. Erie R. R., 280 U. S. 98 (1929).

12. D. S. Milling Co. v. N. Pac. R. R., 152 Wis. 528, 140 N. W. 1105 (1913):

> Where the services of more than one carrier are necessary to complete the journey, the destination named in the original bill of lading may be intended as a transfer point and nothing more.

13. Gulf, Colo. & S. F. Ry. v. Texas, 204 U. S. 403 (1907).

14. Galveston H. & S. A. Ry. v. Wood, Hagenborth Cattle Co., 105 Tex. 178, 146 S. W. 538 (1912).

15. B. & O. S. W. R. R. v. Settle, 260 U. S. 166 (1922).

16. Brief for Appellants, pp. 28-34, 54-71, Gross Income Tax Division v. J. L. Cox & Son, 86 N. E.2d 693 (Ind. 1949). The stipulations and exhibits in the appellant's brief show that the pipeline right of way was first laid out and the railheads were then located at convenient points along appurtenant railroads in order to expedite the flow of materials to the pipeline. Each shipment was earmarked, at the manufacturer's, for a certain portion of the pipeline, and they were timed so as to provide a steady supply of pipe as needed. Though there were no through combined rail and truck routings, motor vehicles were the only practical means of transportation on the final leg of the journey and the shipments were delayed at the railheads only when there were not enough trucks available for their immediate transportation to the pipeline.

17. Gulf, Colo. & S. F. R. R. v. Texas, *supra* note 13.

knowledge, intended to reship the pipe to the place where it was to be used.[18] In such a case the over-all plan of the one controlling the movement rather than the contract or job of a connecting carrier determines the character of the commerce.[19] Accordingly, the importance attached to the nature of Cox's work and his contract with the War Emergency Pipe Lines was inappropriate because he was involved in only one link in the chain of transit constituting the substance of this traffic. The essential nature of this commerce while on the final leg of the journey was not determined by Cox's contract or the fact that he operated solely within the state of final destination.[20] This becomes more apparent after considering the effect of stopping these shipments at the railheads and transferring the pipe to Cox's trucks. Here, the continuity of transit as shown by the cause and purpose of the stops is controlling[21] and stops which do not break the continuity of transit do not affect the character of the commerce.[22] A mere assumption of possession by the owner at a point short of the ultimate destination will not break the continuity of transit,[23]

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18. Cox's contract provided that he was to make all arrangements for any necessary storage of the pipe and that he must pay the storage charges. This, too, is inconsistent with the idea that the railheads were regarded as the ultimate destination of the shipments.

19. In B. & O. S. W. R. R. v. Settle, *supra* note 15, the factual situation was similar to that here, but the interruption and change in carriers was made deliberately in order to change the nature of the commerce and enable the shipper to evade interstate freight rates. The court held the entire journey interstate in nature. The shipper's original intention, which he carried out by moving the goods to their ultimate destination, was the controlling factor. The contract and local nature of the activities of the second carrier were of no significance. Under this doctrine War Emergency Pipe Lines could not, by hiring Cox, change the character of the shipments on the last leg of the journey in order to escape interstate freight rates. But that was not the purpose for which Cox was hired because he operated under an Interstate Commerce Commission permit which fixed his rates. Thus the principal case cannot be reconciled with the *Settle* case unless these shipments are considered in interstate commerce for the purpose of enforcing Interstate Commerce Commission rates, and in intrastate commerce for purposes of state taxation of income derived from that transportation.

20. Buckingham Transp. Co. v. Black Hills Transp. Co., 66 S. D. 230, 281 N. W. 94, 97 (1938):

> If that which is done is in performance of a preconceived and pre-announced intention to move the property to the selected destinations, the essential . . . unity of transportation will not be destroyed by a multiplication of carriers and contracts, by changes in form or mode of transportation, by a re-billing or a reshipping, or by any cessation of movement incidental to a mere form or mode of transportation.

21. This test has been criticized as being a shield behind which a court can do as it pleases. Tarnay, *supra* note 8, at 556. That would not seem to be the case, however, where the continuity of transit is conditioned on the cause and purpose of the stop. Standard Oil Co. v. Atl. C. L. R.R., 13 F.2d 633 (W. D. Ky. 1926), *aff'd in part, mod. in part, rev'd in part* 275 U. S. 257 (1927).

22. Minnesota v. Blasius, 290 U. S. 1, 10 (1933); Missouri Pac. R. Co. v. Schnipper, *supra* note 7; Coe v. Errol, 116 U. S. 517 (1886):

> A temporary cessation of the actual forward movement which is reasonable, in good faith, and solely in furtherance of the intended transportation does not break the continuity of transit.

23. B. & O. S. W. R. R. v. Settle, *supra* note 17.

nor will a stop to allow a change in the means of transportation,[24] to expedite or promote the safety of the journey,[25] or to sort, grade, or process when necessary to or an incident of further interstate shipment.[26] Such delays may be simply mechanical incidents of an otherwise continuous journey.[27] In spite of immediate reshipment, however, interruptions for some purposes may break the continuity of transit,[28] as where property in the course of interstate shipment is stopped for business purposes,[29] for the convenience of the owner,[30] or for final disposition or use.[31] If one were in the pipe distributing business a stop at a distributing point would be for business purposes and would end an interstate shipment.[32] But War Emergency Pipe Lines was not in the pipe distributing business; it was building a pipeline and neither made nor intended to make final disposition or use of the pipe at the railheads. The ultimate destination of each carload of pipe was known to it when the shipments originated, and the stops at the railheads were made solely in furtherance of the transportation to that destination. Therefore, the delays at the railheads afforded no business advantage or convenience disassociated from the transportation and were merely mechanical incidents of the journey. As such they did not break the continuity of transit or effect the character of this commerce, which was essentially a through interstate movement from manufacturer to pipeline right-of-way.

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24. Hughes Bros. v. Minnesota, *supra* note 3 (logs in river transferred to boat); Diamond Match Co. v. Ontonagon, 188 U. S. 82 (1903) (logs in river transferred to railroad).

25. Champlian Realty Co. v. Brattleboro, 260 U. S. 366 (1922).

26. Southern Pac. Term. Co. v. Interstate Commerce Comm., 219 U. S. 498 (1910); State v. Anderson Clayton Co., 92 F.2d 104 (5th Cir. 1937); Oregon-Wash. R. & N. Co. v. Pac. Grain Co., 38 F. Supp. 230 (D. Ore. 1940); State v. S. A. & A. P. R. R., 32 Tex. Civ. App. 58, 73 S. W. 572 (1903). But for cases where processing, etc., did break the continuity of transit, *see* Missouri Pac. R. R. v. Schnipper, *supra* note 7; Diamond Match Co. v. Ontonagon, *supra* note 26; B. & O. R. R. v. United States, 15 F. Supp. 674 (N. D. N. Y. 1936).

27. For additional cases see Note, 171 A. L. R. 283 (1947); Note, 155 A. L. R. 936 (1943); Note 60 A. L. R. 1465 (1926).

28. Chicago M. & S. P. Ry. v. Iowa, 233 U. S. 334 (1914); Texas & N. O. R. R. v. Sabine Tram Co., 227 U. S. 111 (1912); Ohio R. R. Comm. v. Worthington, 225 U. S. 101 (1911).

29. Carey v. N. Y. Cent. R. R., 250 N. Y. 345, 165 N. E. 805 (1922) (grain stored to await a rise in price).

30. This means a convenience disassociated from the transportation. United Mills v. Tax Comm., 54 Ohio App. 1, 5 N. E.2d 940 (1934).

31. Brown v. Huston, 114 U. S. 622 (1884).

32. Atlantic C. L. R. R. v. Standard Oil, 275 U. S. 257 (1927). See also Buchanan v. Carson, 230 S. W. 2d 115 (Tenn. 1949) in which the Army shipped gasoline, by barge, into Tennessee where it was transferred to storage tanks and held awaiting shipment to various airports by truck. When placed in the storage tanks it was not known to which airfield the gasoline would be shipped, and the Army could, and did on occasion, divert the gasoline to other places. Since the destination was unknown at the time of the stop it was characterized as one for the convenience of the owner terminating the interstate journey, and a tax similar to the one in the principal case was properly levied on the income of the second carrier.

At best, the classification of Cox's activities as intrastate is of doubtful validity. But assuming the label proper, this basis of decision is of little assistance in formulating a workable policy for state taxation of goods moving in interstate commerce. The tax policy question must, in the final analysis, be decided by the federal courts and, in particular, the United States Supreme Court; and until some guidance comes from their decisions, it may be the part of wisdom for state courts to render technical decisions based on the interstate/intrastate dichotomy, thus evading the basic federal problems of sensible apportionment of taxes on interstate commerce.

LEGISLATION

THE INDIANA ANNEXATION ACT OF 1949

The problem of enlarging the area of municipalities has often troubled state legislatures, for in seeking a solution the interests of the residents of the area in question must be balanced against the interests of the people in the community to which the land is sought to be annexed. The conflicting interests involved are often complex, for burdens of taxation may outweigh the advantages of urban society conferred upon the territory to be acquired. Conversely, by becoming a part of the municipality, the residents of the adjacent lands may be given the benefits of fire and police protection, water and sanitary facilities without contributing sufficient revenue to the city treasury to compensate for this added service.

The 1949 session of the Indiana Legislature enacted a bill to govern the procedure by which such adjacent lands may be annexed to a city.[1] The act provides for two methods to effectuate the annexation. The interested owners of real estate adjacent to the city may request annexation by presenting to the common council of the city a petition bearing the signature of fifty-one per cent of the persons owning property in the territory and requesting a special ordinance annexing the contiguous territory described in the petition. If the proposed annexation is approved by the common council, the land is annexed. If the ordinance is not passed within sixty days, the petitioners may file, with the circuit or superior court of the county wherein such territory is situated, a duplicate of the petition in which reasons supporting annexation are stated. After appropriate notice to the city officials, the court is required to hear the petition and give judgment upon the question of annexation according to the evidence produced by both parties. Should the court be satisfied that the annexation will be for the best interest of the city and will cause no manifest injuries to property holders in either the city or the

1. There are, of course, other methods by which land may be annexed to a city. For example, the boundaries may be enlarged by an ordinance originating from within the council itself. IND. STAT. ANN. (Burns 1933) § 48-701.