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William R. Andersen

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Paul J. Hartman and the Literature of State and Local Taxation—An Appreciation

William R. Andersen*

The editors of this symposium have asked me for a brief account of the contributions of Professor Hartman's published writings in the field of state and local taxation. In fairness, those contributions cannot be accounted in brief; what follows is more of a bibliography, and an appreciation.

The seminal work in this area of Hartman's scholarship was the 1953 book, *State Taxation of Interstate Commerce*.¹ Hartman says his interest in the subject began when, as a practitioner, he represented clients whose business affairs crossed state lines.² These essentially practical interests were developed into scholarly form during his graduate study at Columbia in 1949, and the resulting product is contained in this volume. The book is nothing less than an analysis of *all* the United States Supreme Court opinions to 1952 relating to state and local taxation of interstate commerce. The book is not, however, an encyclopedia; Hartman has imposed on the special disarray of these cases a rigorous analytical framework, which permits both a clear statement of the holdings of the cases and a useful means of comparing and evaluating the changing doctrines. Hartman says that the basic policy need in this area is to find a workable accommodation of the vital fiscal interests of the states and the equally vital needs of the nation for an uninhibited flow of interstate trade and commerce. Hartman examines each case and each doctrinal resolution against this policy goal; the developments are evaluated in terms of how well they assist in reaching the policy objective.

Hartman's approach has three major themes. One essential message which derives from his painstaking study is that but for a brief period between 1938 and 1945, under the influence of Justice

* Professor of Law, University of Washington. B.S., 1954; LL.B., University of Denver, 1956; LL.M., Yale University, 1958. Professor Andersen teaches in the field of state and local taxes and finance.

1. P. HARTMAN, *STATE TAXATION OF INTERSTATE COMMERCE* (1953) [hereinafter cited as HARTMAN].

2. *Id.* at iv.

Stone³ the Supreme Court has not provided the kind of practical guidance needed by lower courts, legislators, and businessmen. Instead, the decisions tend to exalt doctrinal symmetry over business and economic realities, to make the outcome of a case depend, to use a favorite Hartman example, on a supposed difference between a tax "on" income and a tax "measured by" income. Hartman has said:

That brand of doctrinal declaration, of course, assumes an exactness and a trustworthiness in the test of constitutionality which do not exist. It gives but little help to the legislator, the lower courts, or the business men (to say nothing of lawyers), who must wrestle with the problem, in predicting whether a particular tax can withstand an assault on commerce clause grounds. These alleged tests of constitutionality merely imply the impotence of state power; they describe a result reached, not the reasons for that result. Decisions of the magnitude of the constitutionality of state taxing power should not be made by resort to virtually meaningless formulas and labels.⁴

A major strength of Hartman's work is his insistent reminder that the world runs more on pragmatic realities than on doctrinal elegance, however much the latter may gratify some of us.

The second major theme of Hartman's work is that interstate commerce, while remaining free, must nevertheless "pay its way." This means that the constitutionality of a state tax on interstate commerce should be upheld unless the tax is unfairly apportioned or unless it discriminates against the interstate transaction. "Interstate commerce is entitled to no more," says Hartman, "it is not entitled to preferential treatment over local business."⁵ Hartman regrets the many decisions of the Court creating a virtual immunity for interstate commerce.⁶

A third major theme running through Hartman's work is a preference for legislative over judicial accommodation in the conflict between state tax needs and interstate commerce. "These two great conflicting demands hardly admit of an absolutely logical solution. They call for a wise adjustment; and Congress has better machinery for making that adjustment than the courts."⁷ In Hartman's preferred solution, Congress would determine the basic lines

3. The "golden age" of interpretation starts for Hartman with *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938), and is over by the time the court decides *Freeman v. Hewit*, 329 U.S. 249 (1946). HARTMAN 33-41, 269-72.

4. Hartman, *The Commerce Clause and the States' Power to Tax the Oil and Gas Industry*, in SOUTHWESTERN LEGAL FOUNDATION, SEVENTH ANNUAL INSTITUTE ON OIL AND GAS LAW AND TAXATION 387, 444-45 (1956) (footnote omitted).

5. HARTMAN 274.

6. *Id.* at 272.

7. *Id.* at 284.

of the accommodation, and the courts would retain their classic role in determining whether state tax measures were in harmony with congressional policy.

After the book was published, Hartman began a series of articles that between 1953 and 1966, expanded, amplified, and applied the basic analysis. In 1953, the basic argument was restated in shorter form.⁸ In 1956, Hartman published an article on state taxation of interstate sales⁹ in which he details Supreme Court doctrine relating to the family of taxes functionally classed as sales taxes, including the retail sales tax, the gross receipts tax, the gross income tax, the various species of use taxes, and privileges taxes on the occupation of selling. In that same year, Hartman published a lengthy study of state taxation of the oil and gas industry.¹⁰ He found here, as he had elsewhere, that the Court seemed more concerned with doctrinal elegance than with economic and business reality and, hence, failed in its guidance role.¹¹

In 1959, the Court took a major step in subjecting interstate business income to state taxation with the decision in *Northwestern States Portland Cement Co.*¹² Hartman's 108-page article on the subject,¹³ published the same year, is legal scholarship at its best. He applauds the central thrust of the case in permitting states to tax net income from the multistate business if the tax is fairly apportioned and not discriminatory. But Hartman remains critical of some of the conceptual rigidities of the opinion. He describes the unusually prompt congressional intervention in the matter¹⁴ and subjects that enactment to searching textual analysis.¹⁵ Hartman finally questions whether the Congress listened too readily to the cries that the compliance costs of the new net income taxes would be crippling to interstate business.¹⁶ At a point when most law review articles would have stopped, Hartman is just warming up. An

8. Hartman, *State Taxation of Interstate Commerce: An Appraisal and Suggested Approach*, 1953 WASH. U.L.Q. 233.

9. Hartman, *Sales Taxation in Interstate Commerce*, 9 VAND. L. REV. 138 (1956).

10. Hartman, *supra* note 4.

11. The language quoted in the text at note 4, *supra*, is from the conclusion of this article.

12. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

13. Hartman, *State Taxation of Corporate Income from a Multistate Business*, 13 VAND. L. REV. 21 (1959).

14. Pub. L. No. 86-272, 73 Stat. 555, 15 U.S.C. § 381 (1970). For Professor Hartman's latest effort in this field, see Hartman, "Solicitation " and "Delivery" Under Public Law 86-272: An Uncharted Course, 29 VAND. L. REV. 353 (1976).

15. Hartman, *supra* note 13, 43-48.

16. *Id.* at 123.

eighty page analysis of the tax structures of each state imposing a tax on (or measured by) net income follows, with full citations to the statutes and administrative regulations of the respective states. This kind of aid to the lawyer representing the multistate business is unusual. The article was reprinted in its entirety in a volume of essays on corporate practice,¹⁷ and it is still being cited today.¹⁸ In 1960, Hartman returned to the income tax fray with another examination of the problem, focusing especially on the shortcomings of the congressional reaction to *Northwestern States Portland Cement Co.*¹⁹

A most unusual publication appeared in 1962. Commissioned by the American Bar Association's Committee on State and Local Taxes to aid congressional consideration of legislation in the area, Hartman compiled an eighty-seven page summary of "Views, Divergent, and Otherwise, on Current Important Problems in State and Local Taxation of Multistate Businesses." This unique document contains the views of many leading authorities on interstate taxation, carefully digested and arranged according to a highly articulated outline. The result is not only a useful intellectual roadmap of the literature, but it contains as well views of committee members informally expressed in meetings that would be lost to later students but for their reiteration here.

Turning to property taxation, Hartman and a Vanderbilt colleague, Paul H. Sanders, published in 1966 a fifty page account of authorities bearing on the question of Congress's power to prohibit discriminatory assessment of the property of interstate carriers.²⁰ Written as a response to the suggestion that a bill then pending before Congress to insure fair assessment was beyond the power of Congress, Hartman and Sanders present a convincing case that Congress has ample power to prohibit discriminatory assessment.

As a final example of Hartman's concern for institutional relationships in tax policy, mention should be made of the 1959 piece on municipal income taxation.²¹ Here, Hartman has changed lenses

17. Hartman, *State Taxation of Income from a Multistate Business*, in CORPORATE PRACTICE 20-127 (Roody & Andersen eds. 1960).

18. The latest citation the writer has seen is in Boren, *Specific Allocation of Corporate Income in California: Some Problems in the Uniform Division of Income for Tax Purposes*, 30 TAX L. REV. 607 (1975) in which the Hartman article is cited several times.

19. Hartman, *State Taxation of Interstate Commerce: A Survey and an Appraisal*, 46 VA. L. REV. 1051 (1960).

20. Hartman & Sanders, *The Power of Congress to Prohibit Discrimination in the Assessment of Property of Interstate Carriers for State Ad Valorem Taxes*, 33 I.C.C. PRAC. J. 654 (1966).

21. Hartman, *Municipal Income Taxation*, 31 ROCKY MT. L. REV. 123 (1959).

on his microscope and examines not the relationship between the nation and the states but that between the states and the cities. His concern is both with the needs of the cities for revenue and for correcting the unfair imposition of costs on cities by non-taxpaying suburbanites. Characteristically, Hartman finds in recent doctrines denying cities the power to impose municipal income taxes²² precisely the sort of unrealism and disregard of fiscal needs he had found in the interstate decisions. After his attack, Hartman just as characteristically offers suggestions for drafting strategies and litigation tactics aimed at optimizing the values sought in spite of restrictive judicial opinions.

Throughout the period 1956-66, Hartman also kept close watch on the decisions of the Supreme Court of Tennessee in the field of state and local taxation. In a series of "surveys" of Tennessee law,²³ Hartman reviewed state and local tax cases in Tennessee, although he never felt constrained to limit himself to state boundaries. As a result, these pieces provide useful settings of Tennessee decisions in the larger framework of developing doctrine and experience. One can imagine that Tennessee practitioners and judges were, as a result, better versed in these matters than their counterparts in other states.

A final note on what must be called Hartman's "style." To begin with, it is always clear. Whatever is on his mind is fully revealed to the reader, and repetition or reiteration are used whenever necessary to eliminate any shadow of a doubt as to his meaning. Second, Hartman is direct (at times one wants to say, "blunt"). There is no covering up of difficulties and no undue sensitivity in his writing. He seems to feel deeply the obligations of the scholar to probe and test without mercy, and he meets those obligations in full measure. Finally, Hartman's work is painstakingly complete and accurate. No short cuts are permitted and the highest standards are set for authoritative citations.

22. A specific case discussed at length in the article was *City & County of Denver v. Sweet*, 329 P.2d 441 (Colo. 1958).

23. See Hartman, *State and Local Taxation—1964 Tennessee Survey*, 18 VAND. L. REV. 1255 (1965); Hartman, *State and Local Taxation—1963 Tennessee Survey*, 17 VAND. L. REV. 1150 (1964); Hartman, *State and Local Taxation—1962 Tennessee Survey*, 16 VAND. L. REV. 865 (1963); Hartman, *State and Local Taxation—1961 Tennessee Survey (II)*, 15 VAND. L. REV. 948 (1962); Hartman, *State and Local Taxation—1961 Tennessee Survey*, 14 VAND. L. REV. 1401 (1961); Hartman, *State and Local Taxation—1960 Tennessee Survey*, 13 VAND. L. REV. 1257 (1960); Hartman, *State and Local Taxation*, 12 VAND. L. REV. 1335 (1959); Hartman, *State and Local Taxation—1958 Tennessee Survey*, 11 VAND. L. REV. (1958); Hartman, *State and Local Taxation—1957 Tennessee Survey*, 10 VAND. L. REV. 1209 (1957); Hartman, *State and Local Taxation—1956 Tennessee Survey*, 9 VAND. L. REV. 1116 (1956).

In sum, Hartman has written about a large and important subject, and has treated it with clarity, directness, and accuracy. Could any scholar aspire to more?