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State and Local Taxation — 1961

Tennessee Survey (II)

Paul J. Hartman*

I. PRIVILEGE TAXES—EXACTIONS FOR OPERATION OF OIL PEDDLER'S WAGON

II. PRIVILEGE TAXES—TAXATION OF TRAMPOLINES AS AN "AMUSEMENT PARK"

During the period covered by this survey the pickings by way of decided cases have been pretty slim. Only two cases are here the subject of extended comment.¹ However, the comprehensive congressional study of state taxation of multistate business has been extended until July 1, 1963. The expanded congressional study now being conducted includes all forms of state taxation of interstate commerce, such as franchise taxes, sales and use taxes, gross receipts taxes, and ad valorem taxes. Under the chairmanship of Congressman Willis, a subcommittee of the House Judiciary Committee with the help of a sizeable staff and an advisory group of ten members, is conducting a fact-finding study designed to ascertain not only the problems that need solution but also some feasible solutions.²

I. PRIVILEGE TAXES—EXACTIONS FOR OPERATION OF OIL PEDDLER'S WAGON

Whether the complaining taxpayer in *Westate Oil Co. v. Featherstone*³ was entitled to recover for taxes paid under protest turned on whether taxpayer engaged in the taxable privilege of operating an "oil peddler's wagon," as defined in the statute imposing the tax. Taxpayer, a dealer in oil, had paid taxes for the privilege of operating oil depots and wholesale wagons, and it was taxpayer's contention that, having paid these privilege taxes, it was not subject to the tax imposed on the privilege of operating an oil wagon. Presently, we will see what these taxes were imposed upon.

The business of taxpayer consisted of selling petroleum products wholesale, and the delivery of these commodities to customers. To facilitate the carrying on of its business, taxpayer maintained a large oil depot or bulk storage plant and warehouse at Milan, Tennessee. The petroleum products

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1. For a comment elsewhere in this survey of the Tennessee law on the case of *Combustion Eng'r Co. v. McFarland*, 349 S.W.2d 138 (Tenn. 1961), see Morgan & Handler, *Procedure and Evidence—1961 Tennessee Survey* (II), 15 VAND. L. REV. 925 (1962).

2. See Hartman, *State and Local Taxation—1961 Tennessee Survey*, 14 VAND. L. REV. 1401 (1961) for a more detailed treatment of this congressional study.

3. 348 S.W.2d 299 (Tenn. 1961).

handled by taxpayer were bought by it from a seller in Shelby County, Tennessee, and these products were disposed of by taxpayer in one of two ways: (1) part thereof was transported to its Milan plant, there stored, and from this plant taxpayer subsequently withdrew these products and delivered them to its customers; (2) part of taxpayer's products were transported directly to its customers from the Shelby County supplier where taxpayer made the purchases without ever coming to rest at the Milan depot.

The privilege tax called into judgment in the *Westate Oil* case was imposed upon the operation of an "oil peddler's wagon," which includes the use of any vehicle to deliver petroleum products to dealers or customers where the owner or operator buys the products from an oil depot or other place *not* maintained by the owner or operator.⁴ The simple issue in this case, therefore, was whether taxpayer's direct deliveries of petroleum products from the place of purchase in Shelby County to its customers constituted operating an "oil wagon" within the purview of this statutory definition of that taxable privilege.

Reversing the lower court, the Tennessee Supreme Court seems properly to have held that taxpayer did engage in such a taxable privilege. In the 1957 case of *Moto-Pep, Inc. v. McGoldrick*,⁵ the court had rather effectively cut the ground from under *Westate's* claim that the payment of a tax for the privilege of operating an oil depot, with the tax computed upon the gallons sold, prevented the imposition of the tax in question. In *Moto-Pep*, the court held that the tax there exacted for the privilege of operating an oil depot could not include in its computation those petroleum products which did not pass through taxpayer's taxed depot but that the tax could be based only on the gallonage of oil which actually passed through the storage tanks of the taxed oil depot. In short, *Moto-Pep* excluded from the reach of the tax those petroleum products sold by taxpayer and delivered directly from its supplier to its customers. That clearly answered the contention in *Westate* that the payment of the oil depot tax precluded the levy of the "oil peddler's wagon" tax. They are two mutually exclusive, statutorily created taxable privileges.

Furthermore, *Westate's* payment of the tax for the privilege of operating wholesale oil wagons or trucks does not preclude the exaction for the privilege of operating an oil peddler's wagon. The tax upon the operation of wholesale oil wagons or trucks was imposed upon the privilege of delivering petroleum products to dealers or consumers from taxpayer's oil depot.⁶ Whereas, as we have just seen, the controverted "oil peddler's

4. TENN. CODE ANN. § 67-4203, item 71(c) (1956).

5. 202 Tenn. 119, 303 S.W.2d 326 (1957). For a critical comment on this case by the writer soon after the case was decided, see Hartman, *State and Local Taxation—1958 Tennessee Survey*, 11 VAND. L. REV. 1391 (1958).

6. TENN. CODE ANN. § 67-4203, item 71(b) (1956).

wagon" tax in the *Westate* case was imposed for the privilege of delivering oil directly from taxpayer's supplier in Shelby County to taxpayer's customers. Here, again, we have two mutually exclusive, statutorily created taxable privileges.

II. PRIVILEGE TAXES—TAXATION OF TRAMPOLINES AS AN "AMUSEMENT PARK"

The issue in *Holt v. Worrall*⁷ was whether the complaining taxpayer operated an "amusement park" within the meaning of a tax statute; under the statute, amusement parks, when maintained at a permanent location, are subject to a specific tax and are exempted from all other taxes.⁸ The State claimed in this case that taxpayer did not qualify as an amusement park and was therefore subject to a privilege tax.

Taxpayer maintained a recreational center within which were located fifteen trampolines; there is no mention in the opinion whether any other types of amusement were located at taxpayer's recreational center. A trampoline is described by the court in *Holt v. Worrall* as consisting of strong cloth fifteen feet by ten feet in size, stretched and held tightly in position by, and secured to, a metal frame. It provides a springboard effect when jumped upon, and facilitates the performance of acrobatics when used. The charge for using the trampoline was fifty cents per hour. Taxpayer's fifteen trampolines were located within a cyclone fence adjacent to a heavily travelled highway. At this location, taxpayer also sold soft drinks and packaged food items.

As a basis for the tax claim in *Holt v. Worrall*, the State relied on a statutory provision imposing a privilege tax on all "devices operated by persons as a course of profit, such as devices wherein may be seen pictures, or devices for throwing at wooden figures or any other object"⁹ Based on this statute a tax had earlier been sustained in *G & S Distributing Co. v. Cobb*,¹⁰ where a tariff had been imposed on the privilege of "kiddy-rides," which were devices placed in retail establishments. The State relied upon this case as authority for levying the tax in *Holt v. Worrall*.

The Tennessee Supreme Court invalidated the *Holt v. Worrall* tax and granted a refund to the taxpayer. Taxpayer's operations were thought by the court to be an "amusement park," and as such exempt by statute from any privilege tax other than the tax imposed for the privilege of operating an amusement park. The G & S tax on the "kiddy-rides" was distinguished on the ground of the lack of permanency of location of the "kiddy-rides," which were located in retail mercantile establishments. The *Holt v. Worrall* operation, on the other hand, had a more or less permanent location.

7. 348 S.W.2d 302 (Tenn. 1961).

8. TENN. CODE ANN. § 67-4203, item 75 (1956).

9. TENN. CODE ANN. § 67-4203, item 49(c) (1956).

10. 197 Tenn. 573, 276 S.W.2d 729 (1955).

Although the trampoline operation in question was more or less permanent, there still remains the question whether taxpayer operated an "amusement park."

Since the *Holt v. Worrall* taxpayer seemingly operated only trampolines, there is some doubt whether his operation constituted an "amusement park." It has been held elsewhere that an "essential attribute of an 'amusement park' is the grouping together in one place of various amusements for pleasurable diversion."¹¹ Facilities for picnicking and refreshment have not been regarded as amusements when accompanying a public swimming pool, but only as incidents to enhance the attraction of the pool to members of the public enjoying swimming as a pastime.¹² Similarly, the sale of soft drinks and food items in *Holt v. Worrall* might well be regarded, not as a separate amusement, but only as an incident to enhance the attraction of the trampolines; that apparently would leave only the trampolines as the source of amusement. On the other hand, the fifteen trampolines may be regarded as fifteen separate amusements in order to make up the requisite "various amusements" so as to constitute an "amusement park."

11. *Tice v. Borough of Woodcliff Lake*, 12 N.J. Super. 20, 78 A.2d 825, 826 (Super. Ct. 1951) (Only one amusement was planned—swimming pool and bath house. Under a zoning ordinance this was held not to constitute an amusement park.).

12 *Ibid.*