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Paul J. Hartman

STATE TAXATION OF CORPORATE INCOME FROM A MULTISTATE BUSINESS

PAUL J. HARTMAN*

THE PROBLEM, ITS SCOPE AND IMPORTANCE

So long as we have a federal system of government, a continuing problem, and certainly one of the most pressing, is that of an effective coordination of taxes. That problem has achieved paramount importance in late years. Because of new and expanding conceptions as to what governments should do for people, our state governments are continually confronted with ever-increasing demands that they provide additional governmental functions and supply more governmental services. The resulting increase in governmental activities and extension of benefits mean urgent needs for additional revenue. As prices have spiraled under the increasing pressure of meeting our domestic and foreign civilian and military commitments, the revenue problem grows more acute. It is costing the states and local governments more money to do their existing jobs, to say nothing of shouldering additional responsibilities. From a total expenditure by state governments in 1944 of a little over $5 billion the amount has soared to a total of in excess of $24 billion in the fiscal year 1957—an increase of almost 500%.[1] State tax collections have also risen constantly. Between 1944 and 1959 there was an increase from slightly over $4 billion to $15.8 billion, or an increase of upward of 400%.[2] Local taxes total about the same amount as state taxes.[3] That means that the states and their political subdivisions collected over $31.5 billion in fiscal 1959. The states have understandably persisted in their efforts to get some return for the benefits they have conferred upon all business transacted within their borders, whether it be local business or interstate operations.

* Professor of Law, Vanderbilt University; member, Tennessee, Virginia and West Virginia Bars; member, ABA Subcommittee, Personal Property, Sales & Use, and Franchise Taxes; author, *State Taxation of Interstate Commerce* (1953). The author wishes to acknowledge his indebtedness to Professor Kenneth L. Roberts of the Vanderbilt Law School for his assistance in the preparation of this article—especially his statutory research found in connection with the materials dealing with the net income tax structures of all the states. The author also wishes to express his indebtedness to Mr. Donald W. Pemberton, a senior at the Vanderbilt Law School, for his research assistance.

1. For the 1944 expenditures, see HISTORICAL STATISTICS ON STATE AND LOCAL GOVERNMENT FINANCES 1902-1953 19 (1955), issued by the United States Department of Commerce, Bureau of the Census. For the 1957 expenditures, see COMPENDIUM OF STATE GOVERNMENT FINANCES IN 1957 1 (1958), issued by the same agency.

2. For the tax collection for 1944, see HISTORICAL STATISTICS ON STATE AND LOCAL GOVERNMENT FINANCES 1902-1953, *supra* note 1, at 1. For the 1959 tax collections, see 20 CCH STATE TAX REV. No. 35 at p. 1 (Sept. 3, 1959).

3. *Ibid.*

On the other side of the coin, the federal government is saddled with staggering military and civilian expenditure obligations both at home and aboard. The maintenance of a high rate of economic activity with resultant tremendous revenue yields remains a grim necessity. It is of vital importance, therefore, that our national economy not be strangled with tax barriers that will prevent optimum employment and production. The economic well-being of our nation, from which our gigantic amounts of revenue must come, furnishes urgent and impelling reason for insistence against action by one state to gain fiscal advancement at a cost that is too great for the economic health of sister states and the federal government. A wise reconciliation of these conflicting and competing demands of the state and national interests is imperative.

Moreover, if one state in order to supply her fiscal needs or promote the commercial and economic well-being of her citizens may shield them from competition from sister states by the taxing process, we have opened a Pandora's box of troubles in the nature of reprisals and trade wars that were meant to be averted by subjecting commerce among the states to the power of the federal government.[4]

Each new means of production and transportation has generated commerce and due process clause controversy relative to the taxing power of the states. Such controversies, of course, are unavoidable under our federal system. As a result, very real and troublesome problems have been encountered by the Supreme Court of the United States as an arbiter in balancing the competing tax demands of the states and freedom of commerce and trade across state borders, the desire for which was one of the chief motivating forces that welded the several states into a nation and the benefits of which are among the greatest bulwarks of our strength.[5] Later, we will consider the issue whether the Supreme Court alone can successfully exercise the control required for the mutual accommodation of national interests in commercial freedom and state revenue needs.

There was a time when state and local taxes were perhaps only a minor factor in determining where a new business would locate and were probably not seriously considered in connection with most locational decisions. In recent years, however, because of the need for additional revenue on the part of state and local governments and the resulting increases in varieties and amounts of taxes, business must give more attention to the question of state and local taxes

4. THE FEDERALIST, Nos. 7, 11, 22 (Hamilton); THE FEDERALIST, No. 42 (Madison); MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787 10, 11 (1920); 1 ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION 106-18 (2d ed. 1888); 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, 308 (rev. ed. 1937); *id.* at 478, 547-48.

5. *Ibid.* See address by Justice Stone, *Fifty Years' Work of the United States Supreme Court,* 14 A.B.A.J. 428, 430 (1928).

in deciding where to locate and operate.[6]

In this discussion of state taxation of corporate income from multistate operations, we will include taxes involving net income of a corporation as well as taxes involving gross income. Also, this discussion will cover any general tax on corporations that reaches income as a basis for its computation, whether the tax is levied directly on that income or whether the income is used only as a measure for computing the amount of the tax, the legislatively designated subject of the tax being some activity or event having to do with the corporate operations. This latter type of tax would include such exactions as franchise and business taxes measured by corporate income.

The limitations upon taxation of corporate income imposed by the commerce and due process clauses will be discussed somewhat fully. There will be a survey of the tax structure of each of the fifty states insofar as their taxes reach corporate net income from multistate business. Some attention will be given to the tax statutes reaching corporate gross income. Our endeavors also will include discussions of the various steps that have been taken to untangle the tangled skein of state taxation of corporate income from multistate operations, as well as other proposals that have been made for that purpose.

That the problem of the commerce and due process clause curbs on state taxation of corporate income from multistate operations is of tremendous current importance can easily be shown by the fact that during the last term of the United States Supreme Court, the Court made decisions in connection with no less than six important cases dealing with that subject.[7]

PART ONE: TAXATION OF NET INCOME

I. *The Commerce And Due Process Clause Limitations On Net Income Taxes.*

A. The *Northwestern-Stockham* Decision

No decision by the Supreme Court of the United States in recent years in the field of state and local taxes has caused such consternation among the taxpayers and their counsel as has the *Northwestern-*

6. See Hendricks, *The Influence of State and Local Taxes on Locational Decisions*, PROCED. FIFTIETH ANN. CONF. NAT'L TAX ASS'N 191 (1957). Mr. Hendricks is Manager, Tax Department, Proctor and Gamble Company at Cincinnati, Ohio.

7. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959) (two cases); ET & WNC Transp. Co. v. Currie, 248 N. C. 560, 104 S.E.2d 403, *aff'd per curiam*, 359 U.S. 28 (1959); International Shoe Co. v. Fontenot, 236 La. 279, 107 So. 2d 640, *cert. den.*, 359 U.S. 984 (1959); Brown-Forman Distillers Corp. v. Collector of Revenue, 234 La. 651, 101 So. 2d 70 (1958), *appeal dismissed and cert. den.*, 359 U.S. 28 (1959); Railway Express Agency, Inc. v. Virginia, 358 U.S. 434 (1959). Each of these cases will be discussed in this article.

Stockham decision.[8] That case held that the interdictory force of neither the commerce clause nor the due process clause of the federal constitution denies to a state the power to impose a nondiscriminatory excise tax on the net income of a foreign corporation where the income is earned within the borders of the taxing state, although the income is earned from exclusively interstate commerce. So great was the impact of this decision that no less than ten separate proposals were dropped in the legislative hopper of Congress to limit in some fashion the scope of this decision.[9] One bill was enacted into law, being signed by the President on September 14, 1959.[10] The *Northwestern-Stockham* decision consolidated two cases, *Northwestern States Portland Cement Co. v. Minnesota* and *Williams v. Stockham Valves and Fittings, Inc.* The facts of these two cases are relatively simple.

The Northwestern States Portland Cement Company (taxpayer) was an Iowa corporation with its home office and manufacturing plant in Iowa. A Minnesota tax was involved in the case. Taxpayer leased a sales office in Minnesota but never qualified to do business in that state. Two salesmen and a secretary occupied the sales office and two additional salesmen used it as a clearing house. The taxpayer owned no real estate in Minnesota, warehoused no merchandise there and maintained no bank account in the taxing state. Taxpayer's activities in the taxing state consisted of a regular and systematic course of solicitation of orders for the sale of its products there. All orders received by the salesmen in Minnesota were transmitted to the home office in Iowa for acceptance or rejection, and all merchandise was shipped from the Iowa plant direct to the Minnesota customers. Forty-eight percent of the taxpayer's total sales were made to Minnesota customers. Minnesota imposed an annual tax upon the net income of both residents and nonresidents. One of the four classes taxed by the Minnesota statute is that of domestic and foreign corporations whose business within the state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both. Minnesota's taxing statute utilizes a three-factor formula in determining the portion of net income taxable under its law.[11] The

8. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959). This case has been the subject of the following comments: Cox, *Impact of the Stockham Decision*, 37 TAXES 299 (1959); Note, 47 CALIF. L. REV. 388 (1959); Note, 33 TUL. L. REV. 870 (1959); Note, 12 VAND. L. REV. 908 (1959); Note, 2 WM. & M. L. REV. 223 (1959); 30 MISS. L. J. 324 (1959); 57 MICH. L. REV. 903 (1959).

9. The following numbered bills were introduced: S. 2281, H.R. 8019, H.R. 7715, H.R. 7757, H.R.J. Res. 431, H.R. 7773; S. 2213, H.R. 7894; H.R.J. Res. 450, H.R. 8061, 86th Cong., 1st Sess. (1959).

10. Pub. L. 86-272 (1959), 73 Stat. 555. This law will be discussed in some detail later in this article.

11. MINN. STAT. § 290.19 (1945). Minnesota's apportionment formula will be examined somewhat more in detail later.

first factor is that of the taxpayer's sales assignable to the taxing state during the year to its total sales during that period made everywhere; the second, that of the taxpayer's total tangible property in the taxing state for the year to its total tangible property used in the business that year wherever situated. The third ratio is the taxpayer's total payroll in the taxing state for the year to its total payroll for its entire business in the like period.

The taxpayer in the *Stockham Valves and Fittings* case was a Delaware corporation with its principal office and plant in Alabama. A Georgia tax was involved in the case. Taxpayer maintained a sales-service office in Georgia which served five states. This office was headquarters for one salesman who devoted about one-third of his time to solicitation of orders in Georgia. A full-time woman secretary was also employed there. All orders solicited by the salesmen in Georgia were transmitted to the Alabama home office for approval and were shipped from that office to Georgia customers. Other than office equipment, supplies and advertising literature, the taxpayer had no property in Georgia, stored no merchandise there, and deposited no funds there. From one to two percent of taxpayer's total sales originated in Georgia. A Georgia statute levies a tax on net incomes received by every corporation, foreign or domestic, owning property or doing business in the state. The statute defines "doing business" as including any activities or transactions carried on within the state for the purpose of financial profit or gain, regardless of its connection with interstate commerce. To apportion the net income attributable to Georgia for tax purposes, the statute applies a three-factor ratio based on inventory, wages and gross receipts.[12]

In the *Northwestern States* case, as well as in the *Stockham Valve* case, the taxpayer resisted the tax on both due process clause and commerce clause grounds. Both cases were consolidated for decision and only one opinion was written for both cases. Over both the commerce clause and the due process clause objections, the Supreme Court of the United States sustained the taxes in both cases by a six to three vote. Mr. Justice Clark delivered the opinion for the majority of the Court, consisting of five justices. Mr. Justice Harlan concurred in the majority opinion. Mr. Justice Whittaker, with whom Mr. Justice Frankfurter and Mr. Justice Stewart joined, dissented. Mr. Justice Frankfurter also delivered a separate dissenting opinion.

1. The Commerce Clause Question.—The Court squarely and forthrightly recognized that the question presented in these two cases was whether a net income tax could be imposed upon that portion of a foreign corporation's net income earned from, and fairly apportioned

12. GA. CODE ANN. § 92-3102 (1937). Georgia's apportionment formula will be examined somewhat more in detail later.

to, business activities within the taxing state when those activities are exclusively in furtherance of interstate commerce.[13] No question was before the Court in either case as to the reasonableness of the apportionment of net income for tax purposes under the statutory formulas. Two passages from the Court's opinion, when taken together, seem fairly to express the pith and substance of the holding, sustaining the taxes. Near the beginning of the opinion the Court declared: "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 sufficient nexus to support the same."[14] Later in the opinion the Court stated the rationale of some of the supporting authorities in this fashion: "These cases stand for the doctrine that the entire net income of a corporation, generated by intrastate as well as interstate activities, may be fairly apportioned among the States for tax purposes by formulas utilizing in-state aspects of interstate affairs."[15]

Through the *Northwestern-Stockham* opinion seem to run three main themes: (1) Interstate commerce should bear its just share of state tax burdens in return for the benefits it derives from activities within the State; (2) State taxes on net income should be sustained when they do not discriminate against interstate commerce, either by giving local business a direct commercial advantage, and do not subject interstate commerce to multiple tax burdens which will place that commerce at a disadvantage relative to local business; and (3) These challenged taxes are not prohibited levies upon the privilege of engaging in interstate commerce.

The Court's opinion makes these three propositions clear. It reasoned that while "it is true that a State may not erect a wall around its borders preventing commerce an entry,"[16] nevertheless the founders of the Constitution "did not intend to immunize such commerce from carrying its fair share of the costs of the state government in return for the benefits it derives from within the State."[17] These taxes, thought the Court, did not discriminate against either corporation (the taxpayers) nor did they subject either to an undue burden. Since the taxes were apportioned to income fairly attributable to the taxing state, there were no burdens not borne by local business. Moreover, the taxes were not regarded as privilege taxes based on the doing exclusively interstate business in the taxing states. The

13. See Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 452 (1959).
14. *Ibid.*
15. *Id.* at 460.
16. *Id.* at 461.
17. *Id.* at 461-62.

fact that the taxing states are left to collect only through ordinary means was thought to remove any objection that the exactions compel the taxpayers to pay for the privilege of engaging in interstate commerce. The payment of these taxes was thus not made a condition precedent to the right to carry on business, including interstate commerce. The Court was confronted with the *Spector case*,[18] which struck down a tax imposed upon the privilege of engaging in exclusively interstate commerce, using net income as the measure. *Spector* was distinguished on the ground that the *Northwestern-Stockham* taxes were levied "on" the net income from commerce that was exclusively interstate, while the *Spector* tax was imposed "on" the privilege of engaging in exclusively interstate commerce, with the net income being used only as the measure of the tax.

The majority of the Court in the *Northwestern-Stockham* decision believed that the matter was controlled by the rationale of several earlier cases involving income taxes. The decision of *Peck & Co. v. Lowe*,[19] was thought to point the way. In the *Lowe* case, it was held that the federal income tax *on* net income derived from exportation of goods was not a tax on exported goods, so as to violate the Constitutional prohibition against a federal tax or duty on articles exported from any state. The *Lowe* Court thought that, at most, exportation would be affected only indirectly and remotely. By analogy, the *Northwestern-Stockham* Court thought that a state tax *on* net income derived from interstate commerce is not a forbidden tax *on* interstate commerce itself. The Court was also influenced by the case of *U. S. Glue Co. v. Town of Oak Creek*,[20] which was the first case in the Supreme Court applying that doctrine to sustain state taxes levied *on* net income from interstate commerce.

The Court has almost always thought that the difference between a tax on gross income and a tax on net income from interstate operations called for a different result when resisted on commerce clause grounds. A tax on gross receipts affects each transaction in proportion to its magnitude, irrespective of whether it is profitable. On the other hand, a tax on net income does not arise unless a gain is shown over expenses and losses.

The following language of the *Glue* opinion is pertinent in pointing out what the Court has long regarded as the distinction between a valid tax levied on *net* income from interstate commerce and a forbidden tax levied on the *gross* receipts from that commerce.

> The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest

18. Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951).
19. 247 U.S. 165 (1918).
20. 247 U.S. 321 (1918).

> and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States.[21]

In support of the *Northwestern-Stockham* decision, the Court also cited cases other than the *Glue* decision where the Court had previously sustained a tax on the *net* income of domestic corporations,[22] or where the *Northwestern-Stockham* Court thought the foreign corporation had established a commercial domicile,[23] although the income was derived in part from interstate commerce. The fact that the corporation was a domestic one, or had acquired a commercial domicile in the taxing state, was not thought to be controlling, as is shown by the fact that the Court also had sustained taxes on net income from interstate commerce where the taxpaying corporation was not a domiciliary of the taxing state, was not incorporated there, and did not have its principal place of business in the taxing state. Thus, state franchise taxes reaching net income for the privilege of doing business were sustained to the extent they were apportioned to the business done within the taxing state by a foreign corporations in *Bass, Ratcliff & Gretton, Ltd. v. State Tax Commission*,[24] and *Norfolk & Western R. Co. v. North Carolina*.[25] Sustaining the assessment of New York's franchise tax measured on a proportional formula against a British corporation selling ale in New York, the Court had held in the *Bass* case that it did not violate the commerce clause to attribute to New York a just proportion of the profits earned by the taxed corporation from the sales, although part of the business was interstate commerce. In the *Norfolk & Western* case, North Carolina had been

21. *Id.* at 328-29.
22. Memphis Natural Gas Co. v. Beeler, 315 U.S. 649 (1942).
23. Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920).
24. 266 U.S. 271 (1924).
25. 297 U.S. 682 (1936).

permitted to tax a Virginia corporation on net income apportioned to North Carolina on the basis of mileage within the state, which was the formula designed to attribute a portion of the interstate hauls to the taxing state.

After examining the foregoing cases sustaining taxes on net income from interstate commerce where the taxpayer was a domestic corporation, as well as cases sustaining the tax where the taxpayer was a foreign corporation, carrying on substantial interstate and local activity in the taxing state, the *Northwestern-Stockham* opinion draws this conclusion: "These cases stand for the doctrine that the entire net income of a corporation, generated by interstate as well as intrastate activities, may be fairly apportioned among the states for tax purposes by formulas utilizing in-state aspects of interstate affairs."[26]

The Court thought that any doubt as to the validity of the taxes in the *Northwestern-Stockham* case was entirely removed by the unanimous per curiam opinion in *West Publishing Co. v. McColgan*.[27] In that case California had applied her apportioned net income tax to a foreign corporation, not qualified to do business in California, whose only connection with California was through its salesmen, who solicited orders which were filled at the extrastate offices of the taxpayer. Taxpayer had four solicitors employed in the taxing state on a full time basis. They were authorized to receive payments on orders taken by them, to collect delinquent accounts and to make adjustments of customer complaints. These salesmen occupied space in offices of California attorneys in return for use of the taxpayer's books stored in the offices. These offices were advertised in legal newspapers, published and circulated in the taxing state, as the offices of the taxpayer. On these facts the *Northwestern-Stockham* Court found no local commerce in the *West Publishing* case and treated the case as holding that an apportioned tax on net income may be imposed on a foreign corporation doing a business that is exclusively interstate. The Court thought the *West Publishing* case was "not grounded on the triviality that office space was given"[28] to taxpayer's solicitors by the attorneys in the taxing state.

The *Northwestern-Stockham* opinion thus makes it clear that it will sustain a nondiscriminatory tax imposed on net income from commerce that is exclusively interstate. However, the Court requires that the net income from the interstate operations be fairly apportioned to activities within the taxing state so that the same income would not be subjected to taxation by another state, thus resulting in

26. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 460 (1959).
27. 328 U.S. 823 (1946).
28. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 461 (1959).

multiple tax burdens to which income from local business would not be subjected. By following this procedure, the taxing state can reach only its fair share of the interstate operations with its tax. It will be recalled that neither of the objecting taxpayers in the *Northwestern-Stockham* decision raised any question as to the reasonableness of the apportionment of the net income under the statutory formulas employed by the taxing states. Hence, there was no showing that the taxed income was subject to a tax by another state. A possible *risk* of a multiple tax burden was not considered enough to call for the invalidity of the tax. The following excerpt from the Court's opinion makes it plain that while the commerce clause requires an apportionment of the income to operations properly attributable to the taxing state, nevertheless, the *risk* of tax duplication by another state is not enough to render the tax inimical to the commerce clause; there must be a showing of cumulative tax burdens on the same income:

> While the economic wisdom of state net income taxes is one of state policy not for our decision, one of the "realities" raised by the parties is the possibility of a multiple burden resulting from the exactions in question. The answer is that none is shown to exist here. This is not an unapportioned tax which by its very nature makes interstate commerce bear more than its fair share. As was said in Central Greyhound Lines v. Mealey . . . "it is interstate commerce which the State is seeking to reach and . . . the real question [is] whether what the State is exacting is a constitutionally fair demand by the State for that aspect of the interstate commerce to which the state bears a special relation." The apportioned tax is designed to meet this very requirement and "to prevent the levying of such taxes as will place the interstate commerce at a disadvantage relative to local commerce." Id. at 670. Logically it is impossible, when the tax is fairly apportioned, to have the same income taxed twice. In practical operation, however, apportionment formulas being what they are, the possibility of the contrary is not foreclosed, especially by levies in domiciliary states. But that question is not before us . . . . There is nothing to show that multiple taxation is present. In this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense. This they have failed to do.[29]

This case seems to be the first occasion where the "multiple burdens" test of tax invalidity has been applied to net income taxes. A little later, we will see that that doctrine has been applied when a gross income tax was challenged on commerce clause grounds. Also, when the "multiple burdens" test has been applied to taxes on gross income, the levy has been invalidated on commerce clause grounds when the taxpayer could show that there was a possibility

29. *Id.* at 462-63. Later, we will see that, at one time, the *risk* of a multiple tax burden was enough to invalidate a tax under the commerce clause. *E.g.*, Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939). The multiple burdens doctrine is discussed in detail later.

or risk that a tax on the same income could be repeated by another state, thereby subjecting interstate commerce to cumulative tax burdens not borne by local business.[30]

2. The Due Process Clause Question.—Although the *Northwestern-Stockham* tax craft sailed safely past the Scylla of the commerce clause, it was still necessary to steer past the Charybdis of the due process clause in order to reach the calm harbor of constitutionality. As we know, the due process clause has long been recognized as a limitation on state taxing power. The absence of any connection in fact between the taxed commerce and the state is sufficient for invalidating a tax on due process grounds.[31] In sweeping due process language the Court has declared that a "state may not tax real property or tangible personal property lying outside her borders; nor may she lay an excise or privilege tax upon the exercise or enjoyment of a right or privilege in another state derived from the laws of that state and therein exercised and enjoyed."[32] Very briefly, then, due process is concerned with whether the tax in practical operations has relation to opportunities, benefits or protection conferred or afforded by the taxing state on the taxpayer. In short, due process is concerned with whether the taxing state has given to the taxpayer anything for which it can impose a charge.[33]

In language that is plain and certain the *Northwestern-Stockham* opinion gives short shrift to the due process clause objection to the taxes in this excerpt:

> Nor will the argument that the exactions contravene the Due Process Clause bear scrutiny. The taxes imposed are levied only on that portion of the taxpayer's net income which arises from its activities within the taxing state. These activities form a sufficient "nexus" between such a tax and transactions within a state for which the tax is an exaction. *Wisconsin v. J. C. Penney Co.* . . . . It strains reality to say, in terms of our decisions, that each of the corporations here was not sufficiently involved in local events to forge "some definite link, some minimum con-

30. Gwin, White & Prince v. Henneford, 305 U.S. 434 (1949). The "multiple burdens" doctrine as applied to gross income taxes is discussed in detail at notes 271-82, *infra*. Moreover, the showing of the possibility of multiple property taxes has been enough to find a violation of the due process clause. Standard Oil Co. v. Peck, 342 U.S. 382 (1952).

31. Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77 (1938); Safe Deposit and Trust Co. v. Virginia, 280 U.S. 83 (1929). Even before the adoption of the fourteenth amendment, containing the due process clause, the Supreme Court had imposed territorial limitations on the power of a state to tax. *E.g.*, Case of State Tax on Foreign-held Bonds, 82 U.S. (15 Wall.) 300 (1872); Railroad Co. v. Jackson, 74 U.S. (7 Wall.) 262 (1868); Hays v. The Pacific Mail S. S. Co., 58 U.S. (17 How.) 596 (1854).

32. Great A. & P. Tea Co. v. Grosjean, 301 U.S. 412, 424 (1937).

33. See Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169, 174 (1949); Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444 (1940).

> nection" sufficient to satisfy due process requirements. Miller Bros. v. Maryland . . . . The record is without conflict that both corporations engaged in substantial income-producing activity in the taxing States. . . . As was said in *Wisconsin v. J. C. Penny Co., supra,* the "controlling question is whether the state has given anything for which it can ask return." Since by "the practical operation of [the] tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred. . . ." it "is free to pursue its own fiscal policies, unembarassed by the Constitution. . . ." Id. at 444.[34]

The exploitation of the market for the capture of profits, along with the protection afforded by the state of the market during the process, were enough for the state to demand something in return, thus satisfying the requisites of due process.

3. The Northwestern-Stockham *Dissenting Opinions.*—The three-Justice dissent was of the opinion that the *Northwestern-Stockham*[35] taxes levied on the net income contravened the commerce clause since the business in each instance was exclusively interstate commerce. They thought the challenged taxes were laid directly on, and thereby regulated, exclusively interstate commerce. Moreover, these dissenters were of the persuasion that none of the cases relied on by the majority were authority for upholding the questioned tax.

In a somewhat protracted effort to demolish the majority opinion, this dissent first assails *Peck & Co. v. Lowe,*[36] which the majority thought pointed the way to upholding the *Northwestern-Stockham* tax, against the charge that it was levied on interstate commerce. As we saw, the *Lowe* case involved a federal income tax upon the "entire net income arising or accruing from all sources,"[37] as applied to the whole net income of the taxpayer, where three-fourths of his income came from exporting goods. Over the objection that the federal tax on the entire net income violated that provision of the Constitution which prohibits the federal government from levying a tax on articles exported, the Supreme Court upheld the tax. The Court was of the opinion that the export clause only prohibited taxation of articles in the course of exportation, and therefore a tax on the net income received from the exporting business did not violate the constitutional prohibition. The three *Northwestern-Stockham* dissenters were of the opinion that the *Lowe* case did "not in any sense 'point the way' for" upholding the *Northwestern-Stockham* tax on net income derived

34. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 464-65 (1959).

35. *Id.* at 477. Mr. Justice Whittaker, with whom Mr. Justice Frankfurter and Mr. Justice Stewart joined, dissented.

36. 247 U.S. 165 (1918).

37. *Id.* at 172.

from exclusively interstate commerce.[38]

To be sure, the *Lowe* case is not a "white horse" case, directly in point. Nevertheless, if a tax imposed upon the *entire* net income from a taxpayer whose income is derived, to a large extent, from the exporting business is not a constitutionally forbidden tax upon the exportation business, then by analogy, it seems somewhat persuasive that a tax upon the net income from interstate commerce is not a prohibited tax upon that commerce. In upholding the income tax, as applied to the entire net income of the taxpayer in the *Lowe* case, the Court treated the exaction as a constitutionally permissible "indirect burden" on the business of exporting. The *Lowe* opinion reasoned that "exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses."[39] The Court that decided the *Lowe* case thus uses exactly the same rationale which the Court has used over the years to differentiate between valid state taxes imposed on *net* income, which included income from interstate commerce, and invalid state taxes levied on *gross* income, which included receipts from interstate commerce. The state tax on the net income has been regarded as an "indirect burden" on the interstate commerce and therefore not violative of the commerce clause, while the taxes on the gross receipts have been treated as invalid "direct burdens" upon interstate commerce.[40] Bearing in mind that the Constitution expressly prohibits taxation of exports, while the interdictory force of the commerce clause arises only by implication, perhaps the use of the *Lowe* analogy by the majority in the *Northwestern-Stockham* decision is not as far off base as the dissenters ostensibly think, when the majority states that the *Lowe* case does point the way for upholding the tax.

This *Northwestern-Stockham* dissent then examines the cases relied on by the majority, upholding apportioned state net income taxes, where the taxpayers were engaged in interstate commerce that was mingled with local business. The dissent concludes that these cases do not hold that "exclusively interstate commerce may be taxed by a state."[41] In fact, these dissenters go so far as to say expressly that these cases "hold" the "contrary."[42] The first case analyzed is the *U. S. Glue* case, which sustained a tax on net income "derived from transaction in interstate commerce," where it was apportioned to that "proportion of their (the taxpayers) income derived from business trans-

38. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 488 (1959).
39. Peck & Co. v. Lowe, 247 U.S. 165, 175 (1918).
40. U. S. Glue Co. v. Town of Oak Creek, 247 U.S. 321, 328-29 (1918).
41. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 488 (1959).
42. *Id.* at 488, 490.

acted . . . within the State."[43] This case is explained by the dissent on the ground that the tax was sustained because the apportionment formula limited the tax to that part of the net income derived solely from "intrastate commerce," and excluded the income from the "interstate" aspects of the multistate business.[44] In short, the dissent seems to say that "business transacted within the State" means only "local business," although the Court expressly says that the income was derived, in part, from a "transaction in interstate commerce."[45] Moreover, the *Glue* opinion at no place equates the two expressions.

The dissent makes essentially the same analysis of the *Underwood Typewriter* case,[46] the *Bass* case,[47] the *Beeler* decision,[48] and the *Norfolk & Western* case,[49] as it did the *Glue* case. In all of those cases the taxpayer's business consisted of both local and interstate business, and in all of them a tax on net income was sustained where apportioned to earning within the state. In each case the dissent concludes, however, that the tax was applied only to that income derived solely from local business. The *Beeler* decision and possibly the *Bass* case are correctly analyzed by the dissent,[50] but there is serious question as to the correctness of the dissent's analysis of the *Glue* case, the *Underwood Typewriter* case and the *Norfolk & Western* decision.

The dissent's treatment of these last three cases raises the question, what do these statutory apportionment formulas mean? Do they mean apportionment between income from local and interstate commerce, with the tax imposed only on net income from local business? Or do these formulas simply segregate and tax that part of the total income, *including income from interstate commerce,* that is fairly attributable to the taxing state where the taxpayer did business? Neither the statutory formulas nor the opinions in the *Glue* case, the *Typewriter* case, nor the *Norfolk & Western* case indicate that the formulas were designed to segregate and tax *only* the income from "local business." To illustrate, the *Glue* opinion, as we have just seen, designates as taxable income the "net income derived from transactions in interstate commerce" apportioned to that "proportion of their (taxpayers')

43. U.S. Glue Co. v. Town of Oak Creek, 247 U.S. 321, 326, 329 (1918).
44. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 489-90 (1959).
45. U. S. Glue Co. v. Town of Oak Creek, 247 U.S. 321, 326, 329 (1918).
46. Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920).
47. Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n, 266 U.S. 271 (1924).
48. Memphis Natural Gas Co. v. Beeler, 315 U.S. 649 (1942).
49. Norfolk & W. Ry. v. North Carolina, 297 U.S. 682 (1936).
50. The *Beeler* statute taxed only the net earnings arising from business done wholly within the state, expressly excluding earnings arising from interstate commerce. The *Bass* tax was levied on the privilege of doing business; hence it would have to be confined to local business under a long line of decisions represented by the *Spector* doctrine. Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951).

income derived from business transacted . . . within the State."[51] True, the *Glue* tax was imposed upon the net income of a domestic corporation, but that does not appear to control the decision. Also, taxes in other cases cited by the Court, including the *Underwood* case, were levied upon the income of a foreign corporation. In sustaining the *Underwood* tax, which was imposed upon the net profits earned within the state, the Court declared: "That a tax measured by net profits is valid, although these profits may have been derived in part, or indeed mainly, from interstate commerce is settled."[52] It is somewhat difficult, therefore, to agree with the dissent's conclusion that the taxes sustained in these cases were sustained only because the levies were confined to income from *only* "local business." These apportionment formulas seem designed to apply the tax to income fairly attributable to "in-state" activity, whether the activity is regarded as local business or the "in-state" segment of interstate commerce. Even commerce that is exclusively interstate must be "transacted within a state."

Moreover, it is impossible to agree with the dissent's charge that these cases hold "just the contrary"[53] to the *Northwestern-Stockham* decision. Even if these cases are not authority for the validity of the *Northwestern-Stockham* taxes, certainly they do not "hold" the "contrary," for in none of these cases was any tax struck down.

Mr. Justice Frankfurter delivered a separate dissenting opinion in the *Northwestern-Stockham* case.[54] For him the result of the decision is "to break new ground," because he felt that the Court had "never decided that a State may tax a corporation when that tax is on income related to the State by virtue of activities within it when such activities are exclusively part of the process of doing interstate commerce."[55] That, of course, was what the three-Justice dissenting opinion also said. Likewise, he took the very realistic view that small or moderate sized corporations doing exclusively interstate business would now be faced with new and pressing problems arising from the fact that such concerns will be required to file tax returns in many more states than heretofore, all of which will involve large increases in bookkeeping, accounting and legal paraphernalia to meet these new demands. The cost of such added burdens, he thinks, may well suffocate much interstate business. Mr. Justice Frankfurter is of the opinion that the problem is one that calls for solution by devising a congressional policy.

51. U. S. Glue Co. v. Town of Oak Creek, 247 U.S. 321, 326, 329 (1918).
52. Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 120 (1920).
53. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 488, 490, 491 (1959).
54. *Id.* at 470.
55. *Ibid.*

II. *Summary and Appraisal Of The Current Net Income Tax Situation*

A. Judicial Developments Through the *Northwestern-Stockham* Case

The taxes by both states in the consolidated *Northwestern-Stockham* decision were levied directly "on" the net income, rather than an excise tax for the privilege of doing business, "measured by" net income. The taxpayers, as we have seen, contended that the *Spector*[56] case required nullification on commerce clause grounds of the *Northwestern-Stockham* taxes, as excises for the privilege of doing business, measured by net income, since the taxpayers' businesses were exclusively interstate commerce, although each tax was fairly apportioned to business done within the taxing state. That was the *Spector* holding. *Spector* was distinguished by the *Northwestern-Stockham* Court on the purely artificial, ritualistic ground that the *Spector* tax was imposed upon the franchise of a foreign corporation for the privilege of doing business within the state, with the net income used as the measure of the tax, and was not a levy on the net income; whereas the *Northwestern-Stockham* taxes were imposed on the net income. Under this purely formal distinction, it becomes necessary to make a sharp distinction, when the commerce clause is involved, between taxes levied "on" net income and excise taxes for the privilege of doing business "measured by" net income, which are treated as a forbidden price of doing business which is interstate commerce.

The constitutionality of net income taxes from business that is exclusively interstate, when called into question on commerce clause grounds, therefore, seems to depend entirely upon statutory formula. A tax levied directly "on" the net income from a multistate business will be sustained even if the business is exclusively interstate, if fairly apportioned to business done within the state so as to avoid multiple tax burdens by other states. That is the teaching of *Northwestern-Stockham* case. On the other side of the shield, a tax measured by net income will fall before the commerce clause where the statute is less felicitously drawn so that the subject of the tax is treated taxwise as the untouchable privilege of engaging in interstate commerce. In the *Spector* opinion the Court left no doubt that where the tax is levied "on" the privilege of doing interstate commerce, measured by net income, that the "constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the State."[57] This judicial distinction between *Spector* and *Northwestern-Stockham*, by Mr. Justice Clark, becomes somewhat amusing when we remember that in a most trenchant and realistic dissent in the *Spector* case he declared that "there is no reasonable

56. Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951).
57. *Id.* at 609.

warrant for cloaking a purely verbal standard with constitutional dignity,"[58] and that "exclusively interstate commerce receives adequate protection when state levies are fairly apportioned and nondiscriminatory."[59]

From the standpoint of the economic effect of the tax, the Court is drawing a distinction that not only is artificial but apparently is meaningless, in distinguishing *Northwestern-Stockham* from *Spector*. A tax imposed "on" net income from interstate commerce would seem to have, in practical results, the same consequences for suppressing or disrupting the commerce as one laid directly on the privilege, with the net income used to fix the figure of the tax.

The *Northwestern-Stockham* decision does, of course, open an avenue for circumventing the *Spector* doctrine, as such. All that is necessary for a state to do to get around the specter of *Spector* is to change its fiscal formula from a tax levied on the tax-immune privilege of engaging in interstate business, measured by net income, to a tax levied directly on the net income from that business. The tax collector can then mow a revenue swath just as wide as he could if the *Spector* type tax had been sustained.

In a very forthright manner the *Northwestern-Stockham* Court takes the commendable position that interstate commerce should bear its fair share of the burdens of the states whose privileges the commerce enjoys and whose protection it receives. It echoed the same thinking of a great jurist of an earlier day who had pioneered in the thinking that "it was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increased the cost of doing business."[60] At the same time, of course, the states should not be permitted to utilize their taxing power as an impediment to the country's economic welfare. There must be a reconciliation of the conflicting demands of the states to lay taxes for the maintenance of their governments and the demands of the national interests that commerce shall not be unduly curtailed by state taxation. The *Northwestern-Stockham* opinion purports to recognize the necessity of this balancing of state and national interests.[61]

However, when the *Northwestern-Stockham* opinion declares that the states are powerless to tax the privilege of engaging in interstate commerce,[62] it shields completely a part of that commerce from paying its just share of state revenue. By the same token it grants

58. *Id.* at 614.
59. *Id.* at 614-15.
60. Justice Stone speaking for the Court in Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938).
61. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 461-62 (1959).
62. *Id.* at 458, 463-64 (1959).

a preference to interstate commerce, giving interstate commerce a competitive advantage over local businesses which are saddled with the tax.

A fairly apportioned, nondiscriminatory net income tax of a multistate business would appear to offer one of the best and fairest ways of requiring that business to pay its way.[63] A business has no tax burden to bear unless there is a profit, and the tax will not be heavy unless the profits are large. It should make no difference whether the net income is used as the subject or the measure of the tax. Skillful statutory draftmanship should not be made the sole touchstone for determining such great principles of constitutional law. The pivotal point should be whether the tax, in essence, discriminates against interstate commerce by subjecting it to a heavier tax burden than local business. Obtaining an acceptable answer to this question should be no more difficult to find than weighing all the varied factors in arriving at a judgment whether a particular tax discriminates against interstate commerce in the commonly accepted sense. The Court has always been willing to wrestle with the knotty problem of tax discrimination, whether the discrimination was forthright or devious.[64]

That a state may not impose a tax upon the privilege of carrying on interstate commerce, regardless of the amount of the tax, as *Spector* held, and *Northwestern-Stockham* affirmed, has been determined by a plethora of decisions during our constitutional history, however.[65] This doctrine is based on the postulate that the privilege of engaging in interstate commerce is one given by the constitution and not by the state governments. "No State," says the Court, "can compel a party, individual, or corporation to pay for the privilege of engaging in interstate commerce."[66] As if to accentuate the point, the Court has declared that "Any such excise burdens interstate commerce and is therefore invalid . . . without regard to measure or amount."[67] Nor will such a tax be saved from commerce clause condemnation by apportionment. The "constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state."[68] This commerce clause barrier is present whether the taxpayer is engaged in interstate commerce exclusively,[69] or whether a

63. See Pierce, *State Fiscal Needs and Interstate Commerce,* 18 OHIO ST. L.J. 43, 54 (1957).
64. See Best & Co. v. Maxwell, 311 U.S. 454, 455 (1940).
65. *E.g.,* West Point Grocery v. Opelika, 354 U.S. 390 (1957); Railway Express Agency v. Virginia, 347 U.S. 359 (1954); Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954); Memphis Steam Laundry Cleaners, Inc. v. Stone, 342 U.S. 389 (1952); Cheney Brothers Co. v. Massachusetts, 246 U.S. 147 (1918).
66. Atlantic & Pacific Tel. Co. v. Philadelphia, 190 U.S. 160, 162 (1903).
67. Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203, 217 (1925).
68. Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602, 609 (1951).
69. *E.g.,* Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951); State Tax Comm'n v. Interstate Natural Gas Co., 284 U.S. 41 (1931).

portion of the taxed business is local with the tax levied either upon the interstate branch or upon the whole business.[70] Although a portion of a business is local, and therefore taxable, that has not justified a tax which is also levied on the privilege of engaging in the interstate branch of the business. A privilege or occupation tax imposed by a state with respect to both interstate and intrastate business, through an indiscriminate and inseparable application to instrumentalities common to both sorts of commerce, frequently has been nullified by the commerce clause.[71] To get the tax across the commerce clause hurdle, the statute must be of a separable nature so that the levy on the interstate privilege can be eliminated from the assessment.[72]

In specifying the types of forbidden taxes on the privilege of interstate commerce, the *Northwestern-Stockham* opinion continues the ban on direct levies for the privilege of soliciting interstate business, whether the levy takes the form of a fiat fee imposed upon the privilege, of soliciting,[73] or a corporate excise on the out-of-state seller.[74]

70. *E.g.*, Memphis Steam Laundry Cleaners, Inc. v. Stone, 342 U.S. 389 (1952); Texas Transp. & Terminal Co. v. New Orleans, 264 U.S. 150 (1924); Bowman v. Continental Oil Co., 256 U.S. 642 (1921); Askren v. Continental Oil Co., 252 U.S. 444 (1920); McCall v. California, 136 U.S. 104 (1890).

71. Cases cited note 70 *supra*. In addition, see the following cases: Cooney v. Mountain States Tel. & Tel. Co., 294 U.S. 384 (1935); Bowman v. Continental Oil Co., 256 U.S. 642 (1921); Pickard v. Pullman So. Car Co., 117 U.S. 34 (1886).

72. *E.g.*, Bowman v. Continental Oil Co., 256 U.S. 642 (1921); Ratterman v. Western Union Tel. Co., 127 U.S. 411 (1888).

73. See Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959). The Court has uniformly given the constitutional *coup de grace* to state statutes and municipal ordinances to the extent they levied a license tax of a fixed amount on the occupation of soliciting orders for the purchase of goods to be shipped into the taxing state. *E.g.*, Nippert v. City of Richmond, 327 U.S. 416 (1946); Best & Co. v. Maxwell, 311 U.S. 454 (1940); Real Silk Hosiery Mills v. Portland, 268 U.S. 325 (1925); Caldwell v. North Carolina, 187 U.S. 622 (1903); Robbins v. Shelby County Taxing District, 120 U. S. 489 (1887). The Court usually finds that the tax is aimed at suppression or placing at a disadvantage this type of interstate business when brought into competition with competing intrastate sales, usually made at a retail store, and not, subject to the license tax. See McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 55-56 (1940).

74. See Northwestern States Portland Cement Co. v. Minnesota, note 73 *supra*. If the foreign corporation chooses to remain at home in all respects, except to send abroad into other states its own advertising or itinerant salesmen to solicit orders which are sent directly to the home office of the selling foreign corporation where they are accepted and filled, the state of the buyer has no taxable grip on the out-of-state seller by way of occupation or privilege taxes. See Norton Co. v. Dep't of Revenue, 340 U.S. 534, 537 (1951). Twice the Court has struck down corporation excise taxes for the privilege of doing business, when applied to a foreign corporation engaged in the solicitation of orders for the purchase of goods to be shipped into the taxing state. Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203 (1925) (tax measured by property and assets employed within the state, plus a percentage of the net income from business done within the state); Cheney Brothers v. Massachusetts, 246 U.S. 147 (1918) (capital stock used as measure).

As the *Northwestern-Stockham* opinion indicates, the method of collecting the tax may have considerable significance in determining whether the tax is imposed on the privilege of engaging in interstate commerce, where the taxed business includes such commerce. In holding that the levies there were not for the privilege of engaging in interstate commerce, although the business was exclusively interstate, the Court gives weight to the fact that the "States are left to collect only through ordinary means."[75] If the payment of the tax is compulsory before *any* business within the state can be carried on, or if the statute provides for an eviction of the taxpayer for nonpayment of the tax, such collection methods apparently would cause the Court to conclude that the levy of a tax on net income is a forbidden price for engaging in interstate commerce, where such commerce is involved. The state would then be demanding the tax as a condition precedent to engaging in interstate commerce.

The method of collecting the tax also becomes important where a privilege tax is levied on a business consisting of both interstate commerce and local business. A tax may validly be imposed for the privilege of engaging in the local aspects of the business, even inseparably connected with the interstate business, if the tax is not demanded as a condition of doing *any* business in the taxing state.[76] Unless collection of a privilege tax is left to the ordinary means of collection by a money judgment in a suit at law, rather than eviction for nonpayment, where both interstate and intrastate commerce are inseparably connected, it would seem to be open to the objection that it is made a prohibited condition of continuing to do interstate business.[77]

In *Northwestern-Stockham* the Court not only seems to have applied the "multiple burdens" doctrine to net income taxes for the first time; but, by implication at least, the Court has come out with a revised version of that doctrine. Whereas a showing of a *possibility* or *risk* of multiple taxation has been enough to call for nullification of taxes on gross income, *Northwestern-Stockham* seems to require a showing of actual tax duplication before the Court will strike down a net income tax under the "multiple burdens" doctrine. The *Northwestern-Stockham* taxpayers had argued that if the taxes there were sustained then the income would be exposed to the risk of multiple taxation by other states. As we have seen, the Court disposed of that argument by pointing out that there was no showing that multiple

75. Northwestern States Portland Cement Co. v. Minnesota, 358 U. S. 450, 462 (1959).

76. Southern Natural Gas Co. v. Alabama, 301 U.S. 148 (1937); Pacific Tel. & Tel. Co. v. Tax Comm'n, 297 U.S. 403 (1936); Southern Ry v. Watts & Watts, 260 U.S. 519 (1923).

77. See Pacific Tel. & Tel. Co. v. Tax Comm'n, 297 U.S. 403, 414 (1936); Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 119-20 (1920); St. Louis, S. W. Ry v. Arkansas, 235 U.S. 350, 368 (1914).

taxation was present. If the Court makes it a requirement that there must be a showing that the income from multistate business actually has been taxed elsewhere, rather than a *risk* or *possibility* of tax duplication, in order to warrant striking down a tax by the "multiple burdens" test, that conceivably could produce some strange and unsatisfactory results. Could not a particular tax then be valid with respect to one state and invalid elsewhere, depending upon whether the other states had actually applied a tax to the income in question? Moreover, under this approach, the state first applying its tax to the particular income from interstate commerce would seem to have preempted the field from the standpoint of the commerce clause, and other states must then hold their taxes in abeyance with respect to this income. Also, it may be most difficult for the taxed corporation to show that the income in question actually has been taxed elsewhere, especially if the states involved have made some effort, although unsatisfactory, at apportionment of the income to activities within the state. The apportionment formulas now in existence will be discussed in considerable detail presently.

B. Post *Northwestern-Stockham* Judicial Developments

In a series of decisions shortly after the *Northwestern-Stockham* decision, the Court may have extended further the horizon of state taxing power when resisted by the interdictory force of the commerce and due process clauses. Within a week after the *Northwestern-Stockham* decision, the Court, in a per curiam, decided *ET & WNC Transportation Co. v. Currie*,[78] affirming a judgment of the North Carolina Supreme Court, which upheld a state tax as applied to the net income of an interstate freight motor carrier company, whose income was derived exclusively from interstate commerce. Taxpayer, a foreign corporation, was engaged exclusively in interstate transportation and had no offices in the taxing state, except those incident to its freight terminals. The tax was applied only to that part of the income reasonably attributable to the interstate business performed within the taxing state. The United States Supreme Court cited only *Northwestern-Stockham* as authority for their affirmance. The Court has thus brought the instrumentalities of interstate transportation within the scope of the same rule as manufacturers and sellers.

Suppose the taxpayers in the *Northwestern-Stockham* cases had not had offices in the taxing states, would the taxes have been inimical to the commerce clause, and would there have been a "sufficient nexus" to satisfy due process requirements for a tax imposed upon the net income? Subsequent developments perhaps shed some light on these questions.

78. 248 N.C. 560, 104 S.E.2d 403, *aff'd per curiam*, 359 U.S. 28 (1959).

At the same term as *Northwestern-Stockham*, the Court granted the motion to dismiss the appeal and refused certiorari in the case of *Brown-Forman Distillers Corp. v. Collector of Revenue*.[79] The Louisiana Supreme Court had held that the imposition of the state income tax upon a Kentucky distiller does not unconstitutionally interfere with interstate commerce, although the taxpayer did not maintain a warehouse or stock of goods in Louisiana; and taxpayer's activities in the taxing state were limited to the presence of "missionary men" who called upon wholesale dealers and, on occasion, accompanied the salesmen of these wholesalers to assist them in displaying the merchandise of taxpayer at the business establishments of retailers. This case has a significant difference from *Northwestern-Stockham* in that there was no sales office in the taxing state, and taxpayer's "missionary men" did not have authority to solicit sales.

On May 4, 1959, the Court denied certiorari in the Case of *International Shoe Co. v. Fontenot*,[80] which also involved a foreign corporation engaged exclusively in interstate operations in Louisiana. Taxpayer employed fifteen salesmen who regularly and systematically solicited shoe retailers in Louisiana, but the taxpayer had no office, storage space, warehouse or other place of business in the taxing state; nor had it qualified to do business there. Samples of shoes in the custody of its salesmen and the company-owned automobiles used by the salesmen constituted all the property which taxpayer had in the taxing state. All orders for merchandise were sent out of the taxing state for acceptance or rejection, and all orders were filled by shipments from an out-of-state source of supply. The salesmen displayed samples in Louisiana, using hotel rooms or rooms of public buildings. The expense of such displays was paid by the taxpayer. Any complaints by customers and delinquent accounts were handled at the home office outside the taxing state. Over commerce clause and due process clause objections, the Louisiana Supreme Court had held that the imposition of her tax on net income was valid. The Supreme Court of the United States denied certiorari.

Since the denial of certiorari is not a decision on the merits, the cases disposed of in this manner here cannot, of course, be given much weight.

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79. 234 La. 651, 101 So. 2d 70 (1958), *appeal dismissed and cert. den.*, 359 U.S. 28 (1959). In General Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944), the requisites of the commerce and due process clauses were satisfied, for the purpose of making an extra-state seller collect a use tax, even though the only connection of the taxing state with the seller was the sending of seller's traveling salesmen into the taxing state. For the purpose of satisfying due process requirements in acquiring judicial jurisdiction over a foreign corporation there was a sufficient nexus where the corporation sent salesmen into the forum state. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

80. 236 La. 279, 107 So. 2d 640, *cert. den.*, 359 U.S. 984 (1959).

Suppose the out-of-state *Northwestern-Stockham* sellers had stayed at home and had sold only by shipping the goods into the taxing state in response to mail orders from customers. Would there have been sufficient nexus between the extra-state seller and the customer's state to satisfy due process requirements for tax purposes? The cases have not answered that question in so far as the due process clause is concerned, but the Court has made it plain that a sale made in such a fashion is regarded as a nontaxable interstate commerce activity that cannot be reached by the customer's state through an occupation tax on the out-of-state seller.[81] Unanswered is the question whether a tax levied on the net income from such a sales transaction, rather than on the occupation of selling, could escape commerce clause condemnation.

With the great expansion of ways of merchandising vastly different from those when the Court developed many of its ideas of due process, perhaps there should be a revamping of the notion of what constitutes sufficient "nexus" to satisfy due process, as well as what the commerce clause will permit by way of state taxation. Should not the exploitation of a state's markets for the capture of profits be enough for that state to demand something in return, thus satisfying the requisites of the due process clause? Several hundred travelling salesmen, no matter how avidly they hawk their wares, are not nearly as effective a "nexus" for an exploitation or invasion of a consumer market as a Dinah Shore or a Pat Boone as they croon their sponsor's products into the hands of thousands of purchasers on interstate television and radio. Is the state of market to be denied a tax from either the out-of-state seller or the broadcasting company because the contacts of such out-of-state sellers and broadcasters are ethereal only?[82] Or, should a well known milk company be permitted to milk the consumer market with the sonorous singing of ballads by hillfolk and western singers without paying its tithe to the state of market on the ground that the interstate radio and television milking process is too ethereal?

C. New Congressional Limitations on Net Income Taxes

Regardless of whether the *Northwestern-Stockham* decision represents the "breaking of new ground," as Mr. Justice Frankfurter's dissent says,[83] or whether it is merely a reiteration of previously well-

81. Norton Co. v. Dep't of Revenue, 340 U.S. 534 (1951).

82. Newspaper and radio advertising, the mailing of circulars and deliveries of purchases into the taxing state were held, by a 5 to 4 decision, to be insufficient nexus to satisfy due process requirements when the taxing state sought to make an out-of-state seller collect its use tax, in Miller Bros. v. Maryland, 347 U.S. 340 (1954). For adverse comment by this writer, see Hartman, *Sales Taxation in Interstate Commerce,* 9 VAND. L. REV. 138, 173 (1956).

83. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 470 (1959).

settled principles, as was claimed by the majority, the decision touched off an uproar.

Representatives of business voiced their consternation to Congress over the matter, asking Congress to curtail the sweep of the *Northwestern-Stockham* decision, as well as those cases that followed it, especially the *Brown-Forman* situation where the extra-state seller had no office in the taxing state.[84] In response to this pressure, somewhat extensive hearings were held by the Senate Select Committee on Small Business and the Senate Committee on Finance, as well as hearings by the Judiciary Committee of the House of Representatives. At these hearings the fears and apprehensions of businesses—both large and small—rang like an anvil chorus, with only a pianissimo refrain from the tax collectors counselling congressional caution.[85] Not only were multistate businesses apprehensive over increased taxation by additional states, but also over the inescapable fact that they would incur substantial expenditures in complying with the diverse tax laws of almost every state in which they made a sale or to which they shipped goods. This would require the maintenance of records for each jurisdiction, requiring large increases in bookkeeping and accounting, as well as the retention of legal counsel and accountants who are familiar with the tax practices of each jurisdiction. For the large corporations all of this may perhaps

84. ET & WNC Transp. Co. v. Currie, 248 N.C. 560, 104 S.E.2d 403, *aff'd per curiam,* 359 U.S. 28 (1959), discussed in connection with note 78 *supra;* Brown-Forman Distillers Corp. v. Collector of Revenue, 234 La. 651, 101 So. 2d 70 (1958), *appeal dismissed and cert. den.* 359 U.S. 28 (1959), discussed in connection with note 79 *supra.* International Shoe Co. v. Fontenot, 236 La. 279, 197 So. 2d 640, *cert. den.,* 359 U.S. 984 (1959), discussed in connection with note 80 *supra.*

85. See Report of the Select Committee on Small Business United States Senate, Sparkman, *The Problems Faced by Small Business in Complying with Multi-State Taxation of Income Derived from Interstate Commerce,* H.R. REP. No. 453, 86th Cong., 1st Sess. (1959); *Hearing before the Select Committee on Small Business United States Senate,* "State Taxation on Interstate Commerce," 86th Cong., 1st Sess., parts 1, 2 & 3 (1959); Report of Committee on Finance United States Senate, Byrd, *State Taxation of Income Derived from Interstate Commerce,* S. REP. No. 658 (1959); *Hearings before the Committee on Finance United States Senate,* "State Taxation of Interstate Commerce," 86th Cong., 1st Sess. (1959); and Report from the Committee on the Judiciary House of Representatives, Willis, *State Taxation of Income Derived from Interstate Commerce,* H.R. REP. No. 936, 86th Cong., 1st Sess. (1959). Interspersed throughout these hearings and the reports will be found expressions of the various apprehensions of business men over these decisions. A few voices were raised in support of the taxing authorities. See, *e.g.,* Statement of Fred L. Cox, Georgia Department of Revenue, *Hearings before the Senate Committee on Small Business United States Senate,* 86th Cong., 1st Sess., pt. 1 at 34 (1959), and at *Hearings before the Committee on Finance United States Senate,* "State Taxation of Interstate Commerce," 86th Cong., 1st Sess. at 206 (1959); Statement of James E. Luckett, Commissioner of Revenue of Kentucky, at *Hearings before the Select Committee on Small Business United States Senate,* "State Taxation of Interstate Commerce," 86th Cong., 1st Sess. pt. 1 at 26 (1959); Statement of Robert L. Roland, Collector of Revenue State of Louisiana, *Hearings before the Committee on Finance United States Senate,* 86th Cong., 1st Sess. at 223 (1959).

be just another chore for their staff, but the small and medium sized businesses felt that they could be seriously hampered with these additional hobbles. Such increases in overhead charges in some instances likely would make it uneconomical for a small business to sell at all in areas where volume is small. Thus, there were forebodings that businesses, particularly small and medium sized, might be hesitant to develop new markets in some states by extending their solicitation activities to such states, or there might be a withdrawal of such activities from some existing markets in other states, if solicitations continued to give a taxable grip. The danger of liability for back taxes in states where a business had made some sales but where it had never filed returns furnished additional grist for the hearing mills.

At these hearings business men asked Congress to remove what they regarded as a tapestry of uncertainty and confusion and to establish clear guide lines as to the amount of activity in which they could engage without becoming liable for state taxes. Among other things, Congress was asked to enact a law which would ban state income taxes on businesses whose only activity in a particular state was solicitation of orders.

Congress was galvanized into action. The upshot of the whole matter was the passage by Congress of Public Law 86-272, which was signed into law by the President on September 14, 1959.[86] The gist of this new law is to curtail the *Northwestern-Stockham* decision by permitting a person or company to go or to send a representative into another state to solicit orders for the sale of tangible personal property without paying a state or local *net* income tax to the state of solicitation. For the purposes of this congressional prohibition, the term "net income tax" means any tax imposed on, or measured by, net income. By what is perhaps an over-simplification, this congressional enactment divides businesses between sales and services for tax purposes. Congress has exempted from state and local net income taxes only where an out-of-state seller is engaged in the sale of tangible personal property, but has not granted an exemption from taxation where the income is received from services.[87] Moreover, Congress has not immunized from taxation the income derived from the sale of tangible personal property, unless the *only* contact of the seller with the taxing state is simply the solicitation of the order for the sale of that property by the seller or his representative. Before the extra-state seller can come within the pale of congressional protection against the levy of a net income tax by the customer's state, the order solicited must be

86. 73 Stat. 555 (Pub. L. No. 86-272), *United States Code Congressional And Administrative News* at 3609 (No. 16, 86th Cong., 1st Sess. 1959). For a detailed analysis of this statute, along with the decisional law leading up to it, see 20 CCH STATE TAX REV. No. 35 (Sept. 3, 1959).
87. 73 Stat. 555 (Pub. L. No. 86-272), tit. I, § 101 (1959).

sent outside the state for acceptance or rejection. Still another requisite for admission to this privileged sanctuary of immunity from the net income tax is that the orders must be filled by shipment or delivery from a point outside the state. There is one exception that should be noted here. An out-of-state seller can make sales through an independent contractor and still retain freedom from net income taxes by the customer's state.[88] The independent contractor can maintain its own offices within the customer's state and accept orders there without exposing the out-of-state seller to the tax.

While the act permits the independent contractor to maintain offices solely for the purpose of making sales or soliciting orders for sales of tangible personal property belonging to the out-of-state seller, it is silent with respect to the storage of seller's goods by the independent contractor. There may, therefore, arise questions whether such storage will destory the tax immunity which Congress has accorded the seller. Moreover, questions almost certainly will arise as to whether the particular in-state dealer actually is an independent contractor or simply a "dummy" set up to evade tax consequences on the part of the extra-state seller.

Since a taxpayer providing a *service* has not received shelter from the net income tax, the *Currie*[89] case, which upheld a net income tax assessed against a motor carrier engaged in interstate transportation, apparently is still a precedent in the field of income taxes on transportation companies, because solicitation of freight and passenger business would not fall within the purview of the tax immunity given by Congress. Apparently, therefore, there would be no tax relief in this new law from an otherwise valid tax on net income for trucking companies, taxicabs, railroads, pipelines, newspapers, radio and television stations, telephone and telegraph companies, water transportation and insurance.[90]

One of the pivotal points in litigation that almost certainly will arise under this new law, then, will be the determination of whether the item sold is tangible personal property. The law itself makes no attempt to define this term. There will, of course, arise borderline cases. What about fabrication and installation, when will they be regarded as tangible personal property? Moreover, by whose law will the courts

88. *Ibid.*
89. ET & WNC Transp. Co. v. Currie, 248 N.C. 560, 104 S.E.2d 403, *aff'd per curiam*, 359 U.S. 28 (1959), discussed in connection with note 78 *supra*.
90. This new act has been criticized because it does not offer a solution regarding most of these businesses. See the Report from the Committee on Finance United States Senate, Byrd, *State Taxation of Income Derived from Interstate Commerce* (Minority views), S. REP. 658 at 10 (1959). The states, of course, have been given the power to tax and regulate interstate insurance operations by the McCarron Act, 59 Stat. 34 (1945), 15 U.S.C. 1012(a) (1958). That act was sustained, over a commerce clause attack, in Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946).

determine whether the property sold is tangible personal property? Will it characterize as a matter of federal law the nature of the property involved or will it treat this as a matter to be settled by the varying laws of the different states?

Conceivably, there may be some question whether the congressional enactment actually abrogates the precise holdings of *Northwestern-Stockham.* To be sure, the act gives tax immunity where the out-of-state seller engages only in the solicitation of orders for the sale of goods; but does that immunity also extend to cases where that seller only solicits from its own offices established within the taxing state, which was the *Northwestern-Stockham* situation? One circumstance that would seem to point to the conclusion that immunity is given even where the solicitation is from seller's offices in the taxing state is the fact that, as we have seen, the thrust of much of the congressional hearings leading to the passage of this statute was aimed expressly at the elimination of the effect of this case, as well as at other cases, including *Brown-Forman* where the seller maintained no offices in the taxing state.

Since the congressional curb on the power of the states to levy net income taxes is limited to the situation where the extra-state seller engages "only" in the business activities of "solicitation" of orders within the state, there necessarily will arise questions concerning the meaning of "solicitation only." Is the tax-exempt activity of "solicitation only" limited to the taking of orders, or can the seller engage in aggressive and extensive sales promotional activities within the state and still escape the income tax on the ground that he is engaging in "solicitation only"?

The mentioning of some of the more obvious questions that almost certainly will arise under this congressional enactment, while in no sense intended to be exhaustive, should indicate the existence of a number of troublesome problems with which the courts will be required to wrestle as they apply this statute.

The provisions of this congressional enactment exempting from taxation have no application to the imposition of a net income tax by any state or political subdivision thereof where the seller is a domestic corporation of the taxing state, or an individual domiciled in, or a resident of, the taxing state.[91]

This new congressional enactnent contains two additional provisions that should be noted here. It has a retroactive application to calm the fears over possible back taxes where business had been transacted but no tax returns had been filed. The act expressly provides that if the states or any political subdivisions have not assessed income taxes which are prohibited by this law after the date of enact-

91. 73 Stat. 555 (Pub. L. 86-272), § 101(b) (1959).

ment, then the states cannot go back and assess taxes for income from sales made in the past.[92] Moreover, the House Judiciary Committee and the Senate Finance Committee are required to make full and complete studies of state taxation of income derived from interstate commerce, for the purpose of proposing "legislation providing uniform standards to be observed by the states in imposing income taxes on income" from interstate commerce.[93] The Committees are required by the Act to report to their respective Houses the results of such studies not later than July 1, 1962.[94]

Congressional curbs on state power to tax net income were vigorously criticized by the minority report of the Senate Committee on Finance.[95] Such action by Congress was thought to be an invasion of the powers of the states, which they now have for raising necessary revenue, without which they must become powerless wards of the national government. Likewise, such restrictions were thought to discriminate against many small local businesses, which must compete with the large multistate operators who can escape a large share of state income taxes under these congressional limitations by conducting many of their interstate operations by solicitation only. The minority also felt that many small business enterprises will suffer, because local warehousemen, for example, will certainly lose much of their business as multistate operators concentrate their warehouse activities in order to escape taxes of as many states as possible. Also, it was felt that the congressional proposals to limit state taxing power failed to attack the problem positively. The congressional curbs were thought to be nothing more than a protective measure for a few manufacturing states and a few companies which do a multistate business of a specified type. The minority felt that what is needed is proper allocation of taxes among the various states, not a prohibition against certain state taxes.

At a later place in this article, there will be a discussion of the ability of Congress to displace state taxing power in an area where that power already exists, as well as the ability of Congress to consent to state taxes that otherwise would be prohibited by the commerce clause.[96]

92. 73 Stat. 556 (Pub. L. 86-272) tit. I, § 102 (1959).
93. 73 Stat. 556 (Pub. L. 86-272) tit. II, § 201 (1959).
94. 73 Stat. 556 (Pub. L. 86-272) tit. II, § 202 (1959).
95. Report from the Committee on Finance United States Senate, Byrd, *State Taxation of Income Derived from Interstate Commerce* (Minority views), S. REP. 658 at 10-12 (1959). The minority report was given by Senator Albert Gore and Senator Eugene J. McCarthy. The same report, at 14, also contains the individual views of Senator Russell B. Long, who also opposed the bill.
96. See material discussed under the caption "The Power of Congress To Control State Taxation" beginning at note 353 *infra* and going through note 363 *infra*.

III. *Determining The Net Income From A Multistate Business Attributable To A Taxing State*

When a corporation engages in a multistate business, there inevitably arises the question of how to determine that portion of the total amount of income of the business which may be attributed to a particular state for tax purposes. In the first part of this article, attempt was made to mark out some of the lines of demarcation between permissible and nonpermissible net income taxes insofar as the commerce and due process clauses were concerned. Some further application of those constitutional limitations must necessarily be noticed as we discuss the various techniques used to assign to a particular state its portion of corporate net income. However, discussion of constitutional questions will be minimal. Rather, our primary concern will now be with an analysis of the tax structure of all of the states in order to get a clearer picture of the various facets of taxation of corporate net income, including the main problems that are present. In so doing, we will survey and analyze the statutes and regulations of all states utilizing a corporation net income tax or a corporate franchise tax measured by net income. These provisions have here been reorganized into certain broad classifications, with citations to the pertinent statutory provisions. Classification of the statutes and regulations is made upon the basis of three aspects: (1) the nature and structure of the tax; (2) ascertaining the corporations subject to the tax; (3) methods of assigning income to the states for tax purposes. At the conclusion of this article, the most essential features of the various statutory provisions will be noted in an appendix of two tables.

A. Nature and Structure of the Tax

1. Subject and Measure.—Thirty-four states and the District of Columbia have provisions imposing taxes either upon or measured by the net income of both domestic and foreign corporations doing business within the state.

The statutes of twenty-two of these states impose the tax directly upon the net income attributable to the state, thus constituting net income as both the subject and measure of the tax.[97] Seven states and

97. *Alabama*—ALA. CODE ANN. tit. 51, § 400 (1940); *Alaska*—ALASKA COMP. LAWS ANN. § 5(a) (1949); *Arizona*—ARIZ. CODE ANN. § 43-102 (1956); *Arkansas*—ARK. STAT. § 84-2204 (1947); *Colorado*—COLO. REV. STAT. ANN. § 138-1-3 (1953); *Delaware*—DEL. CODE ANN. tit. 30, § 1902 (Supp. 1958); *Georgia*—GA. CODE ANN. § 92-3102 (1937); *Idaho*—IDAHO CODE ANN. § 63-3001 (Supp. 1959); *Iowa*—IOWA CODE ANN. § 422.33 (1949); *Kansas*—KAN. GEN. STAT. ANN. § 79-3203 (Supp. 1957); *Kentucky*—KY. REV. STAT. ANN. § 141.040 (Supp. 1959); *Louisiana*—LA. REV. STAT. ANN. § 47:31(3) (1952); *Maryland*—MD. ANN. CODE art. 81, § 288(b) (1957); *Missouri*—MO. ANN. STAT. § 143.030 (1949); *New Mexico*—N.M. STAT. ANN. § 72-15-1 (1953); *North Carolina*—N.C. GEN. STAT. § 105-134 (1958); *North Dakota*—N.D. REV. CODE § 57-3830 (1943); *Oklahoma*—OKLA. STAT. ANN. tit. 68, § 876 (1954); *Rhode Island*—R.I. GEN. LAWS ANN.

the District of Columbia denominate their provisions as franchise, excise or privilege taxes and utilize net income as the measure, not the subject, of the tax.[98] Four states supplement their franchise tax with a direct tax upon net income.[99] One state, Montana, imposes an excise tax in the form of a "license fee" for carrying on business within the state.[100] We have already seen that these differences in statutory draftsmanship may lead to a different result when a net income tax is challenged on commerce clause grounds.[101] The particular type of tax adopted by each state is set forth in tabular form as an Appendix, Table II, at the end of the article, and the amount of revenue derived by each state is contained in Table I in the Appendix.

2. *Definitions of Net Income.*—The phrase "net income" is a common element in the provisions of all the taxing statutes, as either the subject or measure of the tax. Thus, it becomes essential to know the various statutory definitions ascribed to this phrase.

Twenty-four states and the District of Columbia define net income as "gross income less allowable deductions."[102] Under such a provision, the problem of determining what is net income resolves itself into the rather simple mechanical determinations of what is "gross income" and what are "allowable deductions." Further treatment of this will be given below.

§ 44-11-2 (Supp. 1958); *South Carolina*—S.C. CODE § 65-222.1 (Supp. 1958); *Virginia*—VA. CODE ANN. § 58-128 (1959); *Wisconsin*—WIS. STAT. ANN. § 71.01 (1957).

98. *Connecticut*—CONN. GEN. STAT. § 12-214 (Supp. 1958); *District of Columbia*—D.C. CODE ANN. § 47-1571 (1951); *Massachusetts*—MASS. ANN. LAWS c.63, § 32-39 (Supp. 1958); *New Jersey*—N.J. STAT. ANN. § 54-10A-2 (Supp. 1958); *New York*—N.Y. TAX LAW § 209 (1944); *Tennessee*—TENN. CODE ANN. § 67-2701 (Supp. 1958); *Utah*—UTAH CODE ANN. § 59-13-3 (Supp. 1959); *Vermont*—VT. STAT. ANN. § 32-5902 (1959).

99. *California*—CALIF. REV. AND TAX CODE §§ 23151, 23501 (1958); *Minnesota*—MINN. STAT. ANN. § 290.02 (1945); *Oregon*—ORE. REV. STAT. §§ 317.010(8), 318.020 (1957); *Pennsylvania*—PA. STAT. ANN. tit. 72, § 3420 (a-c) (Supp. 1958).

100. MONT. REV. CODE ANN. § 84-1501 (Supp. 1958).

101. See discussion of *Northwestern Cement* case in text supported by note 56 through note 61 *supra*.

102. *Alabama*—ALA. CODE ANN. tit. 51, § 400 (1940); *Arizona*—ARIZ. CODE ANN. § 43-111 (1956); *Arkansas*—ARK. STAT. § 84-2007 (1947); *California*—CALIF. REV. AND TAX CODE § 24341 (1958); *Colorado*—COLO. REV. STAT. ANN. § 138-1-17 (1953); *Connecticut*—CONN. GEN. STAT. § 12-213 (Supp. 1958); *District of Columbia*—D.C. CODE ANN. § 47-1557 (1951); *Georgia*—GA. CODE ANN. § 92-3108 (1937); *Kansas*—KAN. GEN. STAT. ANN. § 79-3209 (1949); *Kentucky*—KY. REV. STAT. ANN. § 141.010(11) (1955); *Louisiana*—LA. REV. STAT. ANN. § 47:41 (1952); *Maryland*—MD. ANN. CODE art. 81, § 285 (1957); *Massachusetts*—MASS. ANN. LAWS c.63, § 30(5) (1953); *Minnesota*—MINN. STAT. ANN. § 290.01(19) (1945); *Missouri*—MO. ANN. STAT. § 143 (1949); *Montana*—MONT. REV. CODE ANN. § 84-1502 (1947); *New Mexico*—N.M. STAT. ANN. § 72-15-6 (1953); *North Carolina*—N.C. GEN. STAT. § 105-140 (1958); *North Dakota*—N.D. REV. CODE § 57-3821 (1943); *Oklahoma*—OKLA. STAT. ANN. tit. 68, § 877 (1954); *Oregon*—ORE. REV. STAT. § 317.155 (1957); *South Carolina*—S.C. CODE § 65-255 (1952); *Utah*—UTAH CODE ANN. § 59-13-6 (1953); *Virginia*—VA. CODE ANN. § 58-79 (1959); *Wisconsin*—WIS. STAT. ANN. § 71.02(1) (1957).

Seven states declare that net income shall be computed in the same manner as it is for the federal corporate income tax, with certain modifications.[103] That is, the net income figure arrived at for purposes of the federal income tax will be considered as the state net income figure, with certain adjustments being made for the items of: net operating losses, dividends, interest income, and gains and losses from the sale of intangibles not held for sale.

Three states, Tennessee, Alaska and New Jersey, provide no statutory definition of net income. Tennessee does indicate, however, that good corporate accounting techniques will be recognized in making this determination.[104]

(a) Definitions of Gross Income.—As noted above, most statutes define net income in terms of gross income less certain statutory deductions. It becomes necessary, therefore, to determine the statutory meaning of gross income.

Twenty-one states and the District of Columbia define gross income very broadly to include "income derived from any source whatever."[105] Connecticut has a unique provision relating to gross income which is worth noting:

> [G]ross income as defined in the federal corporation net income tax law in force . . . and, in addition, means any interest received or interest paid by the taxpayer or losses of other calendar or fiscal years, retroactive to include all calendar or fiscal years beginning after January 1, 1935, incurred by the taxpayer which are excluded from gross income for purposes of assessing the federal corporation net income tax.[106]

Of course, those states relying upon the federal tax provisions for

103. *Delaware*—DEL. CODE ANN. tit. 30, § 1903 (Supp. 1958); *Idaho*—IDAHO CODE ANN. § 63-3022 (Supp. 1959); *Iowa*—IOWA CODE ANN. § 422.35 (Supp. 1958); *New York*—N.Y. TAX LAW § 208 (1944); *Pennsylvania*—PA. STAT. ANN. tit. 72, § 3420(a) (Supp. 1958); *Rhode Island*—R.I. GEN. LAWS ANN. § 44-11-11 (1956); *Vermont*—VT. STAT. ANN. § 32-5901(3) (1959). Of course, if the corporation is a foreign one, only that portion of net income attributable to the taxing state is included under such provisions.

104. Tenn. Franchise & Excise Tax Reg. rule 25 (1956).

105. *Alabama*—ALA. CODE ANN. tit. 51, § 401 (1940); *Arizona*—ARIZ. CODE ANN. § 43-112 (1956); *Arkansas*—ARK. STAT. § 84-2008 (1947); *California*—CALIF. REV. AND TAX CODE § 24271 (1958); *Colorado*—COLO. REV. STAT. ANN. § 138-1-9 (1953); *District of Columbia*—D.C. CODE ANN. § 47-1557(a) (1951); *Georgia*—GA. CODE ANN. § 92-3107(a) (1937); *Kansas*—KAN. GEN. STAT. ANN. § 79-3205 (Supp. 1957); *Louisiana*—LA. REV. STAT. ANN. § 47:42A (1952); *Maryland*—MD. ANN. CODE art. 81, § 280 (Supp. 1958); *Minnesota*—MINN. STAT. ANN. § 290.01 (1945); *Missouri*—MO. ANN. STAT. § 143.100 (Supp. 1958); *New Mexico*—N.M. STAT. ANN. § 72-15-4 (1953); *North Carolina*—N.C. GEN. STAT. § 105-141 (1958); *North Dakota*—N.D. REV. CODE § 57-3817 (Supp. 1957); *Oregon*—ORE. REV. STAT. § 317.105 (1957); *Rhode Island*—R.I. GEN. LAWS ANN. § 44-11-11 (1956); *South Carolina*—S.C. CODE § 65-251 (1952); *Utah*—UTAH CODE ANN. § 59-13-5(1) (1953); *Virginia*—VA. CODE ANN. § 58-78(a) (1959); *Wisconsin*—WIS. STAT. ANN. § 71.03(1) (1957); *Oklahoma*—OKLA. STAT. ANN. tit. 68, § 878 (1954).

106. CONN. GEN. STAT. § 12-213 (Supp. 1958).

the meaning of net income need no separate definition of gross income.[107]

Though gross income is generally defined in a broadly-inclusive fashion, all but ten states[108] provide that certain types of income shall be exempt from inclusion therein.[109] Although by no means uniform, the more common provisions exempt the following classes of income: various types of insurance, annuity and endowment proceeds; property received by a gift, demise or bequest; and interest on obligations of the state or United States government or its political subdivisions. This list is not exhaustive and reference should be made to the footnoted provisions if specific information is desired.

(b) Allowable Deductions.—As we saw, "net income" is often defined as "gross income less allowable deductions." Having considered the more common meanings of gross income, it now becomes necessary to ascertain the allowable statutory deductions in order to complete the definition of "net income" for tax purposes.

Twenty-eight states and the District of Columbia have provisions enumerating various deductions.[110] Those typically allowed are, in general, coincident with those permitted by the federal tax provisions. These deductions include such items as ordinary and necessary business expenses; interest paid; bad debts; allowances for depreciation, depletion and obsolescence; charitable contributions up to a certain percentage of net income (between 5% and 15%); and uninsured losses.

Six states—Delaware, Idaho, Iowa, New Jersey, Tennessee and Vermont—have no provision enumerating allowable deductions.

3. Tax Rates Imposed.—Once the taxable "net income," or tax base,

107. So, in Alaska; Delaware; Idaho; Iowa; Kentucky; Massachusetts; Montana; New Jersey; New York; Pennsylvania; Tennessee; and Vermont.

108. Alaska, Connecticut, Delaware, Idaho, Iowa, Kentucky, Massachusetts, Pennsylvania, Tennessee and Vermont.

109. *Alabama*—ALA. CODE ANN. tit. 51, § 384 (1940); *Arizona*—ARIZ. CODE ANN. § 43-112 (1956); *Arkansas*—ARK. STAT. § 84-2007 (1947); *California*—CALIF. REV. AND TAX CODE § 24301-310 (1958); *Colorado*—COLO. REV. STAT. ANN. § 138-1-11 (1953); *District of Columbia*—D.C. CODE ANN. § 47-1557(a) (1951); *Georgia*—GA. CODE ANN. § 92-3107(b) (1937); *Kansas*—KAN. GEN. STAT. ANN. § 79-3205(b) (Supp. 1957); *Louisiana*—LA. REV. STAT. ANN. § 47:42 (1952); *Maryland*—MD. ANN. CODE art. 81, § 280 (Supp. 1958); *Minnesota*—MINN. STAT. ANN. § 290.08 (1945); *Missouri*—MO. ANN. STAT. § 143.150 (1949); *Montana*—MONT. REV. CODES ANN. § 84-1501 (Supp. 1958); *New Jersey*—N.J. STAT. ANN. § 54-10A-4 (Supp. 1958); *New Mexico*—N.M. STAT. ANN. § 72-15-5 (1953); *New York*—N.Y. TAX LAW § 208,9(a) (1944); *North Carolina*—N.C. GEN. STAT. § 105-141 (1958); *North Dakota*—N.D. REV. CODE § 57-3818 (1943); *Oklahoma*—OKLA. STAT. ANN. tit. 68, § 678 (Supp. 1958); *Oregon*—ORE. REV. STAT. § 317.110 (1957); *Rhode Island*—R.I. GEN. LAWS ANN. § 44-11-12 (1956); *South Carolina*—S.C. CODE § 65-253 (1952); *Utah*—UTAH CODE ANN. § 59-13-5(2) (1953); *Virginia*—VA. CODE ANN. § 58-78(b) (Supp. 1959); *Wisconsin*—WIS. STAT. ANN. § 71.03(2) (1957).

110. *Alabama*—ALA. CODE ANN. tit. 51, § 402 (1940); *Alaska*—ALASKA COMP. LAWS ANN. § 5(A) (1949); *Arizona*—ARIZ. CODE ANN. § 42-123 (1956); *Arkansas*—ARK. STAT. § 84-2016 (1947); *California*—CALIF. REV. AND TAX CODE §§

has been determined there remains generally only the mechanical function of applying the tax rate thereto in order to determine the amount of tax payable to the state.

There is great diversity among the state provisions as to tax rates. In general, however, the rate provisions are of two types: (1) those imposing a flat percentage upon allocable net income; (2) those utilizing a progressive rate which increases commensurately with net income. Twenty-four states and the District of Columbia employ the former method. Among these, the rate varies from 2% in Iowa, Missouri and New Mexico to 9½% in Idaho.[111] Five states adopt the progressive rate structure and variations within these are from as low as 1% to as high as 8%.[112] The remaining five states have more in-

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24343-24601 (1958); *Colorado*—Colo. Rev. Stat. Ann. § 138-1-12 (1953); *Connecticut*—Conn. Gen. Stat. § 12-217 (Supp. 1958); *District of Columbia*—D.C. Code Ann. § 47-1557(b) (1951); *Georgia*—Ga. Code Ann. § 92-3109 (1937); *Kansas*—Kan. Gen. Stat. Ann. § 79-3206 (Supp. 1957); *Kentucky*—Ky. Rev. Stat. Ann. § 141.010 (Supp. 1959); *Louisiana*—La. Rev. Stat. Ann. § 47:54-47:78 (1952); *Maryland*—Md. Ann. Code art. 81, § 281 (1957); *Massachusetts*—Mass. Ann. Laws c.63, § 30(5) (1953); *Minnesota*—Minn. Stat. Ann. § 290.09 (1945); *Missouri*—Mo. Ann. Stat. § 143.160 (1949); *Montana*—Mont. Rev. Codes Ann. § 84-1502 (Supp. 1958); *New Mexico*—N.M. Stat. Ann. § 72-15-7 (1953); *New York*—N.Y. Tax Law § 208,9(b) (1944); *North Carolina*—N.C. Gen. Stat. § 105-147 (1958); *North Dakota*—N.D. Rev. Code § 57-3822 (1943); *Oklahoma*—Okla. Stat. Ann. tit. 68, § 880 (1954); *Oregon*—Ore. Rev. Stat. § 317.255 (1957); *Pennsylvania*—Pa. Stat. Ann. tit. 72, § 3420 (Supp. 1958); *Rhode Island*—R.I. Gen. Laws Ann. § 44-11-11 (1956); *South Carolina*—S.C. Code § 65-259 (1952); *Utah*—Utah Code Ann. § 59-13-7 (1953); *Virginia*—Va. Code Ann. § 58-81 (1959); *Wisconsin*—Wis. Stat. Ann. § 71.04 (1957).

111. *Iowa*—Iowa Code Ann. § 422.33 (1949); *Missouri*—Mo. Ann. Stat. § 143.030 (1949); *New Mexico*—N.M. Stat. Ann. § 72-15-31 (1953). Three per cent of net income: *Alabama*—Ala. Code Ann. tit. 51, § 398 (1940); *Connecticut*—Conn. Gen. Stat. § 12-214 (Supp. 1958); *Kansas*—Kan. Gen. Stat. Ann. § 79-3203(b) (Supp. 1957). 3.75% of net income: *Tennessee*—Tenn. Code Ann. § 67-2701 (Supp. 1958). Four per cent of net income: *California*—Calif. Rev. and Tax Code § 23151, 25101 (1958); *Georgia*—Ga. Code Ann. § 92-3102 (Supp. 1958); *Louisiana*—La. Rev. Stat. Ann. § 47:32(c) (1952); *Oklahoma*—Okla. Stat. Ann. tit. 68, § 876 (1954). Five per cent of net income: *Colorado*—Colo. Rev. Stat. Ann. § 138-1-3 (1953); *Delaware*—Del. Code Ann. tit. 30, § 1902 (Supp. 1958); *District of Columbia*—D.C. Code Ann. § 47-1571(a) (1951); *Maryland*—Md. Ann. Code art. 81, § 288 (Supp. 1958); *Montana*—Mont. Rev. Codes Ann. § 84-1501 (Supp. 1958); *Pennsylvania*—Pa. Stat. Ann. tit. 72, § 3420(b) (Supp. 1958); *South Carolina*—S.C. Code § 65-222.1 (Supp. 1958); *Vermont*—Vt. Stat. Ann. § 32-5902 (1959); *Virginia*—Va. Code Ann. § 58-130 (1959). Six per cent of net income: *Minnesota*—Minn. Stat. Ann. § 290.06(1) (Supp. 1958); *North Carolina*—N.C. Gen. Stat. § 105-134 (1958); *Oregon*—Ore. Rev. Stat. § 318.020 (1957). Nine per cent of net income: *Alaska*—Alaska Comp. Laws Ann. § 5(A) (1949). Nine and one-half per cent of net income: *Idaho*—Idaho Code Ann. § 63-3025 (Supp. 1959).

112. One per cent on the first $1000 increasing to five per cent on amounts over $6000: *Arizona*—Ariz. Code Ann. § 43-102 (1956); one per cent on the first $3000 increasing to five per cent on the excess of $25,000: *Arkansas*—Ark. Stat. § 84-2004 (1947); five per cent on the first $25,000 increasing to seven per cent on amounts in excess of $25,000: *Kentucky*—Ky. Rev. Stat. Ann. § 141.040 (Supp. 1959); three per cent on the first $3000, four per cent on $3000 to $8000, five per cent on $8000 to $15,000 and six per cent on all above $15,000: *North Dakota*—N.D. Rev. Code § 57-3830 (1943); two per cent

volved rate provisions which do not fit within either of the above classifications.[113] Generally, they apply rates which vary in accordance with the particular type of corporation being taxed and the particular business situation or nature of income. Table I, which is found in the Appendix at the end of this article shows the divergent rates found among the states.

Only ten of the taxing states have provisions allowing credits against the tax payable. The provisions of these few states are outlined in the footnotes.[114]

B. Corporations Subject to the Tax

Having determined generally the basic tax structure of the various taxing states, we now turn to the question of what corporations are made subject to the tax. In general, the statutes are broadly worded to include within the scope of taxing power *every* corporation domi-

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on the first $1000 increasing to seven per cent on the excess of $6000: *Wisconsin*—WIS. STAT. ANN. § 71.09(2) (1957).

113. *Massachusetts*—MASS. ANN. LAWS c.63, § 38-39 (Supp. 1958); *New Jersey*—N.J. STAT. ANN. § 54-10A-5 (Supp. 1958); *New York*—N.Y. TAX LAW § 210 (1944); *Rhode Island*—R.I. GEN. LAWS ANN. § 44-11-2 (Supp. 1958); *Utah*—UTAH CODE ANN. § 59-13-3 (Supp. 1959).

114. *Alabama* allows credit for interest on obligations of the United States and bonds of the war finance corporation, included in gross income; dividends from banks subject to the state excise tax and as to domestic corporations; a credit for taxes paid on income from sources without the state. ALA. CODE ANN. tit. 51, § 405 (1940). *Colorado* allows a credit against the tax equal to fifteen per cent of the net tax and allows domestic corporations a credit for taxes paid another state because of dividends received from a foreign corporation which it owns. COLO. REV. STAT. ANN. §§ 138-1-3, 138-1-41 (1953). *Louisiana* allows domestic corporations credit for taxes paid to another state. LA. REV. STAT. ANN. §§ 47:32, 47:33 (Supp. 1958). *Maryland* allows domestic corporations a credit for amounts in excess of $25 payable as franchise tax during the year. MD. ANN. CODE art. 81, § 292 (1957). In *Minnesota* each corporation gets a credit of $500 and there is also allowed a credit of eighty-five per cent of dividends received by one corporation from another when such stock does not constitute stock in trade of the taxpayer. MINN. STAT. ANN. § 290.21 (Supp. 1958). In *Missouri* credit is allowed a stockholder of any corporation or joint stock company in an amount obtained by multiplying the corporate income tax rate by the amount of dividends or net earnings of any such corporation or company upon which the income tax has been paid for the last preceding taxable period. MO. ANN. STAT. § 143.180 (1949). *Oklahoma* gives credit for dividends received from any corporation, provided five per cent or more of the entire gross income of such corporation was attributable to Oklahoma and subject to tax. OKLA. STAT. ANN. tit. 68, § 882 (1954). In *Oregon* an offset against the tax is allowed mercantile, manufacturing and business corporations for personal property taxes, and is limited to the lesser of the tax paid on work in process and finished manufactured goods or one third of the excise tax due. ORE. REV. STAT. § 317.070 (1957). *South Carolina* provides a credit to nonresidents for tax paid in home state to a certain extent, but it is not clear whether "nonresident" also applies to foreign corporations. S.C. CODE § 65-241.1 (Supp. 1958). *Tennessee* allows a credit to state banks for sums paid into the state treasury for use of the State Banking Department and gives insurance companies a credit for gross premiums tax against the excise tax. TENN. CODE ANN. § 67-2703 (1955).

ciled in the state and *every* foreign corporation "doing business" therein.[115]

The meaning of the term "doing business" has been the subject of voluminous litigation, but no extended discussion of that complex subject will be attempted here. It is enough to say that the commerce and due process clause requirements are satisfied even though "doing business" consists only of solicitation of orders.[116]

Georgia has enacted a provision specifically setting forth what is considered "doing business" within the state. It provides:

> Every such corporation shall be deemed to be doing business within this state if it engages within this state in any activities or transactions for the purpose of financial profit or gain, whether or not such corporation qualifies to do business within this state, and whether or not it maintains an office or place of doing business within this state and whether or not any such activity or transaction is connected with interstate or foreign commerce.[117]

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115. *Alabama*—ALA. CODE ANN. tit. 51, § 373 (1940); *Alaska*—ALASKA COMP. LAWS ANN. § 5(a) (1949); *Arizona*—ARIZ. CODE ANN. § 43-102 (1956); *Arkansas*—ARK. STAT. § 84-2003 (1947); *California*—CALIF. REV. AND TAX CODE § 23151 & 23501 (1958); *Colorado*—COLO. REV. STAT. ANN. § 138-1-3 (1953); *Connecticut*—CONN. GEN. STAT. ANN. § 12-214 (Supp. 1958); *Delaware*—DEL. CODE ANN. tit. 30, § 1902 (Supp. 1958); *District of Columbia*—D.C. CODE ANN. § 47-1571(a) (1951); *Georgia*—GA. CODE ANN. § 92-3102 (1937); *Idaho*—IDAHO CODE ANN. § 63-3025 (Supp. 1959); *Iowa*—IOWA CODE ANN. § 422.33 (1949); *Kansas*—KAN. GEN. STAT. ANN. § 79-3203(b) (Supp. 1957); *Kentucky*—KY. REV. STAT. ANN. § 141.040 (Supp. 1959); *Louisiana*—LA. REV. STAT. ANN. § 47:31 (1952); *Maryland*—MD. ANN. CODE art. 81, § 288(e) (1957); *Massachusetts*—MASS. ANN. LAWS c.63, § 32 & 39 (Supp. 1958); *Minnesota*—MINN. STAT. ANN. § 290.02 (1945); *Missouri*—MO. ANN. STAT. § 143.030 (1949); *Montana*—MONT. REV. CODES ANN. § 84-1501 (Supp. 1958); *New Jersey*—N.J. STAT. ANN. § 54-10A-2 (Supp. 1958); *New York*—N.Y. TAX LAW § 209 (1944); *New Mexico*—N.M. STAT. ANN. § 72-15-30 (1953); *North Carolina*—N.C. GEN. STAT. § 105-134 (1958); *North Dakota*—N.D. REV. CODE § 57-3830 (1943); *Oklahoma*—OKLA. STAT. ANN. tit. 68, § 874(d) (1954); *Oregon*—ORE. REV. STAT. § 317.070 (1957); *Pennsylvania*—PA. STAT. ANN. tit. 72, § 3420(b) (Supp. 1958); *Rhode Island*—R.I. GEN. LAWS ANN. § 44-11-2 (Supp. 1958); *South Carolina*—S.C. CODE § 65-222.1 (Supp. 1958); *Tennessee*—TENN. CODE ANN. § 67-2701 (Supp. 1958); *Utah*—UTAH CODE ANN. § 59-13-3 (Supp. 1959); *Vermont*—VT. STAT. ANN. § 32-5902 (1959); *Virginia*—VA. CODE ANN. § 58-128 (1959); *Wisconsin*—WIS. STAT. ANN. § 71.01 & 71.02 (1957).

116. In General Trading Company v. State Tax Comm'n, 322 U. S. 335 (1944), the requirements of both clauses of the Constitution were satisfied, for the purpose of making an extra-state seller serve as a tax collector of a use tax, even though the only connection of the taxing state with the seller was the sending of seller's travelling salesmen into the taxing state. Of course, Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959) held that solicitation from a sales office in the taxing state satisfied commerce and due process clause requirements. That case is discussed, beginning at note 8 *supra*. International Shoe Co. v. Washington, 326 U.S. 310 (1945) held that the requisites of due process were met for the purpose of acquiring judicial jurisdiction over a foreign corporation where process was served on salesmen soliciting business in the forum state. In McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944), solicitation of sales was held not to be a taxable event, where there was no sales office in the taxing state, although it is not clear from the opinion whether the attempted sales tax offended the commerce or the due process clause.

117. GA. CODE ANN. § 92-3113 (Supp. 1958).

One other state, New York, has a provision stating what foreign corporations are *not* considered to be doing business therein.[118] Although the states may tax the income of every corporation domiciled in the state or every foreign corporation doing business there, as would be expected, there are variations among the statutes.[119] However, all states but Alaska exempt *certain* corporations from the tax—generally those engaged in nonprofit activity within the state. Organizations ordinarily exempted include labor, agricultural and horticultural organizations; certain fraternal benefit societies; nonprofit civic and business organizations; nonprofit pleasure and recreation clubs; certain farmer's marketing associations; federal land banks and national farm loan associations; building and loan associations; teacher's retirement funds; and nonprofit cemetery and insurance companies.[120]

C. Methods of Assigning Income for Tax Purposes

Having determined the general stucture of the tax and the corporations subject thereto, there still remains the problem of analyzing the methods employed by the various taxing states to assign to each state that portion of net income of the corporation which may be deemed to be fairly attributable thereto. Such determination is necessary only if

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118. N.Y. TAX LAWS § 209 (1944).

119. *Alabama* subjects those corporations acting in a fiduciary capacity to the tax. ALA. CODE ANN. tit. 51, § 373 (1940). *Arkansas* subjects domestic and foreign public utilities to the corporate tax. ARK. STAT. § 84-2003 (1947). *Idaho* defines corporations subject to the tax as any corporation formed under the laws of any government, any common law trust and any association of whatever kind, other than a partnership. IDAHO CODE ANN. § 63-3006 (Supp. 1959). *Pennsylvania* includes domestic and foreign corporations having capital stock, joint stock associations or limited partnerships. PA. STAT. ANN. tit. 72, § 3420(b) (Supp. 1958).

120. See *Alabama*—ALA. CODE ANN. tit. 51, § 399 (1940); *Arizona*—ARIZ. CODE ANN. § 43-147,149 (1956); *Arkansas*—ARK. STAT. § 84-2006 (1947); *California*—CALIF. REV. AND TAX CODE § 23701 (1958); *Colorado*—COLO. REV. STAT. ANN. § 138-1-8 (1953); *Connecticut*—CONN. GEN. STAT. § 12-214 (Supp. 1958); *Delaware*—DEL. CODE ANN. tit. 30, § 1902(b) (Supp. 1958); *District of Columbia*—D.C. CODE ANN. § 47-1554 (1951); *Georgia*—GA. CODE ANN. § 92-3105 (1937); *Idaho*—IDAHO CODE ANN. § 63-3026 (Supp. 1959); *Iowa*—IOWA CODE ANN. § 422.34 (1949); *Kansas*—KAN. GEN. STAT. ANN. § 79-3204 (1949); *Kentucky*—KY. REV. STAT. ANN. § 141.040 (Supp. 1959); *Louisiana*—LA. REV. STAT. ANN. § 47:121 (1952); *Maryland*—MD. ANN. CODE art. 81, § 288(g) (1957); *Massachusetts*—MASS. ANN. LAWS c.63, § 30 (1953); *Minnesota*—MINN. STAT. ANN. § 290.05 (Supp. 1958); *Missouri*—MO. ANN. STAT. § 143.120 (1949); *Montana*—MONT. REV. CODES ANN. § 84-1501 (Supp. 1958); *New Jersey*—N.J. STAT. ANN. § 54-10A-2 (Supp. 1958); *New Mexico*—N.M. STAT. ANN. § 72-15-30 (1953); *New York*—N.Y. TAX LAW § 209 (1944); *North Carolina*—N.C. GEN. STAT. § 105-138 (1958); *North Dakota*—N.D. REV. CODE § 57-3809 (1943); *Oklahoma*—OKLA. STAT. ANN. tit. 68, § 912 (1954); *Oregon*—ORE. REV. STAT. § 317.080 & 318.040 (1957); *Pennsylvania*—PA. STAT. ANN. tit. 72, § 3420(b) (Supp. 1958); *Rhode Island*—R.I. GEN. LAWS ANN. § 44-11-1(a) (1956); *South Carolina*—S.C. CODE § 65-226 (Supp. 1958); *Tennessee*—TENN. CODE ANN. § 67-2701 (Supp. 1958); *Utah*—UTAH CODE ANN. § 59-13-4 (1953); *Vermont*—VT. STAT. ANN. § 32-5908 (1959); *Virginia*—VA. CODE ANN. § 58-128 (1959); *Wisconsin*—WIS. STAT. ANN. § 71.01 (1957).

the corporation carries on multistate operations and does not restrict its trade or business to the taxing state.

The complete lack of uniformity of allocation and apportionment methods used by the taxing states precludes the statement of a rule of universal application. There are, however, three rather general methods for assigning income to a particular state for tax purposes. They are (1) specific allocation, *i.e.,* the allocation of particular classes of income to a particular state wherein the income is said to have a taxable situs; (2) separate accounting as a method properly reflecting a reasonable attribution; (3) apportionment by means of a statutorily prescribed mathematical formula. Each of these methods will now be examined in some detail.

1. Specific Allocation.—The taxing statutes often require that particular items or classes of income be allocated or assigned in toto to that state wherein the income can be said to have a taxable situs. The allocation may be either on the basis of the recipient of the income or its source.

For anything that the due process or commerce clauses have to say about the matter, a state has power to tax *residents* upon their entire net income, wherever earned.[121] The enjoyment of the privilege of residence in the state and the attendant right to invoke the protection of its laws are said to be inseparable from sharing the cost of government.[122] Similarly, the state is the creator of a domestic corporation and for that privilege it can impose a tax upon its net income wherever earned.[123] It is obvious that this can lead to the inequity of "double taxation" when a tax is also imposed upon the same income by the state wherein the income producing property is located.[124] Also, a foreign corporation can acquire a "commercial domicile," separate and apart from the state of incorporation, for tax purposes.[125] Again, multiple taxation could result since the state of incorporation could also constitutionally reach the same income.

121. New York *ex rel.* Cohn v. Graves, 300 U.S. 308 (1937) (rent from extra-state land); Lawrence v. State Tax Comm'n, 286 U.S. 276 (1932) (compensation for personal services rendered outside taxing state); Maguire v. Trefry, 253 U.S. 12 (1920) (net income from bonds held in trust and administered in another state).

122. See New York *ex rel.* Cohn v. Graves, 300 U.S. 308 (1937).

123. Matson Navigation Co. v. State Board, 297 U.S. 441 (1936) (tax measured by net income); *cf.* Cornell Steamboat Co. v. Sohmer, 235 U.S. 549 (1915) (gross receipts from business transacted within state). There has been considerable commerce clause trouble when the state tries to tax the gross income when the corporation it has created engaged in interstate commerce. J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938), discussed beginning at n. 276 *infra.*

124. Guaranty Trust Co. of New York v. Virginia, 305 U.S. 19 (1938).

125. Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936) (property tax on intangibles).

Too, the *source* of the income is often made the basis of allocation to a particular state, irrespective of the domiciliary or residence status of the recipient.[126] Although the owner of intangibles may neither be domiciled in nor a resident of the taxing state, nevertheless it is possible that the income may be treated as having its source therein and taxable on the ground that the taxing state has jurisdiction over the income though it has none over the recipient thereof.[127] The due process clause is said not to forbid a tax by the state where the income is earned, since the taxing state affords the protection and security enabling the taxpayer to earn income therein.[128]

The classes of income commonly said to be specifically allocable by source are designated "nonbusiness" income and generally include (a) rents; (b) dividends and interest; (c) compensation for personal services; (d) royalties from patents and copyrights; and (e) gains and losses from the sale of capital assets. These classes and the statutory provisions relating thereto will now be analyzed in more detail. The states making provision for specific allocation are shown in Table II of the Appendix.

(a) Rents.—Twenty-two states and the District of Columbia specify rentals from real estate, including royalties from oil or minerals, as a type of nonbusiness income that can be specifically allocated to its source.[129] Location of the real estate is the controlling factor to determine the source of rental income. Related expenses in the production of this income may generally be deducted from the total rental income figure. It is apparent that double taxation may result since the state of taxpayer's residence also has power to tax this income.

(b) Dividends and Interest.—The specific allocation of dividend income is provided for in the statutes of fifteen states and the District

126. *E.g.* New York *ex rel.* Whitney v. Graves, 299 U.S. 360 (1937) (income from sale of right to seat on stock exchange located in taxing state).

127. Shaffer v. Carter, 252 U.S. 37 (1920).

128. *Ibid.*

129. *Alaska*—ALASKA COMP. LAWS ANN. § 5(B) (1949); *Arizona*—ARIZ. CODE ANN. § 43-135(g) (1956); *Arkansas*—ARK. STAT. § 84-2020 (1947); *Colorado*—COLO. REV. STAT. ANN. § 138-1-28 (1958); *Connecticut*—CONN. GEN. STAT. § 12-218 (Supp. 1958); *Delaware*—DEL. CODE ANN. tit. 30, § 1903(b) (Supp. 1958); *District of Columbia*—D.C. INCOME AND FRANCHISE TAX LAW § 10.2(c)(3) (1956); *Georgia*—GA. CODE ANN. § 92-3113 (1937); *Idaho*—IDAHO CODE ANN. § 63-3027(a) (Supp. 1959); *Iowa*—IOWA CODE ANN. § 422.33(1) (1949); *Kansas*—KAN. GEN. STAT. ANN. § 79-3218 (Supp. 1957); *Kentucky*—KY. REV. STAT. ANN. § 141.120(3) (1955); *Louisiana*—LA. REV. STAT. ANN. § 47:242 (Supp. 1958); *Maryland*—MD. ANN. CODE art. 81, § 316(a) (1957); *Minnesota*—MINN. STAT. ANN. § 290.17 (1945); *Missouri*—MO. ANN. STAT. § 143.100 (Supp. 1958); *New York*—N.Y. TAX LAW § 210 (1944); *North Carolina*—N.C. GEN. STAT. § 105-134 (1958); *North Dakota*—N.D. REV. CODE § 57-3812 (1943); *Oklahoma*—OKLA. STAT. ANN. tit. 68, § 878 (1954); *South Carolina*—S.C. CODE § 65-279.3(4) (Supp. 1958); *Utah*—UTAH CODE ANN. § 59-13-20(1) (Supp. 1959); *Wisconsin*—WIS. STAT. ANN. § 71.07(1) (1957).

of Columbia.[130] Most provide that such income is allocated to the state wherein the taxpayer has its principal place of business. Others apparently would allocate dividends only to the state of taxpayer's domicile. Wisconsin seems to so indicate.[131]

Eighteen states and the District of Columbia provide for the specific allocation of interest income.[132] Interest derived from transactions not connected with the business of the corporation is generally allocated to the state where the corporation has its principal place of business. Yet two states, Delaware and Iowa, provide that it is to be allocated to the state wherein the obligation is created.[133] The Massachusetts provision seems unusual in that it allocates therein only interest received from a corporation organized under Massachusetts law.[134]

Again, it is apparent that multiple taxation could result here with respect to dividends. States have power to consider that dividends are derived from sources within their borders and can impose a tax on the dividend in the proportion which the declaring corporation derives its income from sources within the state even though the dividend is declared by a foreign corporation outside the taxing state to recipients who also are nonresidents.[135] The state of the recipient's residence

130. *Alaska*—ALASKA COMP. LAWS ANN. § 5(B) (1949); *Colorado*—COLO. REV. STAT. ANN. § 138-1-28 (1958); *Connecticut*—CONN. GEN. STAT. § 12-218 (Supp. 1958); *District of Columbia*—D.C. INCOME AND FRANCHISE TAX LAW § 10.2(c)(3) (1956); *Georgia*—GA. CODE ANN. § 92-3113 (Supp. 1958); *Idaho*—IDAHO CODE ANN. § 63-3027(a) (Supp. 1959); *Iowa*—IOWA CODE ANN. § 422.33(1) (1949); *Kansas*—KAN. GEN. STAT. ANN. § 79-3218 (Supp. 1957); *Louisiana*—LA. REV. STAT. ANN. § 47:242 (Supp. 1958); *Missouri*—MO. ANN. STAT. § 143.100 (Supp. 1958); *North Carolina*—N.C. GEN. STAT. § 105-134 (1958); *North Dakota*—N.D. REV. CODE § 57-3812 (1943); *Oregon*—ORE. REV. STAT. § 314.280(1) (1958); *South Carolina*—S.C. CODE § 65-279.3(2) (Supp. 1958); *Utah*—UTAH CODE ANN. § 59-13-20(1) & (3) (Supp. 1959); *Arkansas*—ARK. STAT. § 84-2020 (1947).

131. WIS. STAT. ANN. § 71.07(1) (1957).

132. *Alaska*—ALASKA COMP. LAWS ANN. § 5(B) (1949); *Arkansas*—ARK. STAT. § 84-2020 (1947); *Colorado*—COLO. REV. STAT. ANN. § 138-1-28 (1958); *Connecticut*—CONN. GEN. STAT. § 12-218 (Supp. 1958); *Delaware*—DEL. CODE ANN. tit. 30, § 1903(b) (Supp. 1958); *District of Columbia*—D.C. INCOME AND FRANCHISE TAX LAW § 10.2(c)(3) (1956); *Georgia*—GA. CODE ANN. § 92-3113 (Supp. 1958); *Idaho*—IDAHO CODE ANN. § 63-3027(a) (Supp. 1959); *Iowa*—IOWA CODE ANN. § 422.33(1) (1949); *Kansas*—KAN. GEN. STAT. ANN. § 79-3218 (Supp. 1957); *Louisiana*—LA. REV. STAT. ANN. § 47:242 (Supp. 1958); *Massachusetts*—MASS. ANN. LAWS ch. 63, § 37 & 41 (1953); *Missouri*—MO. ANN. STAT. § 143.100 (Supp. 1958); *North Carolina*—N.C. GEN. STAT. § 105-134 (1958); *North Dakota*—N.D. REV. CODE § 57-3812 (1943); *Oklahoma*—OKLA. STAT. ANN. tit. 68, § 878 (1954); *Oregon*—ORE. REV. STAT. § 314.280(1) (1958); *South Carolina*—S.C. CODE § 65-279.3(1) (Supp. 1958); *Utah*—UTAH CODE ANN. § 59-13-20(1) & (3) (Supp. 1959).

133. *Delaware*—DEL. CODE ANN. tit. 30, § 1903(b)(6) (Supp. 1958); *Iowa*—IOWA CODE ANN. § 422.33(1) (1949).

134. MASS. ANN. LAWS c.63, § 41 (1953).

135. International Harvester Co. v. Wisconsin Dep't of Taxation, 322 U.S. 435 (1944) (tax phrased in terms of privilege of declaring and receiving dividends); Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940) (to same effect); Wisconsin v. Minnesota Mining & Mfg. Co., 311 U.S. 452 (1940) (to same effect, where commerce clause invoked).

can, of course, also tax the dividend,[136] and so can the state of the declaring corporation's domicile.[137]

(c) Compensation for Personal Services.—Six states[138] have statutory provisions requiring the specific allocation of this class of income. The source of such income is considered to be the place where the service is rendered, irrespective of the residence or domicile of the taxed employee, employer or place where the income is paid. This, of course, can result in double taxation of the same income because the state of the taxpayer's residence also has power to tax residents upon their entire net income wherever earned.

(d) Royalties from Patents and Copyrights.—There is specific allocation of royalties from patents and copyrights in twelve states and the District of Columbia.[139] Again, the principal place of business of the taxpayer generally determines the state to which such income shall be allocated, the property being considered to have its situs there. There are, however, at least two other viewpoints. Delaware allocates the income proportionately to the state in which the product protected by the patent is manufactured or used, or in which the publication protected by the copyright is produced or printed.[140] This, in effect, seems to reject the principal place of business concept. Louisiana allocates royalties or similar revenue to the state or states in which such rights are used.[141]

(e) Gains and Losses from the Sale of Capital Assets.—Situs of the asset determines whether allocation of a capital gain or loss is to be made to a state. There seems to be no disagreement on this among the fifteen states providing for allocation of this type of income.[142]

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136. See cases note 121 *supra*.
137. See cases note 123 *supra*.
138. *Alaska*—Alaska Comp. Laws Ann. § 5(B) (1949); *Arkansas*—Ark. Stat. § 84-2020 (1947); *Idaho*—Idaho Code Ann. § 63-3027(a) (Supp. 1959); *Minnesota*—Minn. Stat. Ann. § 290.17 (1945); *Missouri*—Mo. Ann. Stat. § 143.100 (Supp. 1958); *New York*—N.Y. Tax Law § 210 (1944).
139. *Alaska*—Alaska Comp. Laws Ann. § 5(B) (1949); *Colorado*—Colo. Rev. Stat. Ann. § 138-1-28 (1958); *Connecticut*—Conn. Gen. Stat. § 12-218 (Supp. 1958); *Delaware*—Del. Code Ann. tit. 30, § 1903(b) (Supp. 1958); *District of Columbia*—D.C. Income and Franchise Tax Law § 10.2(c)(3) (1956); *Idaho*—Idaho Code Ann. § 63-3027(a) (Supp. 1959); *Iowa*—Iowa Code Ann. § 422.33(1) (1949); *Louisiana*— La. Rev. Stat. Ann. § 47:243 (Supp. 1958); *New York*—N.Y. Tax Law § 210 (1944); *North Carolina*—N.C. Gen. Stat. § 105-134 (1958); *North Dakota*—N.D. Rev. Code § 57-3812 (1943); *Oregon*—Ore. Rev. Stat. § 314.280(1) (1958); *South Carolina*—S.C. Code § 65-279.3(3) (Supp. 1958).
140. Del. Code Ann. tit. 30, § 1903(b)(2) (Supp. 1958).
141. La. Rev. Stat. Ann. § 47:243 (Supp. 1958).
142. *Arkansas*—Ark. Stat. § 84-2020 (1947); *Colorado*—Colo. Rev. Stat. Ann. § 138-1-28 (1958); *Connecticut*—Conn. Gen. Stat. § 12-218 (Supp. 1958); *Delaware*—Del. Code Ann. tit. 30, § 1903(b) (Supp. 1958); *Georgia*—Ga. Code Ann. § 92-3113 (1937); *Idaho*—Idaho Code Ann. § 63-3027(a) (Supp. 1959); *Kansas*—Kan. Gen. Stat. Ann. § 79-3218 (Supp. 1957); *Louisiana*—

A few states have provisions for specific allocation which seem broad enough to include the above types of "nonbusiness" income though not specifically mentioned in the statutes. Brief mention is made of each of these in the footnotes.[143]

Two states have unusual statutory provisions. In New Jersey no corporation, foreign or domestic (other than a taxpayer entitled to report as an investment company), can allocate any of its income to a state other than New Jersey unless it maintains a regular place of business outside New Jersey. A corporation which is entitled to report as an investment company is one whose business consists of at least 90% of holding or investing in stocks, bonds, notes, mortgages and other such securities for its own account.[144] The statute makes no mention of any types of nonbusiness income specifically allocable to source.[145] Pennsylvania's code provision makes specific allocation available only when there is a gain or loss from the sale of capital assets.[146]

It should be noted that most of the above statutes give the state tax commission discretionary power specifically to allocate other items as may be deemed necessary.

Eight states—Alabama, California, Montana, New Mexico, Rhode Island, Tennessee, Vermont and Virginia—have no provision for specific allocation.[147]

2. Separate Accounting.—Where the taxpayer is a resident of a state which taxes residents on their entire net income irrespective of its source, the state is not required to make any sort of apportionment since the entire amount can be allocated to the taxing state. Also, as we have seen, certain types of "nonbusiness" income can be

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LA. REV. STAT. ANN. § 47:242 (Supp. 1958); *Massachusetts*—MASS. ANN. LAWS c. 63, § 37 & 41 (1953); *Missouri*—MO. ANN. STAT. § 143.100 (Supp. 1958); *North Dakota*—N.D. REV. CODE § 57-3812 (1943); *Pennsylvania*—PA. STAT. ANN. tit. 72, § 3420(b) (Supp. 1958); *South Carolina*—S.C. CODE § 65-279.3 (Supp. 1958); *Utah*—UTAH CODE ANN. § 59-13-20(2) (Supp. 1959); *Wisconsin*—WIS. STAT. ANN. § 71.07(1) (1957).

143. *Arizona*, though somewhat unclear, seems to have a provision allocating income following the situs of property or residence of the recipient. ARIZ. CODE ANN. § 43-135 (1956). *Wisconsin* also has a similar provision. WIS. STAT. ANN. § 71.07(1) (1957). *Iowa* provides for specific allocation or equitable apportionment when income is derived from other than the manufacture or sale of tangible personal property, under rules and regulations of the Commission. IOWA CODE ANN. § 422.33(b) (1949). *Kentucky* has a three-pronged provision for allocation of tangible and intangible property even though no specific items are named. KY. REV. STAT. ANN. § 141.120(3) (1955). *Minnesota* states that income from intangible property not in the business of the taxpayer shall be allocated to Minnesota if the recipient is domiciled in the state. MINN. STAT. ANN. § 290.17 (1945). *Oklahoma* provides for specific allocation of income from intangible personal property according to the domiciliary situs of the taxpayer. OKLA. STAT. ANN. tit. 68, § 878 (1954).

144. N.J. Corp. Bus. Tax Act Reg. § 16:10-1.200 (1959).

145. N.J. STAT. ANN. § 54:10A-5(d) (Supp. 1958).

146. PA. STAT. ANN. tit. 72, § 3420(b) (Supp. 1958).

147. However, *cf.* N.M. STAT. ANN. § 72-15-32(c) (1953).

segregated and specifically allocated *in toto* to a particular state on the basis of the source from which the income is derived.

However, the great bulk of "business" income (as distinguished from "nonbusiness" income) does not lend itself to specific allocation to one particular state *in toto*. Thus, the operating income of a manufacturer, wholesaler or retailer cannot satisfactorily be allocated by source where the business is multistate. To deal with this problem of apportioning such income, the states employ either one or both of two methods: (a) the separate accounting method; and (b) apportionment by mathematical formula. First, we will have a look at the nature and limits of the "separate accounting" method.

When this method is used in a business that operates multistate, the business operations within the taxing state are treated as though separate and distinct from the business carried on outside the state. An attempt is made to determine the net income from the taxing state in the same manner that it would be if the entire business operation were confined to the taxing state. The income producing activity within each taxing jurisdiction is accounted for separately. So far as possible, each item of revenue and expense is associated with its source, and general overhead expense items are associated with specific revenues on some acceptable accounting basis. Since the business in the taxing state is considered separate, the income is determined without reference to the success or failure of the taxpayer's operations in other states.[148] If a taxpayer's accounts can be so kept as properly to reflect all business attributable to a given state, taking into account both receipts and expenses, such separate accounting may serve as an adequate method of apportioning taxable income to that state.

Certain types of multistate businesses do lend themselves to the separate accounting method, such as mining, banking, farming and hotel operations. It is possible, of course, that even some of these businesses may have sales organizations in other states and thus really be unitary in nature and not suitable for the separate accounting method.

There are certain serious obstacles to the use of the separate accounting method which limit its usefulness and applicability in apportioning income to a given state. When the business within the taxing state is not a separate business, but an integral part of a multistate unitary business, the income from the operations within each state cannot be determined in any satisfactory fashion. The larger part of business income of unitary businesses extending into

148. See Cohen, *State Allocations and Formulas Which Affect Management Operating Decisions*, 1 J. TAXATION 2, 3 (1954).

more than one state cannot be assigned satisfactorily to a given state by the separate accounting method. The determination by this method of the economic effect within prescribed geographic limits of any particular phase of a unitary business is artificial and awkward. The income may be earned by a series of multistate transactions beginning with buying profit in one state, manufacturing or production profit in another state and ending with sales profit in other states. Moreover, attempted separate accounting for such central staff functions as purchasing, advertising, financing, accounting, engineering, and legal would, at best, be arbitrary, uncertain and difficult.[149]

Apportioning taxable income to a particular state by the separate accounting method should not be employed where the income is from a unitary multistate business, where the different activities are interrelated and are benefited each by the other. In a unitary business, some formula which gives weight to the different factors responsible for earning the income is the only satisfactory solution to the problem of apportioning the income from the entire unitary business organism among the various states where it is conducted.

As concerns separate accounting, the statutory provisions generally take one of three approaches: (1) allow the corporation to use such a method if the business is not unitary; (2) require the taxpayer corporation to petition the Commissioner of Revenue or similar official if they wish to use this method, or think any other method to be improper; (3) give the Commissioner discretionary power to require or reject such a method if he thinks it is necessary.

Twenty-three states and the District of Columbia have provisions adopting one or all of the above approaches.[150] Ten states—Arkansas, California, Connecticut, Georgia, Iowa, Massachusetts, Pennsylvania, Rhode Island, Utah and Vermont—make no statutory allowance for separate accounting. Tennessee allows this method only if the taxpayer is a construction company.[151] Though not provided for by

149. *Id.* at 1.

150. *Alabama*—Ala. Inc. Tax Reg. § 398.2(A) (1959); *Alaska*—Alaska Comp. Laws Ann. § 5(C)(4) (1949); *Arizona*—Ariz. Code Ann. § 43-135(g) (1956); *Colorado*—Colo. Rev. Stat. Ann. § 138-1-28(1) (1953); *Delaware*—Del. Code Ann. tit. 30, § 1903(c) (Supp. 1958); *District of Columbia*—D.C. Income and Franchise Tax Law § 10.2(c)(4) (1956); *Idaho*—Idaho Code Ann. § 63-3027(d) (Supp. 1959); *Kansas*—Kan. Gen. Stat. Ann. § 79-3217 (1949); *Kentucky*—Ky. Rev. Stat. Ann. § 141.120(4) (1955); *Louisiana*—La. Rev. Stat. Ann. § 47:244 (Supp. 1958); *Maryland*—Md. Ann. Code art. 81, § 316(b) (1957); *Minnesota*—Minn. Stat. Ann. § 290.20 (Supp. 1958); *Missouri*—Mo. Ann. Stat. § 143.080 (1949); *Montana*—Mont. Rev. Codes Ann. § 84-1503 (Supp. 1958); *New Jersey*—N.J. Stat. Ann. § 54:10A-8 (Supp. 1958); *New Mexico*—N.M. Stat. Ann. § 72-15-32(d) (1953); *New York*—N.Y. Tax Law § 210 (1944); *North Carolina*—N.C. Gen. Stat. § 105-134(g) (1958); *North Dakota*—N.D. Rev. Code § 57-3814(2) (1943); *Oklahoma*—Okla. Stat. Ann. tit. 68, § 878(h) (1954); *Oregon*—Ore. Rev. Stat. § 314.280(2) (1957); *South Carolina*—S.C. Code § 65-279.14 (Supp. 1958); *Virginia*—Va. Code Ann. § 58-131.1 (1959); *Wisconsin*—Wis. Stat. Ann. § 71.07(2) (1957).

151. Tenn. Code Ann. § 67-2710 (Supp. 1958).

statute, however, this method might be available to a taxpayer as a result of a judicial decision. For example, such seems to be the case in Arkansas[152] and Georgia.[153] The states allowing separate accounting are shown in Table II of the Appendix.

Some states have distinct statutory provisions for the use of separate accounting by railroad companies, interstate bridge companies and telephone and telegraph companies.[154]

3. Apportionment of Income by Mathematical Formula.—What is the nature and theory of apportioning income by means of a mathematical formula? As we have seen, in a unitary multistate business, no method of assigning income can precisely determine the exact amount of income attributable to any geographic area or to any given part of a series of multistate business transactions culminating in the realization of profit. Hence any effort in that regard necessarily must be somewhat arbitrary and unrealistic. For all such income the taxing states have devised statutory apportionment formulas designed to arrive at a fraction of income properly and reasonably attributable to a given state. The mathematical formula method of apportionment is based upon the assumption that the entire income of a business enterprise is the final result of certain income producing factors or elements, such as *property, payrolls, sales* and *costs of manufacturing.* From this premise it is reasoned that the income produced by the combination of these factors or activities has its source at the locations of the income producing factors.[155] As we will presently see, the factors used by the various states in their respective apportionment formulas vary widely among the different states, as well as between classes of businesses in the same state.

How does the formula method operate as to the apportionment of net income? First of all, the entire net income of a multistate business is determined. As we have seen earlier, this is done by deducting from the entire gross income the total expenses and other deductible items.[156] After the entire net income is determined, then income not connected with the unitary business is usually deducted from the entire net income. Generally, the "nonbusiness" income, is deducted. This "nonbusiness" income, as we saw, includes such items as gains from capital assets, interest, dividends, etc., which may be allocated according to the location or situs of the property or otherwise. After this "nonbusiness" income deduction is made, the residue of the net

152. General Box Co. v. Scurlock, 224 Ark. 266, 272 S.W.2d 678 (1954).

153. Mexican Petroleum Corp. v. Head, 64 Ga. App. 529, 13 S.E.2d 887 (1941).

154. See, *e.g.*, Mo. Ann. Stat. §§ 143.050, 143.060, 143.070 (1949).

155. See Cohen, *State Tax Allocations and Formulas Which Affect Management Operating Decision*, 1 J. Taxation 2, 3 (1954).

156. See discussion of this point in text supported by notes 102 through 110 *supra*.

income from the unitary business, which is the net income for tax purposes, is then apportioned according to the relevant formula to the particular state. This apportionment is made on the basis which the average of the factors of the formula within the taxing state bears to the average of the total of such factors within and without the taxing state.

What are the different formulas and factors used by the various taxing states? An analysis of the statutes and regulations of the states employing such corporate taxes reveals eleven different formulas, which are composed of one or a combination of eight different factors. The substantial lack of uniformity in the provisions has apparently resulted because of the desire of each state to devise a formula and define the factors included therein in a manner most advantageous, taxwise, to itself.

The eleven different formulas and the state using each are as follows:

(1) Iowa and Missouri use a one-factor formula of *sales*.[157]

(2) North Dakota uses a two-factor formula composed of *property* and *business*.[158]

(3) New Mexico uses a two-factor formula consisting of *sales* and *business done*.[159]

(4) The District of Columbia employs the two-factor formula of *sales* and *costs*.[160]

(5) Virginia and Colorado use a two-factor formula composed of *property* and *gross receipts*.[161]

(6) Alaska, California, Connecticut, Delaware, Idaho, Kentucky, Louisiana, Maryland, Minnesota, Montana, New York, North Carolina, Oregon, Rhode Island, South Carolina and Vermont provide for a three-factor formula of *sales, property* and *payroll*.[162]

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157. IOWA CODE ANN. § 422.33(b) (1949); MO. ANN. STAT. § 143.040 (1949).

158. N.D. REV. CODE § 57-3812 & 3813 (1943).

159. N.M. STAT. ANN. § 72-15-32 (1953).

160. D.C. INCOME AND FRANCHISE TAX LAW § 10.2(c) (1956).

161. COLO. REV. STAT. ANN. § 138-1-28 (1958); VA. CODE ANN. § 58-131.1 (1959).

162. ALASKA COMP. LAWS ANN. § 5(C) (2) (1949). As to Alaska sales factor see, Alaska Laws 1959 (effective Jan. 1, 1960), ch. 175 § 5(c). CALIF. REV. AND TAX CODE § 25101 (1958). As to California sales factor see, El Dorado Oil Works v. McColgan, 34 Cal.2d 731, 215 P.2d 4 (1950). CONN. GEN STAT. § 12-218 (Supp. 1958); DEL. CODE ANN. tit. 30, § 1903(b) (7) (Supp. 1958); IDAHO CODE ANN. § 63-3027(d) (Supp. 1959); KY. REV. STAT. § 141.120(4) (b) (1955); LA. REV. STAT. ANN. § 47:245 (Supp. 1958); MD. ANN. CODE art. 81, § 316(b) (1957); MINN. STAT. ANN. § 290.19 (Supp. 1958); MONT. REV. CODE ANN. § 84-1503 (Supp. 1958); N.Y. TAX LAW § 210 (1944); N.C. GEN. STAT. § 105-134 (1958); ORE. REV. STAT. § 314.280(1) (1958); R.I. GEN. LAWS ANN. § 44-11-14 (1956); S.C. CODE § 65-279.5 (Supp. 1958); VT. STAT. ANN. § 32-5903(a) (1959).

(7) Massachusetts, New Jersey, Pennsylvania and Utah use a three-factor formula consisting of *gross receipts, property* and *payroll*.[163]

(8) Alabama, Kansas, Oklahoma, Tennessee, and Wisconsin employ a formula consisting of *sales, property* and *manufacturing costs*.[164]

(9) Arkansas provides for a three-factor formula composed of *sales, property* and *cost of sales*.[165]

(10) Georgia has adopted a three-factor formula of *gross receipts, payroll* and *average inventory*.[166]

(11) Arizona uses a five-factor formula composed of *sales, purchases, manufacturing costs, payroll* and *property*.[167] The various factors included in the formula used by each state is shown in Table II of the Appendix.

How is the formula applied? Generally, the factors of the formula are averaged. Thus, using a three factor formula of property, payroll and sales, suppose a corporation has 30% of its property, 40% of its payroll and 50% of its sales in the taxing state. Averaging the three factors, its assignable percentage will be 40, and it will allocate 40% of its income to the taxing state. Giving equal weight to each of the factors of the typical three-factor formula may produce some unrealistic and inequitable results in certain types of businesses, because each of the factors represented in the apportionment formula does not always contribute equally in the production of the net income to be apportioned.[168]

There are, of course, certain distinct advantages to the formula method of allocation of net income. This method is relatively simple to apply and it avoids the guesswork, conjecture and uncertainties that are incident to the "separate accounting" method. Also, taxable net income will not be attributed to any state unless the entire business, of which the business within the taxing state is an integral part, is *operated at a profit*. By the same token, under the formula method *losses* need not be attributed to any state unless the entire business is operated at a loss.[169]

163. MASS. ANN. LAWS ch. 63, § 38(2), 41(d) (1953); N.J. STAT. ANN. § 54:10A-6 (Supp. 1958); PA. STAT. ANN. tit. 72, § 3420(b) & (n) (Supp. 1958); UTAH CODE ANN. § 59-13-20(6) (Supp. 1959).

164. Ala. Inc. Tax Reg. § 398.2(B) (1959); KAN. GEN. STAT. ANN. § 79-3218(c) (Supp. 1957); OKLA. STAT. ANN. tit. 68, § 878(g) (1954); TENN. CODE ANN. § 67-2707 (1955); WIS. STAT. ANN. § 71.07(2) (1957).

165. See General Box Co. v. Scurlock, 224 Ark. 266, 272 S.W.2d 678 (1954).

166. GA. CODE ANN. § 92-3113(3) & (4) (1937).

167. ARIZ. CODE ANN. § 43-135(g) (1956).

168. See Chwals, *The Uniform Apportionment Formula for State Income Taxes*, 33 TAXES 212, 214 (1955); Cox, *Uniformity of State Income Taxation*, 30 TAXES 184 (1952).

169. Butler Bros. v. McColgan, 315 U.S. 501 (1942); Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n, 266 U.S. 271 (1924).

The due process and commerce clauses have been invoked in resisting the formula method of apportionment, but without much success. Where the entire multistate business shows a profit, a particular state may be able, insofar as the due process clause is concerned, to claim taxable income although the operations in the taxing state show a *loss*.[170] The operations in the taxing jurisdiction are considered as being only a portion of the entire unitary multistate operations of the business. In short, any formula which is reasonably designed to determine the amount of income attributable to local business activity will be upheld, over commerce and due process clause objections.[171] A taxpayer may, however, be able to carry the burden of proving that a particular formula does not give proper weight to the out-of-state activities of its business and that, accordingly, the result reached by the taxing state is unreasonable.[172]

4. An Analysis of the Various Formula Factors.—The actual extent of the diversity in apportionment procedures can be fully understood only by an investigation of the definitions of the various apportionment factors. An analysis of these various definitions will also reveal the vexatious problems, and oftimes inequities, which inhere in the present tax structures applicable to income from multistate business. Even though many states use superficially the same formula, they often define the factors differently.

(a) Property as a Factor.—The basic problems that arise in an attempt to analyze the statutes of those states employing property as a factor in their formula concern: (a) the general scope of the term "property" as used therein; (b) whether "property" includes rented as well as owned property; (c) the mode of valuation of property for inclusion therein.

As to the first, property within the formula of these states is generally said to consist of all real and tangible personal property located within the taxing state.[173] This would include buildings, land, machinery, inventories and other property used by the corporation in the production of income.

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

171. *Ibid.*; Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920); *cf.* International Harvester Co. v. Evatt, 329 U.S. 416 (1947) (gross receipts included in tax); Ford Motor Co. v. Beauchamp, 308 U.S. 331 (1939) (gross receipts included in tax). See Pierce, *The Uniform Division of Income for State Tax Purposes*, 35 TAXES 747, 748 (1957).

172. Hans Rees' Sons, Inc. v. North Carolina, 283 U.S. 123 (1931) (single factor property formula used).

173. *Alaska*—ALASKA COMP. LAWS ANN. § 5(c)(2) (1949); *Alabama*—Ala. Inc. Tax Reg. § 398.2(B) (1959); *Arizona*—ARIZ. CODE ANN. § 43-135(g) (1956); *Arkansas*—General Box Co. v. Scurlock, 224 Ark. 266, 272 S.W.2d 678 (1954); *California*—CALIF. REV. AND TAX CODE § 25101 (1958); *Colorado*—COLO. REV. STAT. ANN. § 138-1-28 (1958); *Connecticut*—CONN. GEN. STAT. § 12-218 (Supp. 1958); *Delaware*—DEL. CODE ANN. tit. 30, § 1903(b)(7) (Supp. 1958); *Idaho*—IDAHO CODE ANN. § 63-3027(d) (Supp. 1959); *Kansas*—KAN. GEN.

As concerns the second question, fifteen states[174] include rented as well as owned property within the factor. Nine of the fifteen states so including provide for valuation of the rented property at eight times the annual gross rent,[175] gross rent including all consideration paid by the taxpayer for the use of the rented property.

Lastly, there are in use at least five methods of valuation of real and tangible personal property *owned* by the taxpayer in these states. Sixteen of the states value owned property by adding the value at the beginning of the year to the value at the end of the year, and then dividing the total by two to obtain an average yearly value.[176] Two states, Arizona and California, by analogy to the general property tax, apparently value property at "full cash value."[177] Connecticut uses the "average monthly net book value" method. This is similar to the average yearly method above and differs only in that the values at the beginning of each month in a year are added and

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Stat. Ann. § 79-3218(c) (Supp. 1957); *Kentucky*—Ky. Rev. Stat. § 141.120(4)(b) (1955); *Louisiana*—La. Rev. Stat. Ann. § 47:245 (Supp. 1958); *Maryland*—Md. Ann. Code art. 81, § 316(b) (1957); *Massachusetts*—Mass. Ann. Laws ch. 63, § 38(2) & 41(d) (1953); *Minnesota*—Minn. Stat. Ann. § 290.19 (Supp. 1958); *Montana*—Mont. Rev. Codes Ann. § 84-1503 (Supp. 1958); *New Jersey*—N.J. Stat. Ann. § 54:10A-6 (Supp. 1958); *New York*—N.Y. Tax Law § 210 (1944); *North Carolina*—N.C. Gen. Stat. § 105-134 (1958); *North Dakota*—N.D. Rev. Code § 57-3812 & 3813 (1943); *Oklahoma*—Okla. Stat. Ann. tit. 68, § 878(g) (1954); *Oregon*—Ore. Rev. Stat. § 314.280(1) (1958); *Pennsylvania*—Pa. Stat. Ann. tit. 72, § 3420(b) (Supp. 1958); *Rhode Island*—R.I. Gen. Laws Ann. § 44-11-14 (1956); *South Carolina*—S.C. Code § 65-279.5 (Supp. 1958); *Tennessee*—Tenn. Code Ann. § 67-2707 (1955); *Utah*—Utah Code Ann. § 59-13-20(6) (Supp. 1959); *Vermont*—Vt. Stat. Ann. § 32-5903(a) (1959); *Virginia*—Va. Code Ann. § 58-131.1 (1959); *Wisconsin*—Wis. Stat. Ann. § 71.07(2) (1957).

174. *Alaska*—Alaska Laws 1959 (effective Jan. 1, 1960), c. 175, § 5(c)(12); *Arizona*—Ariz. Code Ann. § 42-201 (1956); *Connecticut*—Conn. Gen. Stat. § 12-218 (Supp. 1958); *Delaware*—Del. Code Ann. tit. 30, § 1903(b)(7) (Supp. 1958); *Maryland*—Md. Inc. Tax Law & Reg. § 312(b) (1957); *Montana*—Mont. Corp. License Tax Reg. ch. 9, § 907; *New York*—N.Y. Bus. Corp. Franchise Tax Reg. 9-A, art. 412(1) (1956); *North Carolina*—N.C. Gen. Stat. § 105-134 (1958); *North Dakota*—N.D. Rev. Code § 57-3812 & 3813 (1943); *Oklahoma*—Okla. Stat. Ann. tit. 68, § 878(g) (1954); *Oregon*—Ore. Rev. Stat. § 314.280(1) (1958); *Rhode Island*—R.I. Gen. Laws Ann. § 44-11-14(1) (1956); *South Carolina*—S.C. Code § 65-279.7(7) (Supp. 1958); *Vermont*—Vt. Corp. Franchise Tax Reg. art, 402 (1954); *Wisconsin*—Wis. Stat. Ann. § 71.07(2) (1957).

175. So in Alaska, Connecticut, Delaware, Montana, New York, North Carolina, Oregon, South Carolina and Vermont.

176. *Alaska*—Alaska Laws 1959 (effective Jan. 1, 1960), ch. 175, § 5(C)(14); *Alabama*—Ala. Inc. Tax Reg. § 398.2 (1959); *Colorado*—Colo. Rev. Stat. Ann. § 138-1-28 (1958); *Delaware*—Del. Code Ann. tit. 30, § 1903(b)(7) (Supp. 1958); *Kansas*—Kan. Gen. Stat. Ann. § 79-3218(c)(1) (Supp. 1957); *Kentucky*—Ky. Rev. Stat. Ann. § 141.120(4)(d) (1955); *Louisiana*—La. Rev. Stat. Ann. § 47:245(G) (Supp. 1958); *Massachusetts*—Mass. Ann. Laws ch. 63, § 38(4) (1953); *North Dakota*—N.D. Rev. Code § 57-3813(1) (1943); *Oklahoma*—Okla. Stat. Ann. tit. 68, § 878 (1954); *Oregon*—Ore. Rev. Stat. § 314.280(1) (1958); *Rhode Island*—R.I. Gen. Laws Ann. § 44-11-14(1) (1956); *South Carolina*—S.C. Code § 65-279.7 (Supp. 1958); *Utah*—Utah Code Ann. § 59-13-20(6)(a) (Supp. 1959); *Vermont*—Vt. Stat. Ann. § 32-5903(a)(1) (1959); *Wisconsin*—Wis. Admin. Code, Tax § 2.42(1) (1956).

177. Ariz. Code Ann. § 42-201 (1956); Calif. Rev. and Tax Code § 101-2195 (1958).

divided by twelve.[178] New Jersey and New York use average quarterly value and add the values at every three months interval and divide by four.[179] North Carolina adopts the concept of original cost adjusted for depreciation.[180]

Here, there is need for a uniform definition of what is property, as well as the need for a standard method of valuation both as to rented and owned property.

(b) Payrolls as a Factor.—Those states employing payrolls as a factor generally express it as ratio of compensation paid within the state to total compensation paid everywhere.[181] Compensation includes wages, bonuses, salaries or any other form of remuneration paid by the taxpayer for personal services rendered by employees within the state.[182]

There is some controversy over inclusion of the salaries of executive officers within the term "compensation." Delaware, New York, North Carolina, South Carolina and Vermont indicate that it does *not* include officer's salaries,[183] whereas Louisiana and New Jersey, among others, indicate that it does.[184]

The states are in agreement that the services rendered must be in connection with the business carried on within the state and if the employee performs services both within and without the state, the state where he "chiefly" operates seems to be the proper state for attribution.[185]

178. CONN. GEN. STAT. § 12-218 (Supp. 1958).

179. N.J. Corp. Bus. Tax Act Reg. § 16:10-4.150 (1959); N.Y. Bus. Corp. Franchise Tax Reg. 9-A, art. 412 (1956).

180. N.C. GEN. STAT. § 105-134 (1958).

181. *Alaska*—ALASKA COMP. LAWS ANN. § 5(C)(2) (1949); *Arizona*—ARIZ. CODE ANN. § 43-135(g) (1956); *California*—CALIF. REV. AND TAX CODE § 25101 (1958); *Connecticut*—CONN. GEN. STAT. § 12-218 (Supp. 1958); *Delaware*—DEL. CODE ANN. tit. 30, § 1903(b)(7) (Supp. 1958); *Georgia*—GA. CODE ANN. § 92-3113(3) & (4) (1937); *Idaho*—IDAHO CODE ANN. § 63-3027(d) (Supp. 1959); *Kentucky*—KY. REV. STAT. § 141.120(4)(b) (1955); *Louisiana*—LA. REV. STAT. ANN. § 47:245 (Supp. 1958); *Maryland*—MD. ANN. CODE art. 81, § 316(b) (1957); *Massachusetts*—MASS. ANN. LAWS ch.63 § 38(2) & 41(d) (1953); *Minnesota*—MINN. STAT. ANN. § 290.19 (Supp. 1958); *Montana*—MONT. REV. CODE ANN. § 84-1503 (Supp. 1958); *New Jersey*—N.J. STAT. ANN. § 54:10A-6 (Supp. 1958); *New York*—N.Y. TAX LAW § 210 (1944); *North Carolina*—N.C. GEN. STAT. § 105-134 (1958); *Oregon*—ORE. REV. STAT. § 314.280(1) (1958); *Pennsylvania*—PA. STAT. ANN. tit. 72, § 3420(b) (Supp. 1958); *Rhode Island*—R.I. GEN. LAWS ANN. § 44-11-14 (1956); *South Carolina*—S.C. CODE § 65-279.5 (Supp. 1958); *Utah*—UTAH CODE ANN. § 59-13-20(6) (Supp. 1959); *Vermont*—VT. STAT. ANN. § 32-5903(a) (1959).

182. See note 71 *supra*.

183. DEL. CODE ANN. tit. 30, § 1903(b)(7) (Supp. 1958); N.Y. Bus. Corp. Franchise Tax Reg. 9-A, art. 414(2) (1956); N.C. GEN. STAT. § 105-134 (1958); S.C. CODE § 65-279.8 (Supp. 1958); VT. CORP. FRANCHISE TAX REG. art. 404 (1954).

184. LA. REV. STAT. ANN. § 47:245(F)(3) (Supp. 1958); N.J. Corp. Bus. Tax Act Reg. § 16:10-4.270 (1959).

185. See note 181 *supra*.

(c) Cost of Manufacturing as a Factor.—Alabama, Arizona, Kansas, Oklahoma, Tennessee and Wisconsin use this as a factor in their formula and express it as a ratio of total cost of manufacturing, collecting, assembling or processing within the state, to total cost of manufacturing, collecting, assembling or processing everywhere.[186]

Only Alabama and Wisconsin define what is meant by cost of manufacturing and state that it includes total cost of goods and supplies used in manufacturing, wages paid in such manufacturing and other overhead costs assignable to the activities by good accounting practices.[187]

(d) Gross Receipts as a Factor.—This factor is generally defined as the ratio of gross receipts from business done within the state to total gross receipts from business done everywhere, in states so employing it.

Seven states use this as a factor in their formula and include income from sales, services performed in the state, rents and royalties from property situated in the state or patents and other business income, as elements of gross receipts.[188]

(e) Purchase as a Factor.—Arizona is the only state using purchases as a factor in their formula. The statute provides: "The numerator of the purchases fraction shall include all purchases resulting from employee buying activity of the taxpayer within Arizona."[189] There is no further explanation of this factor to be found in the code or regulations of Arizona.

(f) Average Inventory as a Factor.—Georgia uses average inventory as a factor in their formula and defines it thusly:

> The ratio of the average of the monthly inventories of all products held in this State for sale, lease or other distribution or use in connection with the trade or business of the taxpayer during the taxable year to the average of the total monthly inventories of all products held everywhere for sale, lease or other distribution in connection with the trade or business of the taxpayer. The term 'products' shall include goods, wares, and merchandise of every character and kind, whether owned by the taxpayer or held on consignment or otherwise, but shall not include unrecovered or unextracted natural resources, raw materials, or goods in process of manufacture.[190]

186. Ala. Inc. Tax Reg. § 398.2(B)(2) (1959); ARIZ. CODE ANN. § 43-135(g) (1956); D.C. INCOME AND FRANCHISE TAX LAW § 10.2(c) (1956); KAN. GEN. ANN. § 79-3218(c) (Supp. 1957); OKLA. STAT. ANN. tit. 68, § 878(g) (1954); TENN. CODE ANN. § 67-2707 (1955); WIS. STAT. ANN. § 71.07(2) (1957).

187. See note 186 *supra*.

188. *Colorado*—COLO. REV. STAT. ANN. § 138-1-28 (1958); *Georgia*—GA. CODE ANN. § 92-3113(4)(c) (1937); *Massachusetts*—MASS. ANN. LAWS c. 63, § 38(6) (1953); *New Jersey*—N.J. STAT. ANN. § 54:10A-6 (Supp. 1958); *Pennsylvania*—PA. STAT. ANN. tit. 72 § 3420(b) (Supp. 1958); *Utah*—UTAH CODE ANN. § 59-13-20(6) (1953); *Virginia*—VA. CODE ANN. § 58-131.1 (1959).

189. ARIZ. CODE ANN. § 43-135(g) (1956).

190. GA. CODE ANN. § 92-3113(4)(a) (1937).

(g) Business Factor.—North Dakota uses this along with property as a factor and states that the business of a corporation other than a public utility

> shall be measured by the amount that the corporation has paid out during the year for which the income is returned for wages, salaries, or other compensation to employees and for the purchase of goods, materials and supplies consumed or sold in the regular course of business, plus the amount of all receipts from sales and other sources connected with said business, excluding, however, receipts from the sale of capital assets and property not sold in the regular course of business, and also . . . [Items specifically allocated].[191]

The percentage is determined by the ratio of business within the state to total business.

(h) Sales as a Factor.—"Sales" is a factor in most formulas, and an analysis of the applicable statutes reveals the presence of at least four broad concepts of a "sale," with possible additional variations among these. Each state, of course, has defined sales for inclusion within that factor in a fashion that will best suit its own fiscal needs.

Thirteen states have adopted the "sale by destination" theory. Under this view delivery to, and receipt of goods, merchandise or property by the "purchaser" within the state constitutes a sale therein.[192] In five of these thirteen states, moreover, this result would still obtain though the goods were delivered to one designated as a recipient by an out-of-state "purchaser."[193] Under this theory the state of the "market" gets the fiscal advantage of the sales factor rather than the "producing" states.

Seven states use the "state of origin" theory, *i.e.*, that transactions effected through the maintenance of sales offices, stores, warehouses or factories within a state are sales attributable to the state in which

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191. N.D. REV. CODE § 57-3813(2) (1943).

192. *Alabama*—Ala. Inc. Tax Reg. § 398.2(B)(3) (1959); *Alaska*—Alaska Laws 1959 (effective Jan. 1, 1960), ch. 175, § 5(c)(18); *Colorado*—COLO. REV. STAT. ANN. § 138-1-28 (1958) (note that Colorado follows a "gross receipts" factor but as a necessary element thereof, defines sales as "sales by destination"); *Delaware*—DEL. CODE ANN. tit. 30, § 1903(b)(7) (Supp. 1958); *Georgia*—GA. CODE ANN. § 92-3113(4)(c) (1937) (note that Georgia, as Colorado *supra*, employs a "gross receipts" factor, with similar definition of sales thereon); *Iowa*—IOWA CODE ANN. § 422.33(b) (1949); *Kansas*—Kan. Inc. Tax Reg. (1958) (Kansas could also be classified as state of origin, see footnote 194, *infra*); *Louisiana*—LA. REV. STAT. ANN. § 47:245(F)(3) (Supp. 1958); *Montana*—Mont. Corp. License Tax Reg. ch.9, § 906; *New Jersey*—N.J. STAT. ANN. § 54:10A-6 (Supp. 1958) (New Jersey, as Colorado and Georgia, employs a "gross receipts" factor with similar definition of sales therein. New Jersey could also be classified according to state of origin. See footnote 194, *infra*); *North Carolina*—N.C. GEN. STAT. § 105-134 (1958); *Oklahoma*—OKLA. STAT. ANN. tit. 68, § 878(g) (1954) (Oklahoma might also be classified under "state of origin" theory); *South Carolina*—S.C. CODE § 65-279.9 (Supp. 1958).

193. *E.g.*, Alabama, Colorado, Louisiana, North Carolina and South Carolina.

such offices, stores, warehouses or factories are located, although delivery of the goods is to be out-of-state.[194] This method of allocating a sale, of course, favors the "producing" states.

Another concept of "sale" that is employed is the "activities or solicitation" theory. Four states and the District of Columbia seem to make their definition of "sale" turn on this.[195] By this definition, any sales resulting from *promotion* and *solicitation* and various other types of employee *activity* within the state are considered attributable to the state of such activity. The statutes are not at all precise as to what constitutes "activity" within a state.

Closely related to the "activities or solicitation" theory is a concept for allocating a sale adopted in four states. These attribute sales to the locus of the office, agency or place of business at or from which the transactions giving rise to the sale are chiefly *negotiated* and *executed*.[196]

New York and Vermont have lengthy and detailed definitions of a sale.[197] Both seemingly adopt the "state of origin" theory.

It is difficult to classify Missouri under any particular concept of sale. The Missouri statutes provide:

> The amount of sales which are transactions wholly in this state shall be added to one-half of the amount of sales which are transactions partly within this state and partly without this state and the amount thus obtained shall be divided by the total sales . . . and the net income shall

194. *Kansas*—Kan. Inc. Tax Reg. (1958) (See also footnote 192 *supra*); New Jersey—N.J. Stat. Ann. § 54:10A-6 (Supp. 1958) (See also footnote 192 *supra*); *New Mexico*—N.M. Inc. Tax Reg. No. 3 § 76-1231(a) (1948); *Oklahoma*—Okla. Stat. Ann. tit. 68, § 878(g) (1954) (See also footnote 192 *supra*); *Tennessee*—Tenn. Franchise & Excise Tax Reg. rule 15 (1956); *Virginia*—Va. Code Ann. § 58-131.1 (1959) (Virginia employs a gross receipts factor but defines sales therein according to state of origin); *Wisconsin*—Wis. Admin. Code, Tax § 2.42(3) (1956). As to Minnesota, see footnote 196 *infra*.

195. *Arizona*—Ariz. Inc. Tax Reg. § 135-8-(D)-5 (1954); *California*—El Dorado Oil Works v. McColgan, 34 Cal. 2d 731, 215 P.2d 4 (1950); *District of Columbia*—D.C. Income and Franchise Tax Law § 10.2(c) (1) (1956); *Montana*—Mont. Corp. License Tax Reg. c. 9, § 906; *Oregon*—Ore. Rev. Stat. § 314.280(1) (1958).

196. *Connecticut*—Conn. Gen. Stat. § 12-218 (Supp. 1958); *Kentucky*—Ky. Rev. Stat. Ann. § 141.120(4)(f) (1955); *North Dakota*—N.D. Rev. Code § 57-3812 (1943) (North Dakota employs a "business" factor but defines sales therein according to state of negotiation); *Rhode Island*—R.I. Gen. Laws Ann. § 44-11-14(2) (1956). Minnesota seems to include sales upon the basis of both state of origin theory and place of negotiation and execution. This conclusion is based upon a letter from the Department of Taxation, State of Minnesota, dated September 2, 1959.

197. N.Y. Bus. Corp. Franchise Tax Reg. 9-A, art. 413 (1956); Vt. Corp. Franchise Tax Reg. art. 403 (A-B) (1954). Note also that in footnote 165 *supra*, Arkansas was listed as employing a sales factor. However, it has not been possible to ascertain the definition of sale employed therein. Too, in footnote 162 *supra*, Idaho and Maryland were stated to employ a sales factor. Definitions of sale in those states are not here included, however, since extensive statutory and regulatory revision is currently in process in those states in this general area.

> be multiplied by the fraction thus obtained to determine the proportion of income to be used to arrive at the amount of tax, and the amount of tax shall be such percent thereon as may hereafter be provided.[198]

The Missouri Department of Revenue has indicated, however, that in certain instances it has used a three-factor formula in which sales were required to be included at 100%, regardless of their contact with the state of Missouri.[199] This seems contrary to the basic notion that the amount of sales attributable to a state should depend on a relationship of the effort to produce that sale in the state to the overall effort to produce sales everywhere.

In recent years there has been an increase in the number of states using the "state-of-destination" and the "state-of-solicitation" definitions of the taxable situs of a sale.[200] This trend presumably has come about because of the increased revenue needs of the states, as well as the result of litigation apparently thought to have cleared the way for the states to use these definitions of sales when corporate income is involved.[201] Of course, the taxing formulas using these definitions of sales must now operate within the restricted framework of the recent congressional statute ousting the power of the states to impose a net income tax from the sale of tangible personal property when the only contact of the out-of-state seller is that of mere solicitation of orders which are then sent to an extra-state source where they are approved and the orders then filled by shipment from an out-of-state source to the customer in the taxing state.[202]

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198. Mo. Stat. Ann. § 143.040 (1949).

199. Letter from Department of Revenue, State of Missouri, September 2, 1959.

200. See Studenski & Glasser, *New Threat in State Business Taxation*, 36 Harv. Bus. Rev. 77, 86-87 (Nov.-Dec. 1958). See Statement of John Dane, Jr., representing U.S. Chamber of Commerce, at the *Hearings before the Select Committee on Small Business United States Senate*, "State Taxation on Interstate Commerce," 86th Cong., 1st Sess., pt. 1 at 21-23 (1959). Earlier, more states had been using the "location of sales office," and the "source of physical goods" definition of a "sale," with but few states using the "point of destination" as the definition. See Cohen, *State Allocations and Formulas Which Affect Management Operating Decisions*, 1 J. Taxation 2, 8-9 (1954). A few pages later, when the "Uniform Division of Income for Tax Purposes Act" is analyzed, there will be an appraisal of the various definitions of sales. See discussion beginning with note 207 *infra*, and going through note 213 *infra*.

201. The case of West Publishing Co. v. McColgan, 328 U.S. 823 (1946) apparently was believed to give the green light for using solicitation as the basis for the tax. That case is discussed in connection with note 27 *supra*. For an opinion by one tax official that the *West Publishing* decision resulted in action by his state to tax net income from interstate commerce, see Statement of James E. Luckett, Commissioner of Revenue of Kentucky, *Hearing before the Select Committee on Small Business United States Senate*, "State Taxation of Interstate Commerce," 86th Cong., 1st Sess., pt. 1 at 26-27 (1959). McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940) had held that the "transfer of possession" in the taxing state could constitute a taxable event when a sales tax was in question.

202. See notes 86 through 95 *supra*, and supporting text, for discussion of this law.

The most vexatious problems in connection with the apportionment factors lie in these varying definitions of the "sales" factor. Here is to be found the largest source spring for multiple taxation. Every state employing a factor formula has provided for inclusion of receipts from sales therein either under a "sales," "gross receipts" or "business" factor. The basic trouble flows from the wide discrepancy among the different states with regard to the operation of the "sales" factor in the formula. The discrepancy results, of course, from the fact that the various states have adopted "situs of sales" rules favorable to themselves in the light of local characteristics, without any regard to the impact upon taxpayers engaged in unitary operations in a number of states. More than three different methods or rules for locating a "sale" have been shown to exist in the present day formulas. Nevertheless, it is easy to demonstrate with the major of these rules how inequities can result. As we saw in a great bulk of the states the sale is allocated either (1) to the state or origin; or (2) to the state of solicitation of the sale; or (3) to the state of destination. The *same* sales transaction could thus be taxed by three separate states with which the sale has a connection, in the event each state has adopted a different one of these rules for determining the "situs of the sale" for tax purposes, thus resulting in taxes computed on 300% of the income. Also, it would seem possible to have taxes computed on 400% of income under the additional theory which attributes sales to the state wherein the agreement is finally negotiated or executed.

Rigid adherence to the statutorily prescribed factors and formulas could produce inequitable results, or not fairly calculate net income attributable to sources within a state. Therefore, twenty-three states and the District of Columbia have specifically vested wide discretion with the state tax commissioner to modify or change the allocation formula on petition by the taxpayer, or upon his own motion.[203]

203. *Alaska*—Alaska Laws 1959 (effective Jan. 1, 1960), c. 175, § 5(c)(21); *Arizona*—ARIZ. CODE ANN. § 43-135(g) (1956); *California*—El Dorado Oil Works v. McColgan, 34 Cal.2d 731, 215 P.2d 4 (1950); *Colorado*—COLO. REV. STAT. ANN. § 138-1-28 (1953); *Connecticut*—CONN. GEN. STAT. § 12-221 (Supp. 1958); *Delaware*—DEL. CODE ANN. tit. 30, § 1903(c) (Supp. 1958); *District of Columbia*—D.C. CODE ANN. § 47-1580(a) (1951); *Georgia*—GA. CODE ANN. § 92-3133(5) (1937); *Idaho*—IDAHO CODE ANN. § 63-3027(e) (Supp. 1959); *Kentucky*—KY. REV. STAT. ANN. § 141.120(9) (1955); *Maryland*—MD. ANN. CODE art. 81, § 316(b) (1957); *Massachusetts*—MASS. ANN. LAWS c. 63, § 42 (Supp. 1958); *Minnesota*—MINN. STAT. ANN. § 290.20 (Supp. 1958); *Montana*—MONT. REV. CODE ANN. § 84-1503 (Supp. 1958); *New Jersey*—N.J. STAT. ANN. § 54:10A-8 (Supp. 1958); *Oklahoma*—OKLA. STAT. ANN. tit. 68, § 878(k) (1954); *Oregon*—ORE. REV. STAT. § 314.280(2) (1957); *Pennsylvania*—PA. STAT. ANN. tit. 72, § 3420(b) (Supp. 1958); *Rhode Island*—R.I. GEN. LAWS ANN. § 44-11-15 (1956); *Tennessee*—TENN. CODE ANN. § 67-2711 (1955); *Utah*—UTAH CODE ANN. § 59-13-20(8) (1953); *Vermont*—VT. STAT. ANN. § 32-5903(b) (1959); *Virginia*—VA. CODE ANN. § 58-132 (1959); *Wisconsin*—WIS. STAT. ANN. § 71.07(5) (1957).

D. The Uniform Division of Income for Tax Purposes Act

The "minimum activities" requirement for taxing net income, as set forth in the recent congressional statute curbing state power to tax income, based solely on solicitation, does not, of course, represent a solution to all the problems in the field of taxation of income from a multistate operation.[204]

1. The Need for Uniformity in Tax Apportionment and Allocation

Because of the divergencies in the tax structures of the various states, there continue to exist a number of inequities in the nature of multiple taxation by the states. To summarize, these inequities stem primarily from three sources: (1) the varying rules for allocation of nonbusiness income; (2) the divergent factors included in the statutory apportionment formulas; and (3) the differing definitions of superficially identical factors in the apportionment formulas. As we saw, these apportionment formulas vary not only with respect to the basic factors used such as property, payroll, sales and manufacturing costs, but also vary with respect to the definition of each of the factors used in the formula. Even though many states use the same formulas, they often define the factors differently. The most troublesome problem in the definition of factors lies in the varying definitions of the sales factor. Although a multistate business may be taxed on more than 100% of its net income because of the divergent apportionment formulas, on the other hand, some interstate business may be taxed on substantially less than its net income, depending on the particular state in which the business is subjected to such taxes.

Uniformity is thus an obviously desirable objective in order to provide equality of tax treatment at the state level. The problem of uniform allocation and apportionment, though highly desirable, has proved an elusive goal, even though efforts to improve the tax climate in this respect for interstate business have been quite considerable. For more than a quarter of a century the National Tax Association, the tax Bar, the Council of State Governments accountants and businessmen have recognized the need for uniformity in the allocation and apportionment methods of the various states.[205]

The National Conference of Commissioners on Uniform State Laws has prepared a "Uniform Division of Income for Tax Purposes Act." It was approved in 1957 by the Committee of State Officials on Sug-

204. That law has been discussed in detail earlier. See discussion from notes 86 through 95 *supra*.

205. For a clear, succinct summary of the efforts to achieve some degree of uniformity, see Lynn, *Formula Apportionment of Corporate Income For State Tax Purposes: Natura Non Facit Saltum*, 18 Ohio St. L.J. 84, 86-95 (1957). See also Council of State Governments, Recommendations for Uniformity of State Income Taxes on Corporations Doing Business in Several States (1954) for the detailed proposals of this agency.

gested State Legislation of the Council of State Governments and by the American Bar Association.

2. The Purpose and Scope of the Uniform Act.—If this act is adopted in every state having a corporate net income tax, it would assure that 100% of the income, no more or no less, would be taxed. It should be made clear, however, that there are certain things which this act does *not* do. The act does not deal with the question of what constitutes jurisdiction to tax; it assumes jurisdiction. It thus assumes that the commerce and due process clause requirements have been satisfied. Neither does the act deal with the problem of what constitutes income. Nor does the act provide for the tax on income from a multistate business. It merely provides for what is thought to be an equitable means of apportioning and allocating the income to individual states when the existing state legislation has defined the base of an income tax (what is income), and the only remaining problem (which is the only problem dealt with by the act) is the *amount* of the income that should be assigned to the particular taxing jurisdiction.

The problem of allocation and apportionment of income of businesses appears only when a particular business is subject to the taxing jurisdiction of two or more states. Section 2 of the Uniform Act reaffirms that principle by providing that a taxpayer can employ its allocation and apportionment provisions ouly when he is taxable in more than one state. Section 2 also exempts from its operation three classes of taxpayers:

1. Individuals, to the extent of their income for personal services.
2. Financial organizations, such as banks, trust companies and insurance companies.
3. Public utilities.

These exemptions presumably are made either because the allocation and apportionment in these areas have been satisfactorily dealt with by existing legislation; or because better methods are available for the allocation and apportionment of the income of these three classes of taxpayers. In short, the present laws taxing these persons and institutions would continue in force after the adoption of the Uniform Act.

3. The Allocation and Apportionment Provided by the Uniform Act.—The basic scheme of apportionment under the Uniform Act requires a classification of all income as either "business income" or "nonbusiness income," with a different method of dealing with each class. Having discussed the meaning of those classes of income elsewhere, nothing further will be said on that point here,[206] other than to

206. See discussion in connection with notes 126 through 146 *supra*.

set forth the manner in which the Uniform Act allocates such income. Sections 4 and 8 of the act allocate four types of income to a specific state to the extent they constitute "nonbusiness" income, rather than apportion this income by the use of a formula. Very briefly those four types can be summarized. (1). Royalties and rents from real and tangible personal property are allocated to the states where the property is utilized, or at the taxpayer's domicile if not taxed where utilized. (2). Capital gains and losses from sales of real and personal property are allocated to the state where the property has a situs, or commercial domicile if not taxed at the situs. (3). Interest and dividends are allocated to the state of the taxpayer's commercial domicile. (4). Patent and copyright royalties are allocated to the states where the rights are utilized, but if not taxable in the state, the income is allocated to the state of the taxpayer's commercial domicile. The drafter of the Uniform Act presumably felt that to the extent these items constitute "nonbusiness" income, they can properly be attributed to a specific state, rather than be apportioned on the basis of a formula. Thus, "nonbusiness" income is subject to specific allocation under the Uniform Act.

After disposing of the "nonbusiness" income, the remaining "business" income is then apportioned by the Uniform Act by means of a formula. That is to say, the act apportions by formula income arising in the regular course of trade or business and properly attributable to business activity within the taxing state. Sections 9 through 17 provide for the apportionment of business income by the use of a three-factor formula, consisting of *property, payroll* and *sales.* The average of the three factors determines the percentage of income to be apportioned to each state. The Uniform Act also has a "safety-valve" provision. Section 18 permits the use of some other method of allocation and apportionment where unreasonable results flow from the operation of the allocation and apportionment provisions provided for in the Act.

Sections 10 through 12 deal with the method of determining the "property factor" in the formula. Perhaps the most controversial matters concerning the property factor under present statutes are those dealing with valuation of property and the treatment to be afforded rented property. The Uniform Act adopted the valuation at original cost test, while rented property is to be valued at eight times the annual net rental rate.

Sections 13 and 14 provide for the computation of the "payroll" factor. Basically it is the same as the test for unemployment compensation taxes.

The "sales" factor is dealt with in sections 15 through 17. With two exceptions, sales of tangible personal property are attributed to the state of the purchaser. In other words, the Uniform Act uses what we have called the "state of destination" definition for attributing a sale to a state for tax purposes, thereby giving the fiscal benefit of the sales factor to the "market" state, rather than the "producing" state (state of origin).[207] The two exceptions to allocation by the state of the purchaser have to do with goods which are not taxed where shipped, and where the United States Government is the purchaser. In those two instances, the sales are attributed to the state from which the goods are shipped. Sales other than the sales of tangible personal property are attributed by section 17 to the state where the income producing activity is performed. If such activity is performed in more than one state, the sale is attributed to the state where the greater proportion of the activity was performed, based upon costs of performance.

The "sales" factor has been the most controversial feature of the Uniform Act. The act has been strongly criticized because it attributes the situs of the sale to the state of the purchaser.[208] It is urged by the opponents of the act that the sale should be allocated to the home or regional office of the seller on the ground that the state where a corporation's productive activities are located has the prior claim. This is thought to be so because a corporation is an integral part of the economy of a state where it employs capital and labor and operates productive or sales facilities. It receives from that state protection and other services, and for these benefits, the state is entitled to compensation. Since the corporation's income is the most

207 For states adopting these two concepts for allocating a sale in the apportionment formulas now in existence, see notes 192, 193, 194 *supra*.

208. See Statement of John Dane, Jr., representing the U.S. Chamber of Commerce, at the *Hearings before the Select Committee on Small Business United States Senate*, "State Taxation of Interstate Commerce," 86th Cong., 1st Sess., pt. 1 at 13, 16-18 (1959). Studenski & Glaser, *New Threat In State Business Taxation*, 36 HARV. BUS. REV. 77, 86-91 (Nov.-Dec. 1958). The following Statement by United States Senator Kenneth B. Keating of New York at the *Hearings before the Committee on Finance United States Senate*, "State Taxation of Interstate Commerce," 86th Cong., 1st Sess. at 31-32 (1959) in support of congressional curbs on state income taxes based only on solicitation, is illustrative of the criticism. He said, in part:

"A corporation which employs capital and labor and operates facilities within a State is an integral part of that State's economy and receives a variety of protective and other services for which the State should be compensated. Since these services directly relate to the income-producing activities of the company, a tax on income allocated to these activities is patently reasonable. On the other hand, a company which does not have a place of business in a State does not receive any benefits from the State which relate to its income-producing activities. Such a State does not put out a fire on the company's premises, it does not insure its employees against injury on the job, it does not protect its warehouses, it does not maintain the streets and highways or subways and utilities needed for the company's functioning. The fact that the property of such a foreign corporation is delivered to one of its citizens may justify a sales or use tax, but it does not justify a tax on the net income of the company."

practical measure of the benefits it has received, a tax on the income attributable to the in-state activities has solid justification under the benefit theory of taxation. On the other hand, so the argument further runs, the benefits provided by a state to a corporation which has no place of business within its borders and which merely sells goods to resident customers are speculative and conjectural at best.

Another objection to the use of the Uniform Act's "state of the purchaser" definition of sale is that it would require a corporation to pay taxes to a much greater number of states than it would be required to do if the "point-of-origin" definition of a sale is used. In short, the argument runs, it would be administratively more efficient for the corporation, and would cost less for it to pay taxes in the fewest possible states.[209] Likewise, the "state of the purchaser" definition of a sale is said to have disadvantages to the tax collectors, resulting from the fact that a large number of corporations would incur many rather small tax liabilities in some states.[210] This, it is pointed out very realistically, places the conscientious tax administrator in a dilemma. Should he try to cover the waterfront and attempt to collect the tax from every foreign corporation, even though the costs of collection might exceed the tax itself? Or should the tax collector enlarge the mesh of the collection net so that only the larger fish will be caught, thereby tacitly encouraging tax avoidance by the small taxpayer? This latter course entails serious consequences from the point of view of its effect on taxpayer morale. Suppose one taxpayer's sales are just large enough to be caught in the collection net, but his two major competitors, whose total sales exceed those of taxpayer, are each so small that the tax collector does not bother to enforce the tax against them. We need not long ponder taxpayer's feelings about the equity of the tax policy of the state.

Of course, much of the sting is taken out of this whole argument against the use of the "state of the purchaser" definition of sales by the recent congressional action outlawing state net income taxes based solely on solicitation of a sale of tangible personal property.[211] This minimum activity prescribed by Congress for tax purposes would prevent their being trifling tax liabilities in many instances. By the same token, this congressional statute would severely curtail the scope of the Uniform Act. Thus, the "state of purchaser" sales factor in the

209. See Statement of John H. Murphy, President of the New York State Tax Commission, at the *Hearings before the Select Committee on Small Business United States Senate,* "State Taxation on Interstate Commerce," 86th Cong., 1st Sess., pt. 3 at 325 (1959).

210. See testimony by John Dane, Jr., U. S. Chamber of Commerce, at the *Hearings before the Committee on Finance United States Senate,* "State Taxation of Interstate Commerce," 86th Cong., 1st Sess. at 196, 200-01 (1959).

211. This legislation has been discussed earlier. See material beginning with note 86 through note 95 *supra.*

apportionment formula of the Uniform Act would be zero if the only contact of the seller with the state of purchaser of the goods was that of solicitation of the sale, resulting in no tax for a state so situated.

The proponents of the Uniform Act can, however, make out a strong case for attributing the sales factor to the state of purchaser. They urge that the payroll and property factors in the apportionment formula already weigh the apportionment formula heavily in favor of the producing states.[212] Moreover, the market states deserve a better break since, without the buyers which they provide, the productive facilities of the manufacturing state would be of little value. Also, the state of purchaser test affords less opportunity for manipulation of sales operations merely to avoid taxes. Thus, central sales offices can readily be moved to states having no income taxes whereas customers cannot. Taxing a sale other than in the state of the purchaser can result in a commercial handicap to competing local businesses, which must pay the tax to the purchaser's state. By permitting a tax only by the state of the purchaser equality of competition between local and out-of-state goods is more nearly preserved. This competitive disadvantage to local business by permitting the sale to be taxed other than in the purchaser's state would seem to exist only if the commodity sold has not been subject to a similar tax elsewhere. A very realistic question may somewhat plague those who would deny to the state of the purchaser the power to include the sales factor in its apportionment formula. If the state of the purchaser is not permitted to tax a sale, from what source can it replenish its depleted coffers? In many such states there may not be necessary manufacturing and production facilities to serve as taxable activities.[213]

Although the Uniform Act has been the subject of very considerable study since its preparation, only Alaska has adopted provisions similar to the Act.[214] In addition to the foregoing objections to the act, which would defeat it in the manufacturing and producing states, there are perhaps two other reasons why it has received less than an enthusiastic reception. In the first place, any revision of existing tax laws affects state revenues at a time when the states have been experiencing unusually great demands for additional governmental services. States simply do not want to rock the tax boat. In the

212. See statement of Fred L. Cox, Conferee, Georgia Department of Revenue, at *Hearings before Select Committee on Small Business United States Senate*, "State Taxation on Interstate Commerce," 86th Cong., 1st Sess., pt. 1 at 34 (1959).

213. There has been concern that the curtailment of the taxing power of the states, which are hard pressed for tax revenues, will make the states powerless wards of the federal government. See Report of Committee on Finance United States Senate, Byrd, *State Taxation of Income Derived From Commerce* (minority views), S. REP. 658, 86th Cong., 1st Sess. 12 (1959).

214. See CCH State Tax Guide, Summary of Current Tax Legislation, 1491.

second place, while tax paying groups or their representatives desire uniformity, they remain unwilling to accept any revision which increases their taxes, although overall administrative savings might well offset any tax increases.[215] Unless Congress takes a hand in the matter by enacting a uniform apportionment statute, there appears to be but little hope of achieving any solution to the tax tangle by means of uniformity in apportionment methods.[216]

PART TWO: STATE TAXATION OF CORPORATE GROSS INCOME

In order to round out a discussion of state taxation of corporate income, it is felt that some attention should be given to the taxation of the gross income of corporations. Already we have had occasion to see how the gross receipts of corporations sometime constitute one of the factors in the fiscal formula by which the states apportion, for tax purposes, the net income of a corporation engaged in a multistate business.[217]

Most of the states have some sort of tax reaching either total gross income of the taxpayer or the gross receipts derived from certain activities. Some of the taxing states allow exemptions, others do not. Incident to their operations in more than one state, corporations may become subject to a tax levied directly upon their gross income from all sources, including gross receipts from sales of property and services, as well as interest, rentals and dividends.[218] Or in such operations corporations may become subject to a franchise or privilege tax, with the measure of the liability being gross income,[219] or with the tax liability restricted to the gross receipts from sales of certain kinds

215. For a detailed and comprehensive analysis of this Uniform Act, see Pierce, *The Uniform Division of Income for State Tax Purposes*, 35 TAXES 747 (1957). For a critical analysis of the Uniform Act, along with a number of proposed changes and modifications, see Wilkie, *Uniform Division of Income for Tax Purposes*, 37 TAXES 65 (1959).

216. Later, there will be a discussion of various proposals for congressional action in field of state taxation of interstate commerce. See discussion starting with note 364 *supra*, and going through note 373 *supra*.

217. See the various formulas set forth in connection with note 157, *supra*, through note 167 *supra*.

218. *E.g.*, Indiana levies a tax on gross income of all residents and gross income of persons and corporations doing business in Indiana, derived from sources in Indiana. IND. ANN. STAT. § 64-2602 (1951).

219. *E.g.*, Alaska has a business license tax for engaging in any business levied on gross receipts, see CCH STATE TAX GUIDE ¶ 60-216 (1959). Arizona levies an occupational gross income tax, ARIZ. REV. STAT. ANN. § 42-1309 (1956). Michigan imposes an adjusted business receipts tax for the privilege of engaging in activity for gain in Michigan, MICH. STAT. ANN. § 7.557(3) (Supp. 1957). Mississippi levies a privilege tax measured by gross income or gross proceeds, MISS. CODE ANN. § 10105 (Supp. 1958). New Mexico levies a privilege tax measured by gross receipts, N.M. STAT. ANN. § 72-16-4.1 (Supp. 1959). Washington imposes an occupation or business tax for the privilege of engaging in business, WASH. REV. CODE § 82.04.080 (1952). West Virginia levies an occupational tax on gross income for the privilege of engaging in business, W.VA. CODE ANN. § 959-960(10) (1955).

of property,[220] or gross receipts from sales of services, particularly receipts from services of utilities.[221] A good bit of commerce clause litigation has involved the taxation of the gross receipts of public utilities. That will become evident as this discussion moves along. Various kinds of taxing statutes will be noticed as we proceed with the discussion, which will consider, by and large, the commerce clause limitations on the power of the states to reach, taxwise, corporate gross income or receipts from particular activities. The due process clause has been involved to a much lesser degree than the commerce clause in this area.

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220. *E.g.*, Arkansas has an excise tax on gross receipts from sales of tangible property, ARK. STAT. ANN. § 84-1903 (Supp. 1957). Delaware has a manufacturer's license tax based on gross receipts, DEL. CODE ANN. tit. 30 § 2701 (1953). Hawaii levies a tax for the privilege of selling certain property, HAWAII REV. LAWS §§ 117-13, 117-14 (1955). Louisiana levies an occupational license tax covering gross receipts from many occupations, some of which are selling various items, LA. REV. STAT. 88 47:359-397 (1952). Mississippi levies a tax on gross income from sales of certain property, MISS. CODE ANN. § 10108 (Supp. 1958). North Carolina levies an excise tax on gross proceeds of sales of tangible personal property by wholesalers, N.C. GEN. STAT. § 105-164.5 (Supp. 1959). Illinois has an occupational retail sales tax for selling property, ILL. STAT. ANN. ch. 120 § 441 (Supp. 1958). Texas has an excise tax for the sale of certain property, TEX. REV. CIV. STAT. ANN. tit. 122 § 7058 (1951). Virginia levies a merchant's license tax on gross receipts from sales, VA. CODE ANN. § 58-321 (1959).

221. *E.g.*, Alaska taxes gross receipts of certain utilities. CCH STATE TAX GUIDE ¶ 80-215 (1959). Alabama levies a tax on gross receipts of utilities, ALA. CODE ANN. §§ 51-177 through 186 (1940 and Supp. 1955). Arizona taxes gross receipts of certain utilities, ARIZ. CODE ANN. § 40-401 (1956). Arkansas levies an excise on gross receipts of certain utility services, admissions, and services by hotels, etc. ARK. STAT. ANN. §§ 73-201, 84-1903 (1956). Colorado uses gross revenues of certain public utilities as basis for regulatory fees, COLO. REV. STAT. ANN. §§ 15-2-10 through 16 (Supp. 1957). Connecticut has tax on gross earnings of certain utilities, CONN. GEN. STAT. §§ 12-249 through 12-268 (1958). Delaware taxes gross earnings of certain utilities, DEL. CODE ANN. tit. 30 §§ 3301, 3501, 3502 (1953). Florida taxes gross receipts of certain utilities, FLA. STAT. ANN. §§ 195.13 through 195.16 (1958). Hawaii has a privilege tax measured by gross receipts from sales of certain services, including receipts of utilities. HAWAII REV. LAWS §§ 117-14, 125-1 through 126-7 (1955). Idaho taxes gross receipts of express companies, IDAHO CODE ANN. § 63-2602 (1948). Illinois has an occupational tax for repairing property, ILL. STAT. ANN. ch. 120 § 441 (Supp. 1958). Illinois also has a tax on gross receipts of certain railroads, and the sale of electricity, gas, transmission of messages, ILL. STAT. ANN. ch. 120 §§ 373, 467 through 481a (1954). Kansas taxes gross earnings of express companies, KAN. GEN. STAT. ANN. §§ 79-806, 79-907 (1949 and Supp. 1957). Kentucky taxes gross receipts of certain utilities, KY. REV. STAT. ANN. § 136.240 (Supp. 1959). Louisiana taxes gross receipts of certain utilities, LA. REV. STAT. ANN. §§ 47:355 through 47:358 (1952 and Supp. 1958). Maine taxes gross operating revenues of certain utilities, ME. REV. STAT. ANN. ch. 16, §§ 116, 122, 123, 128, 133 (1954 and Supp. 1959). Maryland imposes a franchise tax on gross receipts of businesses, including utilities and insurance companies, MD. ANN. CODE art. 81, §§ 129-143 (1957). Minnesota has a tax on gross earnings of utilities and trust companies, as well as a tax on gross premiums of insurance companies, MINN. STAT. ANN. §§ 60.63, 294.01, 294.43 (1947 and Supp. 1958). Mississippi levies an occupational tax on gross income of sales of certain services, MISS. CODE ANN. §§ 10106, 10109 (Supp. 1958). Missouri taxes gross receipts of express and freight lines, MO. REV. STAT. §§ 153.010, 153.020 (1952). Montana levies a tax on gross receipts of certain utilities, MONT. REV.

I. *Commerce And Due Process Clause Limitations On Taxation Of Gross Income Of Corporations.*[222]

In many respects, taxes on the gross income from all sources resemble net income taxes. There are, however, some significant differences. A tax imposed on gross income affects each transaction, whether profitable or otherwise, while a tax on net income does not arise at all unless a gain remains after expenses and losses. Taxation of the gross income or gross receipts from a multistate business, of course, would furnish a lucrative and easily accessible source of revenue for state and local governments. Such taxes have sailed a rather stormy course during our constitutional history, however. When challenged on commerce clause grounds, the first such tax was upheld in 1872 in the case of *State Tax on Railway Gross Receipts*,[223] which involved

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CODES ANN. §§ 84-1601, 84-1707, 84-2501, 84-2601, 84-4819 (1947 and Supp. 1959). New Jersey imposes a tax on gross receipts of certain utilities and insurance companies, N.J. STAT. ANN. §§ 54:13-11, 54:13-15 (Supp. 1958). New Mexico taxes gross earnings of certain utilities, N.M. STAT. ANN. §§ 72-12-1 through 72-12-6 (1953 and Supp. 1959). New York levies a tax on gross income of utilities and insurance companies, N.Y. TAX LAW §§ 186, 186 a & b and 187. North Carolina taxes gross receipts of certain utilities, N.C. GEN. STAT. §§ 105-115 through 105-120 (1958 and Supp. 1959). North Dakota taxes gross earnings of certain utilities, N.D. REV. CODE § 57-3304 (Supp. 1957). Ohio taxes gross receipts of certain utilities, OHIO REV. CODE §§ 5727.33 through 5727.42 (1959). Oklahoma levies a tax on gross receipts of airports and airways, freight cars and electric cooperatives, OKLA. STAT. ANN. §§ 68-773 through 782, 68-805 through 805g, 68-861 through 867 (1954 and Supp. 1958). Oregon imposes a tax on gross operating revenue of certain public utilities, ORE. REV. STAT. §§ 308.705 through 730 and 308.805 (1957). Pennsylvania levies a tax on gross receipts of certain public utilities, banks and insurance companies, PA. STAT. ANN. tit. 72 §§ 2181 through 2284 (1949 and Supp. 1958). Rhode Island levies a tax on gross income of public utilities companies, R.I. GEN. LAWS ANN. §§ 44-13-1 through 44-13-10 (1956) and insurance companies, R.I. GEN. LAWS ANN. §§ 44-17-1 through 44-117-10 (1956). South Carolina levies a tax on gross premiums of insurance companies and certain utilities, S.C. CODE § 58-12 (1952). South Dakota taxes gross earnings of certain utilities, S.D. CODE §§ 57-1401 through 1405 (1939). Tennessee levies a tax on gross income of public utilities, TENN. CODE ANN. §§ 67-4202 items 87-89, 67-4102 items G. H. M. N. P. Q. (1955). Texas imposes a tax on gross receipts from public utility services and insurance companies, TEX. REV. CIV. STAT. ANN. 7058 (1951 and Supp. 1958). Utah taxes gross operating revenue of utilities, UTAH CODE ANN. 54-5-1 and 2 (1953). Vermont levies a tax on the gross premiums received from insurance, and in a limited manner taxes gross earnings of telephone, and telegraph companies, VT. STAT. §§ 32-8492, 32-8521, 32-8551 (1959). Virginia has a tax on gross proceeds of various service companies, including railroads, power companies, telephone and telegraph companies, pipe line and express companies, VA. CODE ANN. §§ 58-503 to 58-685 (1950). Washington taxes gross income of certain utilities, WASH. REV. CODE §§ 82.16.010 (1957). West Virginia taxes gross receipts of certain utilities, W.VA. CODE ANN. §§ 958 (13) through (17) (Supp. 1959). Wisconsin imposes a tax on gross receipts of public utilities and insurance companies, WIS. STAT. §§ 76.34 through 42 (1957). Wyoming taxes gross receipts of express companies, WYO. COMP. STAT. ANN. § 39-181 (1957).

222. Elsewhere the writer has discussed somewhat more in detail several of the gross income tax cases that will be considered herein. See HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE 180-214 (1953); Hartman, *Sales Taxation in Interstate Commerce*, 9 VAND. L. REV. 138, 176-203 (1956).

223. 82 U.S. (15 Wall.) 284 (1872).

a Pennsylvania tax imposed on the gross receipts of transportation companies. The receipts there taxed were made up from freight charges received from transporting merchandise in interstate commerce. The Court purported to adhere to the proposition that a state could not regulate interstate commerce, but the assailed tax was gotten across that hurdle by deciding that the fruits of interstate transporation lost the commerce clause protection against taxation after they became intermingled with the other property of the carrier. As an alternative ground of decision, the Court treated the levy as an excise tax upon the franchise of a corporation created by the state, with gross receipts being a fair and convenient measure of the value.

Fifteen years later, however, the Court pretty much reversed its field and placed serious limitations on the taxation of gross income from interstate operations, deciding two cases that have influenced judicial thinking ever since. In *Fargo v. Michigan*[224] and *Philadelphia & Southern Steamship Co. v. Pennsylvania*,[225] the Court held that the states were impotent, because of the commerce clause, to impose taxes directly on the gross receipts derived from interstate transportation. The rationale of the two decisions is that gross income received from interstate commerce is as necessary to the commerce as the transportation itself; and when the state taxed the gross receipts from the transportation it was attempting to regulate the commerce itself, in conflict with the exclusive power of Congress over interstate commerce.

We have seen that the Court employs a completely different rationale when taxation of "net income" from interstate commerce is involved. In repelling a commerce clause attack where the tax is levied directly on *net* income, rather than *gross* income, from interstate commerce, the Court takes the position that the tax is levied after the commerce has taken place, expenses have been paid, losses adjusted and the taxpayer is free to use the money as he pleases; and if there is no profit, then there will be no net income tax.[226] The net income tax is much less likely, therefore, to discourage interstate trade than is the gross receipts tax.

While the commerce clause ban against taxation of gross income from multistate operations originated in the field of transportation, nevertheless we will soon see that the scope of the ban has been so widened that it prohibits taxes not only on gross income from inter-

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224. 121 U.S. 230 (1887).

225. 122 U.S. 326 (1887).

226. See U.S. Glue Co. v. Town of Oak Creek, 247 U.S. 321, 328-29 (1918), discussed in connection with notes 20 and 21 *supra*. In essence, too, that is the rationale of Northwestern Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).

state transportation activities, but also taxes on gross income from interstate communications and interstate sales.[227]

Next, we will try to locate some of the varying and wavering lines between permissible and non-permissible state taxing action as the states have tried by one method or another to reach gross income for tax purposes.

II. *Methods Of Reaching Gross Income For Taxation*

Although the Court pretty effectively closed the door to state and local taxes levied directly on the gross income from interstate commerce during much of our constitutional history, that did not mean that this convenient and lucrative source of revenue would go untouched. Taxing officials have ingenious minds at times. Two methods of making fiscal inroads developed.

A. In Lieu of Property Tax

One method of breaking through the commerce clause barrier was the so-called "in lieu of" tax, which meant that the tax was imposed upon the gross income as a fair substitute for all other taxes which a state could constitutionally impose on taxpayer's property. The commerce clause has never been thought to prohibit a state from levying a tax on property owned by a concern engaging in an interstate business. The Court sustained an "in lieu of" tax in *United States Express Co. v. Minnesota.*[228] There Minnesota had imposed a tax on the gross receipts of express companies derived from interstate business within the state. Repeating the doctrine that a state could not burden or regulate interstate commerce, the Court nevertheless felt that since the tax was levied "in lieu of" all taxes upon the property of the taxpayer, it was a constitutionally competent exercise of state taxing power. In essence, the Court treated the tax as a fair substitute for a property tax on the business of a "going concern."

Two cases, one in 1954 and one in 1959, mark out fairly definite current judicial guide lines for the validity of the "in lieu of" gross receipts taxes. That this tax may run into commerce clause difficulties was shown by the 1954 case of *Railway Express Agency v. Virginia.*[229]

The taxpayer, a foreign corporation, did only an interstate busi-

227. *E.g.,* J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938); Western Union Tel. Co. v. Alabama State Bd. of Assessment, 132 U.S. 472 (1889); Western Union Tel Co. v. Pennsylvania, 128 U.S. 39 (1888).

228. 223 U.S. 335 (1912). One of the earliest cases approving the "in lieu of" doctrine as applied to gross receipts seems to be Postal Tel. Cable Co. v. Adams, 155 U.S. 688 (1895), where the statute was cast in terms of a privilege tax.

229. 347 U.S. 359 (1954). The decision was 5-4. Mr. Justice Clark, with whom Chief Justice Warren, Mr. Justice Black and Mr. Justice Douglas joined, wrote the dissenting opinion.

ness within the taxing state (Virginia). It was prohibited by the Virginia Constitution from doing any public service business in Virginia except that done in interstate commerce.[230] Nevertheless this Delaware corporation had numerous offices in Virginia; it owned real property and motor vehicles there; and carried on a large express business in Virginia. Virginia had developed a rather comprehensive tax structure applicable to express companies. She empowered the local governments to impose ad valorem taxes on the "dead value" of all real property and tangible personal property located within the respective jurisdictions of the local governments. Her statute allocated to state taxation, free of all local taxes, two kinds of property —intangible personal property and money. Also applicable to express companies was "an annual license tax . . . for the privilege of doing business" in the state. This tax was imposed upon gross receipts earned in Virginia "on business passing through, into or out of" the state.[231] This tax was in addition to the state property tax. When Virginia sought to apply this annual privilege tax to the Railway Express, it was resisted as an unconstitutional levy on the privilege of carrying on interstate commerce.

The Virginia Supreme Court sustained the tax as a property tax measured by gross income and laid on the excess of the "going-concern" value of the taxpayer's physical assets over their "barebones" value.[232] This was regarded by the Virginia Court as a separate intangible property of the taxpayer. In upholding the tax, the Virginia Supreme Court thus disregarded the statutory language that expressly characterized the exaction as a "privilege tax." Taxpayer was thus subject to three property taxes: the local tax on the barebones value of physical assets; the state ad valorem tax on intangible personal property, as well as this contested state tax on the excess value of taxpayer's assets.

The Supreme Court of the United States held the law, as applied, invalid as a privilege tax on an exclusively interstate business. Such privilege taxes, as we have seen, have uniformly been declared a violation of the commerce clause.[233] However, in striking down the *Railway Express* tax, the Supreme Court disregarded the state court's characterization of the exaction as a property tax on intangible property, measured by gross receipts. As we have seen, such apportioned gross receipts taxes on an interstate transportation company are

230. VA. CONST. art. XII, § 163. This provision of the Virginia Constitution was upheld in Railway Express Agency, Inc. v. Virginia, 282 U.S. 440 (1931).

231. VA. CODE ANN. §§ 58-546, 58-547 (1950).

232. Railway Express Agency, Inc. v. Virginia, 194 Va. 757, 75 S.E.2d 61 (1953).

233. See discussion in connection with notes 56 through 59 *supra*.

valid, if "in lieu of" property taxes.[234] Moreover, in determining the value of such property, a state may take into account the property's augmentation of value as a part of a "going concern," and tax this intangible value of the taxpayer's property.[235]

What, then, caused the Supreme Court of the United States to upset Virginia's tax on Railway Express as a tax on the privilege of engaging in exclusively interstate commerce? There are several things that the court seems to think pointed the way to that conclusion. In the first place, a tax on gross receipts to be sustained "in lieu of" a property tax has been upheld only where it is roughly equivalent to a normal property tax.[236] It has been procribed where levied in addition to a property tax.[237] The Virginia statute expressly provided that this questioned tax on the intangible or "going-concern" property value of taxpayer should be imposed in addition to Virginia's intangible property tax on this taxpayer. The Court did not stress this feature, however. The Court was of the opinion that the equivalency between the challenged tax and a normal property tax was lacking, pointing out that if this "going-concern" value were treated as separate "intangible property," then, every dollar invested in taxpayer's tangible property is deemed worth over $100 for tax purposes.[238] The Court arrived at this result by taking the amount of the gross receipts tax imposed by Virginia and projecting the "going-concern" value from it by the use of the rate imposed by Virginia on intangible personal property. The Court thought it overtaxed the credulity of the Court to ascribe to the intangible going-concern worth of property a value over one hundred times that of the tangible property that produced this intangible worth. That, concluded the Court, was such "extreme attribution" that it required a rejection of the state court's characterization of the levy as a property tax. The "going-concern" value of a prosperous business, of course, might well be that great. In what the Court may have regarded as clinching its position that this gross receipts tax could not be considered a fair equivalent of a property tax on the Railway Express, the Court concluded that it had

234. *E.g.*, Illinois Central R. R. v. Minnesota, 309 U.S. 157 (1940); Great Northern Ry. v. Minnesota, 278 U.S. 503 (1929); Pullman Co. v. Richardson, 261 U.S. 330 (1923); Cudahy Packing Co. v. Minnesota, 246 U.S. 450 (1918); United States Express Co. v. Minnesota, 223 U.S. 335 (1912).

235. Pullman Co. v. Richardson, 261 U.S. 330 (1923); Cudahy Packing Co. v. Minnesota, 246 U.S. 450 (1918); Adams Express Co. v. Ohio State Auditor, 165 U.S. 194 (1897), *rehearing den.*, 166 U.S. 185 (1897); Postal Tel. Cable Co. v. Adams, 155 U.S. 688 (1895).

236. Illinois Central R.R. v. Minnesota, 309 U.S. 157 (1940); Pullman Co. v. Richardson, 261 U.S. 330 (1923); Northwestern Mutual Life Ins. Co. v. Wisconsin, 247 U.S. 132 (1918); Cudahy Packing Co. v. Minnesota, 246 U.S. 450 (1918); Ohio Tax Cases, 232 U.S. 576 (1914).

237. New Jersey Bell Tel. Co. v. State Board of Taxes, 280 U.S. 338 (1930); Meyer v. Wells, Fargo & Co., 223 U. S. 298 (1912).

238. See Railway Express Agency v. Virginia, 347 U. S. 359, 366 (1954).

declined to regard mere gross receipts as a sound measure of going-concern value in the practical world of commerce, where values depend on the profit potential of a business, not merely its volume.

Another feature which the Court ostensibly thought militated against the validity of the tax was the fact that the Virginia statute expressly declared that this tax was imposed for the privilege of doing business, and it will be remembered that Railway Express was confined to business that is exclusively interstate by Virginia's Constitution. However, under prior authority the fact that the statute was cast in terms of a privilege tax should not be fatal to the validity of this gross receipts tax, provided the levy amounts to no more than the ordinary tax upon property or its just equivalent, including the intangible or "going-concern" value added by the physical property's assemblage into a going business, even if that business is interstate commerce.[239] The Court felt that the tax in dispute did not depend on taxpayer's owning any physical property in Virginia, nor upon the value of such property, but would attach to the gross revenues even if the taxpayer found some way to dispense with all local, physical property. Also, the tax base used by Virginia for this tax was exactly the amount of gross revenue reported by taxpayer. When all those factors were thrown on the scales, a majority of the Court concluded that Virginia's gross receipts tax was in fact and in effect a privilege tax for the purpose of doing an exclusively interstate business, rather than a tax on gross receipts "in lieu of" property taxes. As such, it violated the commerce clause.

Four members of the Court dissented. They agreed with the Virginia Supreme Court's conclusion that the levy was an ad valorem tax on taxpayer's intangible property, with the operative incidence of the tax being the "going-concern" value of taxpayer's physical assets in Virginia. The writer has difficulty in finding anything in the Court's opinion that refutes the contention that the "going-concern" value of taxpayer's business in Virginia was less than Virginia claimed.

Five years after Virginia lost this first round of her legal battle to tax Railway Express, she reappeared in the legal arena for a second round with the same foreign corporation. That occurred in the 1959 case of *Railway Express v. Virginia*.[240] This time Virginia fared much better with a new tax statute applicable to express companies. Since her first defeat, Virginia had overhauled her tax structure. Her new

239. Northwestern Life Ins. Co. v. Wisconsin, 247 U.S. 132 (1918) (license tax on gross receipts in lieu of all personal property taxes was upheld); Postal Tel. Cable Co. v. Adams, 155 U.S. 688 (1895) (Mississippi tax on gross receipts of foreign corporation in lieu of property tax was phrased as a privilege tax. It was sustained.).

240. 358 U. S. 434 (1959).

statute empowers local governments to levy ad valorem taxes on the "dead" value of all real property and tangible personal property except rolling stock, with the state keeping for itself the power to tax rolling stock, money and other intangibles, as well as the "live" or "going-concern" value of business in Virginia. The new statute expressly characterized the tax on express companies as "a franchise tax which shall be in lieu of taxes upon all of its (express company) other intangible property and in lieu of property taxes on rolling stock."[241] This franchise tax is measured by the gross receipts from operations within Virginia.

It will be noticed that this revamped statute is not denominated a license tax laid on the "privilege of doing business in Virginia," as was the earlier tax statute that was invalidated. Nor was this new tax "in addition to the property tax" levied by Virginia under the old statute that ran afoul of the commerce clause. The new statute is clearly designated a franchise tax "in lieu of" taxes upon all of taxpayer's other intangible property and "in lieu of" property taxes on rolling stock, with gross receipts as the measure.

Again, taxpayer objected to the tax as an invalid privilege tax on an exclusively interstate business, rather than being a tax on intangible personal property. Also, it was claimed that the tax deprived taxpayer of property without due process of law in violation of the fourteenth amendment.

In its opinion upholding the tax, a majority of the Supreme Court of the United States thought the sole question was "whether the tax in practical operation is on property or on privilege."[242] It agreed with the Virginia Supreme Court that this tax, although termed a franchise tax, was a property tax on the "going concern" and intangible property values of the taxpayer's business. Although labeled a franchise tax by the statutory nomenclature, nevertheless this tax was expressly declared by the statute to be in lieu of all taxes on other intangible property and rolling stock. The tax was sustained by the Supreme Court of the United States as an exaction in lieu of all other taxes which Virginia could lawfully levy on the property of the taxpayer within the state The Supreme Court of the United States concluded that a tax measured by gross receipts might not be the best measure of a "going concern" value, but thought that it was too late to question the constitutionality of such a measure. As we have seen, this conclusion by the Court is supported by authority. Nevertheless, there may be an uplifted eyebrow when it is recalled that in the

241. VA. CODE ANN. § 58-546 (1950).

242. Railway Express Agency v. Virginia, 358 U.S. 434, 439 (1959). Mr. Justice Frankfurter concurred in the result reached without an opinion. Justices Harlan and Brennan wrote separate concurring opinions. Mr. Justice Whittaker wrote a dissenting opinion in which Mr. Justice Stewart joined.

prior *Railway Express* case in 1954, in giving the commerce clause quietus to a Virginia tax on the gross receipts of the same taxpayer, the Court had felt that the levy was such "extreme attribution" that it would "overtax" the "credulity" of the Court to characterize it as a property tax on the going-concern value of taxpayer's property. The Court had further made it known in the 1954 case that it declined to regard gross receipts as a sound measure of going-concern value in a practical world of commerce, where values depend on profitableness of business, not merely volume.[243] In the 1959 *Railway Express* case, the dissenters took the position that the tax was imposed directly on interstate commerce and thus violative of the commerce clause.

Virginia's tax was likewise upheld over the due process clause objection. This issue was based primarily on the fact that the taxing authorities had computed the tax by a formula ascribing to Virginia the proportion of gross receipts as the mileage of carriers within Virginia bore to the total national mileage. The resulting amount of the tax was said by taxpayer to be confiscatory. The Court rejected this contention by pointing out that taxpayer's failure to reveal its gross receipts on its tax return forced the state to obtain the amount by some method of approximation. Taxpayer had failed to make an affirmative showing that the mileage method used by Virginia was "so palpably unreasonable that it violates due process."[244]

From Virginia's two recent taxing experiences with Railway Express, as well as from earlier cases, we can see that the Court is concerned with two main considerations in dealing with taxes on gross receipts from interstate commerce. On the one hand, the Court makes it clear that the states lack power to tax the privilege of engaging in interstate commerce. On the other hand, the Court recognizes the essential fairness that the states should be allowed to tax property within their boundaries, and to tax it at its actual value as a going concern, taking into account the augmentation of value attributable to the interstate business in which it is employed. Thus, where the gross receipts taxes have a fair relation to the property employed within the state, including the tangible, as well as the intangible or "going concern" value of the property, the tax can withstand the impact of the commerce clause. As the second *Railway Express* case holds, even though the statute designates the exaction as a privilege tax measured

243. Railway Express Agency v. Virginia, 347 U.S. 359, 366-67 (1954), discussed beginning at note 229, *supra*.

244. *Id.* at 443. A tax may be upset, however, where the apportionment formula can be shown to produce an inequitable result to the particular taxpayer. *E.g.*, Southern Ry. v. Kentucky, 274 U. S. 76 (1927) (excise tax); Wallace v. Hines, 253 U.S. 66 (1920) (excise tax apportioned by mileage method); Johnson Oil Refining Co. v. Oklahoma, *ex rel.* Maxwell, 290 U. S. 158 (1933) (property tax); Union Tank Line Co. v. Wright, 249 U. S. 275 (1919) (property tax apportioned by mileage method).

by gross receipts, if it amounts to no more than the ordinary tax on property or a just equivalent therefor, the tax is not open to a successful attack on commerce clause grounds, even though the receipts were derived from a business that is exclusively interstate. This principle is brought into sharp focus when taxes on gross receipts have been imposed in addition to ad valorem property taxes, rather than "in lieu of" such taxes. Where the tax has been in addition to property taxes, it has fallen before the commerce clause, but the tax has been upheld where levied "in lieu of" such other taxes. This difference is regarded as vital. In the latter instance the tax is treated as a valid tax on property with its value determined by gross receipts from an interstate operation; in the former it is considered as a prohibited tax on interstate commerce itself.[245] To repel a commerce clause attack, the tax on gross receipts as a substitute for a tax on property must, therefore, be conditioned on a finding that it is reasonably equivalent to a normal property tax.[246]

B. Gross Income as the Measure of the Value of a Local Activity or Event

A second legislative device for reaching gross income by a tax has been to impose the exaction on some local "activity" or "privilege" which would not be regarded as a tax-immune segment of interstate commerce, and to measure the amount of the tax by the gross income attributable to the local activity or event even though the income was received, in part, from interstate operations. This method of reaching gross income received judicial sanction, apparently for the first time, in *Maine v. Grand Trunk Ry.*,[247] decided in 1891, just four years after the states had received their set-back in gross receipts taxes in *Fargo*,[248] and *Philadelphia & Southern*.[249] The *Grand Trunk* case involved a statute of Maine, which levied upon a foreign corporation engaged in interstate railroad business a tax "for the privilege of exercising its franchise within the State of Maine." The amount of the tax was determined by the gross receipts from both interstate and local business which were derived from operations within the taxing state. The Court treated this tax as a levy imposed upon the local privilege of exercising the corporate franchise within the state, with gross receipts constituting only the measure of the tax. Thus, the

245. *E.g.*, New Jersey Bell Tel. Co. v. State Bd. of Taxes, 280 U. S. 338 (1930); Galveston, H. & S. A. Ry. Texas, 210 U. S. 217 (1908).

246. *E.g.*, Meyer v. Wells, Fargo & Co., 223 U. S. 298 (1912), where the equivalency could not be shown and the tax fell.

247. 142 U. S. 217 (1891). This case was relied on as precedent in Interstate Oil Pipe Line Co. v. Stone, 337 U.S. 662 (1949).

248. Fargo v. Michigan, 121 U. S. 230 (1887), discussed in connection with note 224 *supra*.

249. Philadelphia & Southern S. S. Co. v. Pennsylvania, 122 U. S. 326 (1887), discussed in connection with note 225, *supra*.

tax escaped commerce clause condemnation as a tax on interstate commerce. Since only those receipts attributable to operations within the state were included in the measure, it was thought to be a fair means of ascertaining the value of the local privilege. The Court took the trouble to point out, however, that the Maine tax was not imposed upon the gross receipts themselves either in form or in fact. Also, it has been held competent for a state to use gross receipts as a tax measure where the taxable event is the privilege of existing as a domestic corporation.[250] The right to be a domestic corporation and carry on business in a corporate capacity depends solely upon the grace of the state. Consequently, the incorporating state may measure a charge for that privilege by the gross receipts from business operations within the state.

The use of gross receipts to determine the value of a local privilege or activity has been used widely and extensively as a lucrative revenue raising device although interstate operations are involved. Where property or commodities have not yet begun to move in interstate commerce, they are not immune from various state privilege taxes, although the property nltimately will be transported beyond the borders of the taxing state. The fact that goods are being produced, processed or prepared for an interstate journey has not exempted from various sorts of nondiscriminatory privilege taxes either the production, processing or preparing of the articles themselves, or those who manufactured or otherwise processed or prepared the article for the interstate passage. Thus, the state of origin has been able to impose a tax on the privilege of manufacturing,[251] production of commodities,[252] or the extraction of resources,[253] sold in interstate commerce, and measure the tax by the gross receipts from such sales. The tax is regarded as levied on a local activity distinct from interstate commerce. The use of the gross receipts, including gross receipts from interstate sales, as a measure, is regarded as a convenient, sanctioned method of arriving at the value of the local privileges of manufacturing, production and extraction. The tax is said by the Court to be only an "indirect burden" on interstate commerce. Here the gross receipts tax has been sustained even though levied "in addition to an ad valorem property tax."[254] However, a tax laid directly on gross income from interstate operations has often been regarded as a proscribed "direct burden" on interstate commerce.[255]

250. Cornell Steamboat Co. v. Sohmer, 235 U.S. 549 (1915); Ashley v. Ryan, 153 U.S. 436 (1894) (tax on privilege of consolidation).
251. American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919).
252. Utah Power & Light Co. v. Pfost, 286 U.S. 165 (1932) (generation of electricity); Oliver Iron Mining Co. v. Lord, 262 U.S. 172 (1923).
253. Hope Natural Gas Co. v. Hall, 274 U.S. 284 (1927) (extraction of gas).
254. American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919).
255. See *e.g.*, Crew Levick Co. v. Pennsylvania, 245 U.S. 292, 297 (1917).

Also, there may be a taxable event or privilege at the conclusion of an interstate journey, and the Court has gone rather far, at times, in finding localism on the consuming end.[256] Gross receipts from sales of gas brought in from another state can be taxed if the sale is the last, because consummated by consumption of the commodity.[257] However, the sale of gas to a connecting carrier in an interstate journey of oil and gas has not created a taxable event.[258]

Although interstate and local business are inseparably intermingled, a local privilege tax measured by gross receipts will be sustained if it is not levied inseparably on both.[259] The local aspects of the business can serve as a proper fulcrum of the tax with gross receipts as the measure.

Prior to 1938, a state could reach the gross income from interstate commerce only if the tax (a) was levied in lieu of a property tax; or (b) was used as a fair measure of the value of a local privilege or activity. Such taxes were said to be only "indirect burdens" upon the commerce. Unless the Court was satisfied that the tax satisfied one or the other of these requirements, the tax was condemned by some such appellation as a "regulation of the commerce,"[260] and as a "direct burden" upon the commerce.[261]

From the standpoint of the economic consequences of the tax, the Court drew a distinction that was artificial and formal. Thus, while the states were forbidden to impose a privilege tax "on" gross receipts from interstate commerce, nevertheless the states ordinarily could levy a tax on certain local privileges or activities, and measure the tax by gross receipts. *American Manufacturing Co. v. St. Louis*[262] illustrates this distinction. In that case the tax was imposed on the privilege of manufacturing and measured by the gross receipts from the manufacturing plant, including out-of-state sales. The proper statutory formula was used—it was a tax "on" the privilege of manu-

256. International Harvester Co. v. Department of Treasury, 322 U.S. 340 (1944); Department of Treasury v. Allied Mills, Inc. 220 Ind. 340, 42 N.E.2d 34 (1942), *aff'd per curiam*, 318 U.S. 740 (1943); McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940) (sales tax).

257. East Ohio Gas Co. v. Tax Comm'n. 283 U.S. 465 (1931).

258. State Tax Comm'n v. Interstate Natural Gas Co., 284 U.S. 41 (1931); *cf.* Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954). On another occasion the writer has discussed in detail the cases dealing with the commerce clause and state and local taxes on the oil and gas industry. See Hartman, *The Commerce Clause and the States' Power to Tax The Oil and Gas Industry*. Proceedings of the Seventh Annual Institute on Oil and Gas Law and Taxation as Affects the Oil and Gas Industry (1956), pp. 387-445. (Southwestern Legal Foundation, Dallas, Texas).

259. Ficklen v. Shelby County, 145 U.S. 1 (1892); Pacific Tel. Co. v. Tax Comm'n, 297 U.S. 403 (1936) (occupation tax measured by gross receipts invalidated since tax inseparably imposed on both). See Southern Ry. v. Watts & Watts, 260 U.S. 519, 530 (1923).

260. Galveston, H. & S. A. Ry. v. Texas, 210 U.S. 217, 227 (1908).

261. Crew Levick Co. v. Pennsylvania, 245 U.S. 292, 297 (1917).

262. 250 U.S. 459 (1919).

facturing, measured by gross receipts. The tax was upheld. In the later case of *Adams Manufacturing Company v. Storen,* [263] the Court placed its blessing on this artificial distinction in striking down a tax levied directly "on" gross receipts from sales of manufactured goods by the state where they were manufactured. Speaking through Justice Roberts, the Court very pointedly observes that the *American Manufacturing* tax "was upon the privilege of manufacturing within the state and it was permissible to measure the tax by the sales price of the goods produced rather than by their value at the date of manufacture. If the tax there under consideration had been a sales tax the city could not have measured it by sales consummated in another state."[264]

This formal distinction between taxes levied "on" gross receipts and taxes "measured by" gross receipts seems purely formalistic and without any commerce clause justification. A tax imposed on a local privilege or activity measured by the volume of gross income from both local and interstate operations would appear to have, in practical and economic results, the same consequences for curtailing or burdening the commerce as a tax laid "directly on" the income. Nevertheless, this distinction has continued to exist for the purpose of determining the commerce clause question, and the fact that a tax levied directly on the gross income was fairly apportioned to business done within the taxing state did not save the tax from commerce clause condemnation.[265]

Consistent with the admonition of a great authority in the field of constitutional law that "the states can tax interstate commerce if they go about it in the right way,"[266] it should follow that the imponderables of gross receipts taxes would disappear with a revamping of a condemned tax statute, changing it from a tax "on" gross income to a tax on some other subject and "measured by" the gross income. Unfortunately, such has not always been the case. Constitutionality of a tax has not always been achieved by the simply expedient of casting the statute in terms of bearing upon some local activity or privilege. The Court often is of the opinion that the event designated as the subject of the tax is an integral part of interstate commerce, thus resulting in the invalidity of the tax. The Court has failed, moreover, to develop a trustworthy or workable standard to guide the lawmakers and tax collectors in deciding when the activity has sufficient localism to serve as the subject of a valid tax.[267]

263. 304 U.S. 307.
264. Adams Mfg. Co. v. Storen, 304 U.S. 307, 313 (1938).
265. Fargo v. Michigan, 121 U.S. 230 (1887) (tax was limited to earnings from use of cars within the state).
266. Powell, *Contemporary Commerce Clause Controversies over State Taxation,* 76 U. PA. L. REV. 773, 774 (1928).
267. An occupation tax on broadcasting, measured by gross receipts from

There have been some instances where the Court seemed to feel that the tax ran afoul of the commerce clause because gross receipts were used as the *measure* or method of fixing the value of the privilege or activity designated as the subject of the tax.[268] That is somewhat unusual, however. As a good bit of the preceding discussion of gross income taxes would indicate, the Court has at times made it plain that the *subject* taxed, rather than the *measure* of the tax, is the dominant test of taxability with respect to both the commerce clause and the due process clause.[269] However, there have been instances where the Court found that the *measure* violated the requisites of the due process clause,[270] and we have just seen where the Court apparently thought the *measure* was offensive to the commerce clause. In short, the decisions are rather inconclusive on the issue of whether the *measure,* as well as the *subject* of the tax must satisfy due process and commerce clause requirements.

III. *The Pragmatic Approach To Gross Income Taxes*

Beginning in 1938, there was a brief interlude when the Court took a different approach to the constitutionality of gross income taxes. This approach made its appearance on the judicial horizon under the guidance of Justice Stone. In his *Di Santo* dissent,[271] Justice Stone had showed his dissatisfaction with the "direct-indirect" burdens test of constitutionality of a state tax, which was employed by the Court during a long era of doctrinal declarations that interstate commerce

sales of time to customers, was struck down as a tax on interstate commerce. Fisher's Blend Station, Inc. v. State Tax Comm'n, 297 U. S. 650 (1936). However, is broadcasting any more interstate commerce than the generation of electricity where the generation and transmission across state lines are simultaneous, which was held a taxable local event in Utah Power & Light Co. v. Pfost, 286 U. S. 165 (1932). Loading and unloading interstate commerce on ships has been held an integral, nontaxable segment of interstate commerce, so that the gross receipts therefrom could not be taxed. Puget Sound Stevedoring Co. v. Tax Comm'n, 302 U. S. 90 (1937); Joseph v. Carter & Weekes Stevedoring Co., 330 U. S. 422 (1947). However, the delivery of goods transported interstate by land as part of an interstate sale has been thought to be a taxable, local event, so that a state could tax the gross receipts from the sale. International Harvester Co. v. Department of Treasury, 322 U. S. 340 (1944); McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 650 (1940) (sales tax).

268. Gwin, White & Prince v. Henneford, 305 U. S. 434 (1939); New Jersey Bell Tel. Co. v. State Bd. of Taxes, 280 U. S. 338 (1930). In some of the capital stock franchise tax cases the Court seems to take the view that the legislatively designated measure of the tax is an infringement of the commerce and due process clauses. *E.g.,* Western Union Tel. Co. v. Kansas *ex rel.* Coleman, 216 U. S. 1 (1910).

269. The "validity of the tax can in no way be dependent upon the mode which the state may deem fit to adopt in fixing the amount," and, continued the Court, no "constitutional objection lies in the way of a legislative body prescribing any mode or measurement to determine the amount it will charge for the privilege it bestows." Home Ins. Co. v. New York, 134 U.S. 594, 600 (1890). See Baltic Mining Co. v. Massachusetts, 231 U.S. 68, 87 (1913).

270. Connecticut Gen. Life Ins. Co. v. Johnson, 303 U.S. 77 (1938); James v. Dravo Contracting Co., 302 U.S. 134 (1937).

271. Di Santo v. Pennsylvania, 273 U.S. 34, 44 (1927).

could not be taxed at all. In that land-mark dissent he had declared that this test is "too mechanical, too uncertain in its application, and too remote from actualities to be of value," and to employ it, said Justice Stone, was "little more than using labels to describe a result rather than any trustworthy formula by which it was reached." In 1938 this great jurist began to lay a foundation for an approach to the question of the validity of state taxes which would give more consideration to the possible economic effect of the particular tax on interstate commerce and less consideration to the formal aspects of the tax. Also explicit in his approach is the essential fairness that interstate commerce should bear its fair share of the cost of local governments under whose protection it operates.

The first real opportunity to apply his approach as a ground for the decision of a case came to Justice Stone in the *Western Livestock* case,[272] where the Court sustained a New Mexico occupation tax on the business of publishing a magazine having an interstate circulation, measured by its gross receipts from the sale of advertising. One ground for the holding was the application of the traditional, mechanical formula of calling it a tax imposed on the "local activity" of preparing, printing and publishing magazine advertising, with gross receipts from the advertising fairly measuring the value of the local occupation. The burden on the interstate business was thought to be too remote and too attenuated to call for a rigidly logical application of the doctrine that gross receipts from interstate commerce may not be made the measure of a tax.

As an "added reason" for sustaining the tax, Justice Stone introduced the "cumulative burdens" test for determining the validity of gross receipts taxes when challenged on commerce clause grounds. In essence, his "added reason" concerned two main propositions: (1) Interstate commerce should bear its just share of state tax burdens; (2) State taxes on interstate commerce should be sustained when not involving risk of "cumulative burdens not imposed on local commerce." Not being able to perceive any risk that other states could, in form or substance, levy the same or a similar tax upon the same segment of the interstate transaction as that taxed by New Mexico (the taxing state), the Court upheld the tax.

The "cumulative burdens" test of constitutionality, which commenced in *Western Livestock*,[273] has wound its way through a maze of subsequent cases with varying degrees of acceptance, rejection and distortion. We saw its reappearance in *Northwestern-Stockham*,[274]

272. Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938).
273. For a much fuller discussion of the development of the "cumulative burdens" doctrine by the writer, see Hartman, *Sales Taxation in Interstate Commerce*, 9 VAND. L. REV. 138, 185-90 (1956).
274. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).

this time applied to net income taxes, rather than taxes on gross income. The "cumulative burdens" doctrine early assumed the more familiar name of the "multiple burdens" test.[275] Although this approach appeared as the "added reason" in *Western Livestock*, it was relied on as perhaps the controlling reason in *Adams Manufacturing Co. v. Storen*[276] to strike down an unapportioned Indiana gross income tax imposed directly on the gross receipts of a local manufacturer derived from interstate sales requiring out-of-state delivery. Although not articulated so clearly in the *Adams* case, the "cumulative burdens" test was used as an alternative ground for overturning the tax, but the Court also referred to the tax as a forbidden burden on the commerce. In the *Adams* case there was no attempt to apportion the receipts so as to let Indiana reach only that part of the gross income attributable to those activities which took place within her borders. Since Indiana laid her tax on gross receipts "without apportionment," it was thought to threaten a double tax burden not borne by local commerce. The Court reasoned that if the tax by the manufacturing state (Indiana) were upheld, a similar tax could be imposed by the state of the buyer upon the total gross income, and interstate commerce would thus be subject to the risk of a double tax burden not borne by local business. This result was reached even though the taxpayer was incorporated in the taxing state.

It should be added in passing that it is not absolutely clear from the *Adams* opinion exactly what is meant by the Court's phrase "without apportionment." It is not possible to say with certainty whether the Court meant only "without apportionment between local and interstate receipts," or whether it meant "without splitting the interstate receipts between the participating states," so that each state could tax that part of the receipts fairly attributable to it, even though derived from interstate commerce.[277] Also, in his opinion in the *Adams* case, Justice Roberts reaches backwards to clutch the dead hand of the past in distinguishing the *Adams* case from the *American Manufacturing*[278] case which sustained a privilege tax on manufacturing where gross proceeds from interstate sales were used as the measure. Seemingly he thinks that the statutory ritual is the all important distinction. He points out that the *American Manufacturing* case in-

275. For helpful discussions of this doctrine, see Hellerstein, *State Franchise Taxation of Interstate Businesses*, 4 TAX. L. REV. 95 (1948); Menard, *State Taxation of Interstate Commerce: From Form to Substance and Back Again*, 18 OHIO ST. L. J. 9, 14 (1957).

276. 304 U.S. 307 (1938).

277. Compare Mr. Justice Roberts' statement in Adams Mfg. Co. v. Storen, 304 U.S. 307, at 311 (1938) with his statement at 314 of the same case. See Powell, *More Ado About Gross Receipts Taxes*, 60 HARV. L. REV. 501, 521-22 (1947).

278. American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919).

volved an excise tax levied on the privilege of manufacturing, with the proceeds of the sales of manufactured goods used as the measure. Justice Roberts then goes on to express the belief that had the *American Manufacturing* tax been levied on the sale, the tax would have fallen before the commerce clause.[279] It seems rather obvious, however, that both types of tax would have had the same dollars and cents effect on interstate commerce.

Not long after the *Adams* case, the *Gwin, White*[280] case again invoked the "multiple burdens" test to upset a Washington occupation tax. The measure was gross receipts from sales made by taxpayers who were commission merchants of a Washington sales agency engaged in obtaining orders for, and supervising shipment and sale of, Washington fruit throughout the United States. This time Washington had used what had been regarded as the correct statutory ritual. The subject of the tax was the privilege of engaging in business activities in Washington with the unapportioned gross receipts from sales of fruit grown in and shipped from Washington being used as the measure. Nevertheless the tax met its Waterloo, the Court feeling that the taxed proceeds included not only that part of the proceeds of sales attributable to the taxpayer's activities in Washington, but also included receipts attributable to extra-state activities by sales agencies. These out-of-state sales agencies would sell fruit shipped to points beyond the state before there were orders for it. The measure of the tax, however, included income only from the sale of those apples that grew in Washington. The Court reasoned that if the *Gwin, White* tax were upheld as to the total receipts a similar tax could also be levied on the same sales proceeds by those states in which the sales agents operated. The Court felt that the net effect would be to impose upon interstate commerce "the risk of a multiple burden to which local commerce is not exposed."[281] The tax would thus place interstate commerce at a competitive disadvantage with local commerce.

Although Washington had used the proper statutory formula by making the subject of the tax a local occupation, with the gross proceeds used as a measure, it did not save the tax. The Court felt "that the tax, though nominally imposed upon appellant's activities in Washington, by the very method of its measurement reaches the entire interstate commerce service rendered both within and without the state and burdens the commerce in direct proportion to its volume."[282] It seems pretty plain that the *Gwin, White* Court, speak-

279. Adams Mfg. Co. v. Storen, 304 U.S. 307, 312-13 (1938).
280. Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939).
281. *Id.* at 439.
282. *Id.* at 438.

ing through Justice Stone, was much more concerned with the economic consequences of the tax in suppressing or curtailing the commerce than with the statutory formula in which the tax was cast. We should not lose sight of the fact, of course, that if the legislatures are given a completely free rein in selecting the measure of a tax, they could exert their taxing power to the detriment of national commercial freedom just about as effectively as if they were permitted to fasten their tax talons on an out-of-state value as the subject of the tax, which they cannot constitutionally do. Either the commerce or due process clause should bar a state from using the *measure* of a tax to reach extrastate values not fairly attributable to the taxing state. It is extremely difficult to get away from the thought that the stuff that will create a trade barrier, such as the commerce clause was designed to prevent, is the disproportionate economic weight of a tax on interstate business as compared with the tax consequences on local business, and not some legislative departure from a judicially created mechanical formula, barren in its economic results. Although the *Adams,* as well as the *Gwin, White* Court, indicated that an apportioned tax levied on gross income would withstand the impact of the commerce clause, it gave no indication of what kind of an apportionment would suffice.

One year after the 1939 *Gwin, White* decision, the Court upheld sales taxes levied by the state of the consumer, declaring that the "taxable event" was the "transfer of possession" of the goods by the seller to the purchaser at the conclusion of an interstate journey. That was *McGoldrick v. Berwind-White,*[283] and its three companion cases.[284] During the next few years after *Berwind-White,* the Court not only had an opportunity to examine cases involving taxes levied by the state of the purchaser "directly on" gross income which consisted of receipts from interstate sales transactions, but it also examined cases of taxes levied "directly on" gross income from such interstate sales by the state of the seller. While a number of cases of this nature were before the Court within a three year period, nevertheless an examination of only two of them will serve to illustrate the judicial attitude toward taxation of gross income during the period.

In *Department of Treasury v. Wood Preserving Corp.,*[285] in 1951, the Court was faced with the question whether it would permit a state to include in a tax levied directly on gross income the receipts

283. McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940).
284. McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430 (1940); McGoldrick v. Felt & Tarrant Mfg. Co., 309 U.S. 70 (1940); Jagels, "A Fuel Corporation" v. Taylor, 255 App. Div. 965, 8 N.Y.S.2d 456 (1938), *aff'd,* 280 N.Y. 766, 21 N.E.2d 526 (1939), *aff'd per curiam,* 309 U.S. 619 (1940).
285. 313 U.S. 62 (1941).

from sales where the sale was followed by interstate transportation. Indiana's gross income tax was again before the Court. The taxpayer (seller), a Delaware corporation, made contracts outside Indiana for the sale of railroad ties, which were obtained from producers in Indiana and delivered to the buyer (Baltimore & Ohio Railroad) in Indiana, where they were immediately loaded on cars and shipped to the seller's plant in Ohio for creosoting. Payments for the ties were made to the taxpayer (seller) in Pennsylvania, where it had its principal place of business. Speaking through Chief Justice Hughes, a unanimous Court held that it was constitutionally competent for Indiana to impose a tax directly on the gross receipts from those sales. The sale and delivery of the ties to the railroad company in the taxing state were thought to be local transactions, even though they were shipped out of the state immediately after the sale.

The *Wood Preserving* tax on gross income was unapportioned, but no apportionment was thought necessary, since the only proceeds that were taxed was the income derived from the sale, which was attributable to the taxing state. The receipts which the taxpayer received from its creosoting operations in Ohio were not included in the income that was taxed. The taxing state had thus eliminated from the taxed income those receipts not attributable to activities within her borders, thereby avoiding the danger of the risk of multiple taxation, which was said to be the vice that called for the nullification of the taxes in the *Adams* and *Gwin, White* cases. The entire taxed *Wood Preserving* receipts were thus attributable to the taxing state. The Court makes no mention of the "multiple burdens" doctrine, however.

It should be noted that the tax in question was levied "directly on" the gross income which included gross receipts from an interstate transaction. Nevertheless it got safely across the commerce clause hurdle.

In *International Harvester Co. v. Department of Treasury*,[286] the complaining taxpayer was objecting to a tax levied directly on his gross income from sales at both ends of the interstate journey. The taxed income included gross receipts from sales followed by interstate transportation, as well as gross receipts from sales where the sale was made at the conclusion of the interstate trip. The taxpayer (seller) was a foreign corporation authorized to do business in Indiana (the taxing state) and it maintained manufacturing and sales branches in the taxing state, as well as in other states.

In this case the taxpayer challenged the applicability of Indiana's gross income tax to the gross proceeds from the sales of three different types of transactions. In Class C type sales Indiana buyers bought from

286. 322 U.S. 340 (1944).

branches of taxpayer-seller outside Indiana. The contracts of sale were made beyond the borders of Indiana, but the buyers took delivery to themselves at factories of taxpayer in Indiana. In the class D type sales, buyers outside Indiana bought from branches of taxpayer in Indiana, and the contracts were made in Indiana. In Class E type sales, Indiana buyers made purchases from Indiana branches under contracts made in Indiana, but the goods were shipped by taxpayer from its factories outside Indiana to buyers in Indiana.

Over due process and commerce clause objections, the Court held that it was competent for Indiana to apply her gross income tax to all three classes of sales. In class C sales, the delivery of the goods in Indiana at the conclusion of the interstate journey was thought to be an adequate taxable event. Reasoning that Indiana could have imposed a sales or use tax on these class C transactions, the Court concluded that "there is no constitutional objection to the imposition of a gross receipts tax by the State of the buyer."[287] The Court thought that Indiana was asserting authority over the fruits of a transaction consummated within her borders.

In Class D sales, the deliver of the goods by the Indiana taxpayer (seller) to the buyer in Indiana at the beginning of the interstate transportation and the making of the contracts within the taxing state were events adequate to sustain Indiana's tax on the gross proceeds of the sale. Although the goods sold and delivered were to be transported beyond the taxing state immediately on delivery, that was held not to affect the taxability of the transaction. That was like the tax in *Wood Preserving*[288] that was upheld. The *Berwind-White*[289] sales tax case was thought to be authority for imposing the class D tax, although the class D sales were on the opposite end of the interstate journey from the *Berwind-White* sales. In both cases the Court considered the taxable event to be a "local transaction" separate and distinct from the interstate commerce. The *risk* of exposure to sales taxation of the same transaction by another state was not enough to require the Court to condemn Indiana's tax on Commerce clause grounds.

In the class E sales, where the Indiana buyer bought goods from an Indiana seller which shipped the goods to the buyer in Indiana from points outside the state, the consummation of the transaction in Indiana was considered a taxable transaction. It was regarded as an event distinct from the interstate movement of the goods, and the event

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287. *Id.* at 345.

288. Department of Treasury v. Wood Preserving Corp., 313 U.S. 62 (1941), discussed with note 285 *supra.*

289. McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940), used in connection with note 283 *supra.*

occurred after the interstate commerce had ended. The Court relied primarily on the use tax and sales tax cases as authority. In its reliance on these cases, the Court took occasion to observe that while the Indiana tax was called a gross income tax levied on the proceeds of the class E sales, the name of the tax did not matter; it was dealing with matters of substance, said the Court, and not with dialectics. The Court was of the opinion that there is the same practical equivalence whether the tax is on the selling or the buying phase of the transaction. Each was said to be in substance an imposition of a tax on the transfer of property. The Court thus made it plain that there is no constitutional difference when a "gross receipts" tax, a "sales tax" or a "use tax" is utilized.[290]

In conclusion, the *International Harvester* opinion says that "where a State seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way. . . . To deny Indiana this power would be to make local industry suffer a competitive disadvantage."[291]

Beginning in 1938 with Justice Stone's opinion in the *Western Livestock* decision,[292] the Court employed a test of substance, rather than form, in answering the commerce clause question when taxes involving gross income were called into question. The Court increasingly stressed the consequences and effects, either actual or threatened, of the challenged tax to hamper or hinder interstate operations. In a forthright manner, the Court had emphasized that it was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burdens even though it increased the cost of doing business. The paramount concern of the Court was whether the challenged tax would place interstate commerce at a competitive disadvantage with local business. At times, too, the Court recognized that the denial of state power to tax an interstate transaction would be to make local business suffer a competitive disadvantage. Consistent with the Court's approach of substance, rather than form, in determining the commerce clause issue, the Court had declared without equivocation that there is no constitutional difference when a "gross receipts" tax, a "sales tax" or a "use" tax is employed by the state. Likewise, the Court had erased the formal, and economically empty, distinction between a tax levied "on" gross income and taxes levied on some local activity or privilege, using gross receipts from interstate operations to measure the value of the activity or privilege. The tax would be sustained if the income taxed was

290. See *id.* at 347-48.
291. 322 U.S. 340, 349 (1944).
292. Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938), discussed beginning at note 272 *supra*.

fairly attributable to activities and events having a substantial connection with only the taxing state. That was the criterion for determining the commerce clause question whether the subject of the tax was some local privilege or event, with gross income used to fix the value (the measure), or whether the tax was imposed directly on gross income from interstate activity as the subject of the tax. If the tax, though nominally imposed upon a local privilege or event, by the method of its measurement, subjected interstate commerce to a heavier tax burden than local business, it would be struck down. The emphasis and stress upon formulas and labels were greatly reduced. A pragmatic approach to the commerce clause question had been adopted and interstate commerce paid its way, but it could not be discriminated against.[293]

IV. *Retreat From Substance to Formalism In Gross Receipts Taxes*

A. Expansion of the Zone of Tax Immunity

The practical considerations that were making headway after the *Western Livestock* gross receipts tax decision in 1938, in determining the commerce clause question, were all jettisoned in 1946 by *Freeman v. Hewitt.*[294] Although this case did not concern a corporate taxpayer, nevertheless it did set a pattern which is applicable to the gross income received by a corporation. Moreover, the approach used by the court in that case has influenced much of the judicial thinking in state taxation of interstate commerce since that time.

In *Freeman v. Hewitt* formalism and labels again became the touchstone for determining taxability, and interstate commerce was again given unnecessary freedom from taxation. Once more Indiana's tax on gross income was called into judgment. A divided Court held that Indiana's tax could not be applied to the proceeds of the sale of certain securities of an Indiana trust estate, which had been sold for the estate by a local Indiana stock broker acting through a New York broker. The actual sale was consummated upon the New York Stock Exchange. The proceeds of the sale were then delivered to the objecting taxpayer (trustee of the estate) in Indiana. A majority of the Court, speaking through Mr. Justice Frankfurter, struck down the tax, as applied to the gross proceeds, as violative of the commerce clause, using a variety of appellations to describe the infirmities of

293. For a useful discussion of an approach to determine whether or not a tax discriminates against interstate commerce, see Overton, *State Taxation of Interstate Commerce,* 19 TENN. L. REV. 870 (1947).

294. 329 U.S. 249 (1946). For a recent clear and succinct case analysis showing the cycle from form to substance and a return to form in the tests used to determine the commerce clause question, see Menard, *State Taxation of Interstate Commerce: From Form To Substance and Back Again,* 18 OHIO ST. L. J. 9 (1957).

the tax. It was thought to be a "direct imposition on that very freedom of commercial flow,"[295] a forbidden imposition on the "very processes of interstate commerce"[296] and a "direct tax"[297] on interstate commerce.

The "multiple burdens" doctrine, which had been developed mainly by Justice Stone in an effort to require interstate commerce to pay its way, was rejected as mere "fashions" in judicial writing.[298] In its place, there was the judicially resurrected doctrine that interstate commerce cannot be taxed at all, no matter how slight the burden, and it "is immaterial that local commerce is subjected to a similar encumbrance,"[299] said the Court. The economic effect of the tax was thought by the Court to be irrelevant in determining whether it runs afoul of the commerce clause. To Mr. Justice Frankfurter's way of thinking, "the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce."[300]

The *Freeman v. Hewitt* criterion of constitutionality pretty much dredges up the discarded pre-Stone Age "direct-indirect" burdens test, which had been used while declaring that interstate commerce could not be taxed at all. As Justice Stone had earlier protested on another occasion by way of trenchant dissent, the test used by the *Freeman* Court to determine whether the tax is invalid is "too mechanical, too uncertain in its application, and too remote from actualities to be of value," and to use this test is "little more than using labels to describe a result rather than any trustworthy formula by which it was reached."[301]

Had the Court not permitted itself to be so hobbled by formalism it might have sustained the tax. Because of the substantial local incidence of the transaction in the taxing state, the gross receipts could have been used as a fair value of that local activity. The local aspects of the transaction consisted not only of the domicile of the trustee and beneficiary of the trust estate, but also the situs of the trust. We have already seen that the use of gross receipts as a fair measure of a taxable "local incident" has long been sanctioned, even where the tax

295. Freeman v. Hewitt, 329 U.S. 249, 256 (1946).

296. *Id.* at 253.

297. *Ibid.*

298. A well-known authority in the field thinks that the trend towards the point that interstate commerce must pay its way came to a halt when Justice Stone passed from the scene. Dowling, *Introduction—State Taxation of Multistate Business,* 18 OHIO ST. L.J. 3, 5 (1957).

299. Freeman v. Hewitt, 329 U.S. 249, 252 (1946).

300. *Id.* at 254.

301. Di Santo v. Pennsylvania, 273 U.S. 34, 44 (1927).

was levied directly "on" those receipts.[302] The *Freeman* decision thus illustrates Professor Powell's criticism of commerce clause tests that "names were made to matter more than mathematics or economics."[303]

The 1947 case of *Joseph v. Carter & Weekes Stevedoring Co.*,[304] decided a year after *Freeman v. Hewitt*, perpetuated the doctrine that interstate commerce is immune from taxation. *Carter & Weekes* upset New York's gross receipts tax as applied to receipts from stevedoring, where both interstate and foreign commerce were loaded. Not being able to find sufficient localism in loading the cargo to permit the tax on the "local event" theory, the majority of the Court thought that the tax was an infringement of the commerce clause insofar as the interstate commerce aspects of the stevedoring were concerned. The Court then proceeded to decide that the risk of a "multiple tax burden" also was enough to make the tax fatally defective on commerce clause grounds because of the possibility of an additional tax on the proceeds from unloading of the cargo at another port of call in another state.

Clearly, the *same* incident, *i.e.*, loading cargo in New York, cannot be reached, taxwise, by any other state. The activity of loading was confined exclusively to the state that imposed the tax, and a tax upon gross receipts from unloading in another state would be taxation of receipts from an entirely separate and distinct activity.[305] Consequently, the risk of multiple taxation of the same proceeds simply was not present in *Carter & Weekes*, and the Court's basis for unconstitutionality assumed the existence of a premise which factually did not exist. Local business in New York, including stevedoring, presumably must pay the gross receipts tax litigated in *Carter & Weekes* on both loading and unloading operations. Therefore, local business suffers a commercial handicap with interstate business by reason of the tax, because local business is forced to compete against interstate business, which is sheltered against the assessment of the taxes which are being paid by the local business. Because of the pyramiding costs of state government, it generally will be impossible for a state to give any equalizing tax relief by trying to temper its severe tax wind to the shorn local lamb.

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302. On a number of occasions that had been the holding of the Court when the tax was questioned under the same statute as that involved in the *Freeman* case. International Harvester Co. v. Department of Treasury, 220 Ind. 340, 42 N.E. 2d 34, *aff'd per curiam*, 318 U.S. 740 (1943); Department of Treasury of Indiana v. Ingram-Richardson Mfg. Co., 313 U.S. 252 (1941); Department of Treasury of Indiana v. Wood Preserving Corp., 313 U.S. 62 (1941).

303. Powell, *More Ado About Gross Receipts Taxes*, 60 HARV. L. REV. 501, 503 (1947).

304. 330 U.S. 422 (1947).

305. The Court has held that there is no forbidden multiple taxation where the tax by another state would be on a different subject matter. Coverdale v. Arkansas—Louisiana Pipe Line Co., 303 U.S. 604 (1938).

In *Central Greyhound Lines, Inc. v. Mealey*,[306] decided one year after *Carter & Weekes*, there was a much more sensible approach to the problem of taxation of gross income. *Mealey* involved New York's tax on gross receipts of all utilities doing business within the state. The tax was applied to the total receipts of the Greyhound Bus Company derived from interstate transportation of passengers. The Court held that New York had no taxable grip on the *unapportioned* gross receipts on the ground that the tax made interstate commerce bear more than its fair share of the cost of local government. However, the tax would be upheld, the Court said, if *apportioned* according to the percentage of the total mileage which was traversed within the taxing state.

Two aspects of the rationale of the *Mealey* decision should be noted. In the first place, this tax levied directly "on" gross receipts was held to be a "direct" tax on interstate commerce, which generally has been regarded as a forbidden imposition on interstate commerce. In the second place, the tax could not escape commerce clause condemnation, but only because it was not fairly apportioned. The Court says, however, that if properly apportioned, such a tax, although levied "on" the gross receipts from interstate transportation, rather than "measured by" gross receipts, would be sustained, at least insofar as gross receipts from interstate transportation are concerned. The Court thus seemed willing to permit interstate commerce to be taxed, so long as no other state can repeat the tax, and thereby expose interstate commerce to multiple tax burdens not borne by local business. In *Canton R.R. Co. v. Rogan*,[307] the *Mealey* rationale was followed in upholding a Maryland franchise tax on railroads engaged in interstate commerce, measured by gross receipts, where it was apportioned according to mileage within the state.

In 1949, in the case of *Interstate Oil Pipe Line Co. v. Stone*,[306] four of the nine members of the Court voted to sustain a tax on the privilege of doing business measured by the gross receipts from the operation of an interstate pipe line, engaged in transporting oil exclusively in interstate commerce. A fifth justice voted to uphold the tax on the ground that the event taxed was a local activity. Thus the tax was sustained, but the remaining four members of the Court dissented

306. 334 U.S. 653 (1948). For a recent discussion of all the various kinds of state and local taxes to which multistate transportation is subjected, see Brabson, *Multistate Taxation of the Transportation Industry*, 18 OHIO ST. L.J. 22 (1957).

307. 340 U.S. 511 (1951). In the recent case of Railway Express Agency v. Virginia, 358 U.S. 434, 446 (1959) Mr. Justice Brennan concurred in the decision upholding a gross receipts tax, on the ground that it was properly apportioned, relying on both *Rogan* and *Mealey*. This case is discussed beginning at note 240, *supra*.

308. 337 U.S. 662 (1949).

on the ground that this was a prohibited tax on the privilege of carrying on interstate commerce. As the case stands, it means but little, since later pronouncements by the Court, including the *Northwestern-Stockham*[309] decision, make it clear that the Court will not sustain a tax which it thinks is an encroachment on the privilege of engaging in interstate commerce.

Two more cases are of importance in trying to decide what activity can be used as the subject of a privilege tax with gross income used as the measure or base of computation of the tax. The first of those cases is *Norton Co. v. Dep't of Revenue.*[310] There Illinois sought to impose her occupation tax, measured by gross receipts, upon a foreign manufacturing corporation, which maintained a sales office and warehouse in Chicago. Some orders for goods were sent by Illinois customers directly by mail to the home office in Massachusetts. Other orders were forwarded by the Illinois branch office. All orders were accepted or rejected by the home office in Massachusetts. The orders were filled by shipment from the home office either directly to the customers in Illinois or through the Illinois branch. Illinois tried to include within the taxable gross receipts all proceeds from all sales made to Illinois customers. The Court held that Illinois could properly include receipts from all sales that utilized the branch office, (a) either in receiving the orders; or (b) in distributing the goods. Illinois was not permitted to include the proceeds from the sales of orders sent directly by the customer to the taxpayer's out-of-state home office where the order was filled and the goods shipped directly to the customer from the home office.

The *Norton* opinion is clear as to what transactions Illinois can regard as taxable local activities, but the opinion is not clear as to the exact reason why some of the transactions are taxable. The Illinois branch office maintained a stock of goods; it received orders; it held merchandise shipped in carload lots in order to save freight; and it supplied services to customers by way of repairs to machines and technical advice. The Illinois branch also made some over-the-counter purely local sales to customers. The Court says that the activities of the Illinois branch office were decisive factors in holding the Illinois market, and that this foreign corporation cannot channel business through a local outlet to gain the advantage of a local business and also hold the immunities of an interstate business. However, it is not clear whether the Court is saying that local activity of the branch office may bring within the taxing power of a state some other transactions which otherwise would escape taxation on commerce clause

309. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959), approving this doctrine as announced in earlier cases.

310. 340 U.S. 534 (1951).

grounds. Specifically, would those controversial transactions have been held to be taxable if the Illinois branch office had done nothing but solicit the orders from customers? Mr. Justice Reed dissented on the ground that he thought Illinois could not tax those orders solicited by the branch office.[311] In his opinion the solicitation of orders by the Illinois branch was not any different, from the commerce clause standpoint, from the non-taxable sale resulting from solicitation in *McLeod v. Dilworth*,[312] where there was no branch office in the taxing state. At the other pole, Justices Clark, Black and Douglas, in their dissent,[313] thought that, because of the activities of the Illinois branch office, all of the proceeds of taxpayer's sales in Illinois were reasonably attributable to Illinois, including those orders sent directly from the customer to the out-of-state office, where they were filled and the goods sent directly from it to the customer. This view, in essence, does say the local activity of the branch office may bring within the taxable grip of the state some transactions which otherwise would escape taxation on commerce clause grounds. To some extent, that may be what the majority also says.

Field Enterprises, Inc. v. State of Washington[314] may have extended the *Norton* doctrine, or it may simply have clarified that opinion. In *Field Enterprises* a foreign corporation, which published encyclopedias, maintained in the taxing state (Washington) a division branch office. This Washington branch office included a manager, stenographers and salesmen, some of whom solicited orders and collected any initial payments, but other payments were sent by the purchaser directly to the home office in Illinois. Displays and sample sets of encyclopedias were also maintained in the branch office in the taxing state. Orders obtained, either by the Washington solicitors or by customers coming to the branch office in that state, were forwarded to the out-of-state home office where they were accepted and filled. The home office was the source of all supply of books and all orders were shipped directly from the home office directly to the customers.

Upon this set of facts the State of Washington was permitted, over commerce clause objections, to collect her business and occupation tax for the privilege of engaging in business, measured by the gross proceeds of sales. Since no opinion was written by the United States Supreme Court in upholding the *Field Enterprises* tax, it is difficult to say what are the controlling factors for finding sufficient localism to

311. *Id.* at 539.

312. McLeod v. J. E. Dilworth Co., 332 U.S. 327 (1944).

313. Norton Co. v. Department of Revenue, 340 U.S. 534 (1951).

314. 47 Wash. 2d 852, 239 P.2d 1010 (1955), *aff'd per curiam*, 352 U.S. 806 (1956). For a detailed analysis of this case by a writer who thinks the Court may have done some violence to some of their earlier decisions, see Strecker, *Local Incidents of Interstate Business*, 18 OHIO ST. L.J. 69, 71-78 (1957).

support this privilege tax. *Norton*[315] was cited by the Court as authority for the tax, although it is pretty clear that there was much more that could be termed local activity in *Norton* than those activities of Field Enterprises.

Norton does make it plain that a tax involving gross receipts will not be upheld unless it is attributable to what the Court thinks is a "local incident."[316] Interstate commerce continues to enjoy its tax immunity bath in the area of gross receipts taxes. The latest word on the subject, *Northwestern-Stockham*,[317] by preserving *Spector*,[318] leaves no doubt that the privilege of engaging in interstate commerce is not a taxable local privilege. Moreover, *Northwestern-Stockham* makes it equally clear that mere solicitation from offices within a state, where the orders are sent out of state to be filled, is purely interstate commerce.[319] Hence, such solicitation, without more, pretty clearly would not be a taxable privilege.[320] We know from *Northwestern-Stockham*, however, that Illinois, and states similarly situated, could take a leaf out of the book of Minnesota and Georgia and impose a tax on the *net* income from the activity of soliciting business that is exclusively interstate, and not run afoul of the commerce clause.

B. Gross Receipts As A Factor In The Apportionment Formula

Already we have seen that several states use "gross receipts" as a factor in the mathematical formula used to apportion net income for the purpose of taxing that income.[321] Also, gross receipts may be used as a factor in an apportionment formula for the purpose of computing other kinds of state taxes. A review of a couple of cases will show most of the problems that come up when gross receipts are used, either singly or along with other factors, in the fiscal formula for the purpose of computing, for tax purposes, the value of an activity in a far-flung multistate operation.

The use of gross receipts as a single factor in the formula for valuing local activity for a franchise tax was involved in *Ford Motor Co. v. Beauchamp*.[322] There, Texas imposed an annual franchise tax on all

315. Norton Co. v. Department of Revenue of Illinois, 340 U.S. 534 (1951), discussed in connection with note 310 *supra*.
316. *Id.* at 537.
317. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959), discussed beginning at note 8 *supra*.
318. Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951), discussed beginning with note 47 *supra*.
319. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).
320. See notes 73 and 74 *supra*.
321. See discussion beginning with note 157 *supra*, and going through note 167 *supra*.
322. 308 U.S. 331 (1939).

corporations chartered or authorized to do business in Texas. The tax was assessed upon such proportion of (a) the outstanding capital stock; (b) surplus and undivided profits of the corporation; (c) plus its long-term indebtedness, as the gross receipts from the corporation's Texas business bore to total gross receipts.

The complaining taxpayer, Ford Motor Company, sent parts into Texas for assembly and sale in intrastate commerce to Texas dealers. Ford's capital, as defined in the statute, was over $600,000,000. Total gross receipts for the year were over $800,000,000; and Texas gross receipts were over $34,000,000. The statutory apportionment formula, as applied to Ford, yielded a $23,000,000 tax base allocable to Texas. Ford had only an assembly plant in Texas, whose book value was $3,000,000. The tax was paid under protest and suit instituted to recover the amount of tax paid on the $20,000,000 in excess of the book value of the assets in Texas. Ford launched a two-pronged attack on the tax, as applied to it. It contended that the tax was inimical to the commerce clause in that it was imposed on assets used in its interstate business; and that it took Ford's property without due process of law because it taxed activities and property outside the taxing state and over which the state had no jurisdiction.

Over these objections, the tax was sustained. The exploitation by a foreign corporation of interstate opportunities under the protection and encouragement of a state government afforded a sufficient basis for imposing a privilege tax. There was an abundance of localism. The Court was also of the opinion that the statutory formula used to arrive at the value of the franchise tax was fair, although the value of the taxed local privilege took into account the augmentation in value from its connection as a part of an interstate organism. This method of computation merely recognized the increased value of the privilege of doing local business resulting from the use of property beyond the state. The state was simply placing a charge upon that privilege commensurate with the protection it afforded.

Of course, common sense should teach us that an asset may fluctuate in value according to the income it produces. In this connection, we have it on the twice-given assurance of the highest tribunal in the land that a "live horse is worth more than a dead one, though the physical object may be the same, and a smooth-going automobile is worth more than the unassembled parts."[323] Likewise, these tangible assets by way of the assembly plant located in Texas, as part of an interstate organism, may have produced much more income than like assets located elsewhere. Again, we have the judicial assurance that

323. Railway Express Agency, Inc. v. Virginia, 358 U.S. 434, 441 (1959); Railway Express Agency, Inc. v. Virginia, 347 U.S. 359, 364 (1954).

"Death Valley Scotty generated much less gross from his sightseeing wagon than did his counterpart in Central Park."[324]

Consequently, the property of Ford's assembly plant in Texas with a book value of only $3,000,000 had an income producing potential that made the privilege of operating that plant in Texas worth much more than the book value of the physical assets. The "going-concern" value of property is an integral factor which influences the real value of the activity. As such intangible factor, it should be reflected in the computation of the privilege tax.[325]

The value of the taxable activity thus received an increment from interstate operations. In this respect interstate commerce is reflected in the amount of the tax, and it can realistically be said that interstate commerce was required to pay its way.

International Harvester Co. v. Evatt[326] has some features that distinguish it from the *Ford Motor* case and, by the same token, this case widens the compass of validity of gross receipts taxes. In the *Ford Motor* case, gross receipts constituted the single factor formula used to compute a privilege tax. In *International Harvester* gross receipts appeared as one of the factors in a multifactor formula. In *Ford Motor* all the sales were local; in *International Harvester* there were interstate sales.

In *International Harvester,* the taxing state (Ohio) had imposed a tax for the privilege of doing business and computed the tax, in part, on the basis of gross receipts from both interstate and intrastate sales, and partly on a proportion of the capital stock of the corporation. Taxpayer was a far-flung enterprise engaged in the business of manufacturing and marketing machinery. Factories, warehouses and sales agencies were owned by taxpayer both within and without the taxing state. Some goods manufactured in other states were sold in the taxing state.

Under Ohio's apportionment formula, the total value of the taxpayer's issued capital stock was divided in half. One half of the value of the stock was multiplied by a fraction whose numerator was the value of all of taxpayer's property in Ohio and whose denominator was the total value of all of the taxpayer's property wherever located. The other half of the value of the capital stock was multiplied by a fraction whose numerator was the total value of "business done" in

324. Railway Express Agency, Inc. v. Virginia, 358 U.S. 434, 443 (1959).

325. Railway Express Agency, Inc. v. Virginia, 358 U.S. 434 (1959), appears to be the latest pronouncement by the Supreme Court in which it permitted a state to impose a privilege tax, measured by gross receipts, in lieu of a property tax on the intangible or "going-concern" value of property. For a discussion of that case, see note 240 *supra.*

326. 329 U.S. 416 (1947).

Ohio and whose denominator was the total value of business done everywhere. The sum of these two products was used by Ohio as the tax base.

Taxpayer contended that the formula, as applied to it, transformed the tax on its business to a tax on an activity outside the taxing state, in violation of both the due process and commerce clauses.

The main objection to this formula of calculation lay in the fact that the total value of business used as numerator in the second fraction included the gross proceeds of sales of goods manufactured within, but sold outside, the taxing state, as well as the gross proceeds of goods manufactured in plants outside the taxing state but sold in Ohio.

The Court sustained the tax, as applied. The commerce clause argument was rejected on the ground that the apportionment formula used to determine the value of the local privilege was thought to be fair. In holding that the commerce clause offered no barrier to the imposition of this tax, the Court said, in part:

> Of course, the Commerce Clause does not bar a state from imposing a tax based on the value of the privilege to do an intrastate business merely because it also does an interstate business. . . . Nor does the fact that the computation . . . includes receipts from interstate sales affect the validity of a fair apportionment . . . And here, it clearly appears . . . that the whole purpose of the state formula was to arrive, without undue complication, at a fair conclusion as to what was the value of the intrastate business for which its franchise was granted.[327]

The use of gross receipts from interstate sales to determine the fair value of a local activity such as manufacturing, of course, has long been sanctioned.[328]

In order to buttress its commerce clause objections to the *International Harvester* tax, the taxpayer had urged that, although the tax was apportioned, nevertheless it could be repeated by other states. In answering this multiple burdens argument, the Court replied that "since it (the tax) is assessed only against the privilege of doing local Ohio business of manufacturing and selling, we do not come to the question, argued by appellant, of possible multiplication by other states. None of them can tax the privilege of operating factories and

327. International Harvester Co. v. Evatt, 329 U.S. 416, 421 (1947). Western Cartridge Co. v. Emerson, 281 U.S. 511 (1930) involved an Illinois franchise tax imposed on a manufacturing corporation at the rate of five cents per hundred shares of that portion of its issued capital stock which bore the same ratio to all its issued capital stock as the amount of its property and business within the state of Illinois bore to its total property and business. Although all interstate sales of goods manufactured by the challenging corporation within the state were attributed by the taxing officials to that state as business done there, the tax did not fall before the commerce clause.

328. American Mfg. Co. v. St. Louis, 250 U.S. 459 (1919).

sales agencies in Ohio."[329] It is, of course, true that no other state can tax the local activity of operating factories and sales agencies in Ohio, which is the subject of the tax; but what about multiple taxation of these gross receipts from interstate sales which are used in the *measure* of the tax. Other states may well have a valid tax claim on the receipts from these sales.[330] However, in view of the fact that these receipts were part of the legislatively designated *measure* of the tax—were thus used only as a factor in the formula for computing the value of the taxed local activity—the Court was expounding ordinary garden-variety of commerce clause gospel. Generally the subject of the tax, rather than the measure, has been the dominant test of taxability under the commerce clause.[331] Nevertheless, looking at the matter realistically, whether or not taxpayer is required to pay multiple taxes on these receipts from the interstate sales in question would seem to depend upon the fairness of the apportionment formulas used by the various states having a taxable grip on the income. Unless each state in which International Harvester has taxable sales activity has assigned to itself only a proportion of the receipts that are commensurate with the activities there carried on and the property there located, then there will be tax duplication. The Court quite properly stated the nub of the matter in the *Northwestern-Stockham* opinion, in responding to the argument that the taxpayer was subject to the risk of tax duplication:

> Logically it is impossible, when the tax is fairly apportioned, to have the same income taxed twice. In practical operation, however, apportionment formulas being what they are, the possibility of the contrary is not foreclosed, especially by levies in domiciliary states.[332]

Moreover, we have seen earlier that because of the divergent state apportionment formulas in the net income tax field, along with the differing definitions of the factors in even a superficially identical formula, tax multiplication is quite possible even though each state pur-

329. International Harvester Co. v. Evatt, 329 U.S. 416, 423 (1947).

330. International Harvester Co. v. Department of Treasury, 322 U.S. 340 (1944); Department of Treasury of Indiana v. Wood Preserving Corp., 313 U.S. 62 (1941); McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940). All these cases are discussed beginning with note 283 *supra*, and going through note 291 *supra*.

331. See discussion beginning at note 262 *supra*, and going through 270 *supra*. The Court has, on rare occasions, upset a tax imposed on a local activity where the measure, consisting of gross receipts, threatened a multiple tax burden not borne by local business. *E.g.*, Gwin, White & Prince v. Henneford, 305 U.S. 434 (1939). This case is discussed beginning at note 280 *supra*, and going through note 282 *supra*.

332. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 462-63 (1959).

ports to assign to itself only that income it thinks fairly attributable to it.[333]

In rejecting the due process argument, the *International Harvester* Court made it clear that a tax law will not be thrust down merely because the result is achieved through a formula which takes into consideration interstate and out-of-state transactions having a relation to the local privilege. Here, as in the *Ford Motor* case, the Court stressed that the privilege of doing business within the state is made more valuable owing to its being part of a multistate enterprise. The recognition of that fact for tax purposes does not run counter to the requisites of due process, because the opportunities afforded by the taxing state have a direct and substantial relationship to the interstate operations.

The national character of the modern corporation whose property and operations may be scattered through many states, but whose use, management and balance sheet are unitary, is given realistic recognition in the *Ford Motor* and *International Harvester* decisions. Earlier in this article, we saw that same realistic recognition for the purpose of imposing net income taxes.[334] When we discussed the taxation of net income, it was there pointed out that an apportionment by way of a mathematical formula, including such income-producing factors as property, payroll, sales and manufacturing costs was the only feasible way to assign net income for tax purposes in a unitary multistate enterprise.[335] In the cases involving net income, we saw that apportionments have been upset upon a showing that they were materially contrary to fact, in that a taxing state was attempting, through its apportionment formula, to assign to itself a greater portion of income than was fairly attributable to it.[336] Likewise in other kinds of taxes, when the Court felt that the formula produced an inequitable result, the tax has been set aside.[337] The Court could not find that such an

333. See discussion beginning at note 121 *supra,* and going through note 203 *supra.*

334. See discussion beginning at note 8 *supra,* and going through note 53 *supra.*

335. See discussion beginning at note 154 *supra,* and going through note 155 *supra.*

336. Hans Rees' Sons, Inc. v. North Carolina, *ex rel.* Maxwell, 282 U.S. 123 (1939); see note 170 *supra,* through note 172 *supra.*

337. Some excise taxes have been invalidated where the Court thought the apportionment formula used by the taxing state was trying to compel the taxpayer to pay more than its fair share of tax by including values not properly attributable to the taxing state. Southern Ry. v. Kentucky, 274 U.S. 76 (1927); Wallace v. Hines, 253 U.S. 66 (1920). In the *Wallace* case an excise tax based on the proportion of the value of the total property of the railroad which its mileage in the taxing state bore to its entire mileage, was invalidated on both due process and commerce clause grounds. The cost of construction per mile in the taxing state was much less than without, and the taxpayer had valuable property outside the state which could not be shown to add to the value of the road and of rights exercised in the taxing state. In the

inequitable apportionment had been made in *Ford Motor* and *International Harvester*, which likewise involved unitary multistate operations. The apportionment formulas in both cases were found to be fair, even though the formulas reflected the value of the local privilege as an integral part of a much larger interstate organization. The advantages of such large capital resources should be distributed fairly and equitably among all those states in which the corporation engages in business activity.

The "unit rule," which is the basis of the apportionment method of assigning income for tax purposes, and which was followed in *Ford Motor* and *International Harvester*, was originally developed to apportion property or earnings of such unitary enterprises as communication or transportation companies.[338] Those, of course, are companies whose property does have real intangible or "going-concern" value above its "barebones" or physical worth, owing to its use as part of one entire enterprise, and whose earnings are incapable of separation into the respective portions derived from the in-state segment of the business. This "unit rule" has thus been extended, wisely it seems, to corporations engaged in production and selling activities. Although it may be more difficult to determine what rightfully belongs to a state when a sale is concerned in multistate sales operations than when the receipts are from multistate transportation or communication, that does not mean that there can be no constitutional apportionment of income from enterprises whose income is derived from interstate sales. The *Ford Motor* and *International Harvester* decisions are in line with those decisions using the apportionment formulas in the taxation of net income[339] in showing that such a practice is possible and feasible, as well as constitutional. Gross receipts may not constitute a very satisfactory nor accurate measure of the value of an activity, since

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field of property taxes the assessment has also been struck down where the Court thought the apportionment formula was trying to include values not properly attributable to the taxing state. Johnson Oil Refining Co. v. Oklahoma *ex rel.* Mitchell, 290 U.S. 158 (1933); Union Tank Line Co. v. Wright, 249 U.S. 275 (1919).

338. *E.g.*, Pullman Palace Cov. Co. v. Pennsylvania, 141 U.S. 18 (1891); Adams Express Co. v. Ohio State Auditor, 165 U.S. 194 (1897), on rehearing 166 U. S. 185 (1897); St. Louis & S.W. Ry. v. Arkansas, 235 U.S. 350 (1914); Western Union Tel. Co. v. Missouri *ex rel.* Gottleib, 190 U.S. 412 (1903); see Fargo v. Hart, 193 U.S. 490, 499 (1904). For a discussion of the origin and development of the "unit rule," as well as a treatment of the formulas used to apportion net income, see Silverstein, *Problems of Apportionment in Taxation of Multistate Business*, 4 TAX L. REV. 207 (1949).

339. *E.g.*, Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959); Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n, 266 U.S. 271 (1924); Atlantic Coast Line R.R. v. Daughton, 262 U.S. 413 (1923); Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920); United States Glue Co. v. Oak Creek, 247 U.S. 321 (1918). These cases are discussed earlier, beginning with note 8 *supra*, and going through note 53 *supra*. See also, Butler Brothers v. McColgan, 315 U.S. 501 (1942).

such receipts may not reflect any profit whatsoever. Nevertheless there is little doubt that such is a constitutionally proper measure. In its latest word on the subject, the Supreme Court declared that while "it may be true that gross receipts are not the best measure, it is too late now to question its constitutionality."[340]

V. *Summary Comment On Gross Income Taxes*

When a state taxes the gross income or receipts of a multistate business enterprise, the judicial function should be to determine what portion of the income or receipts may fairly be attributed to the taxing state. That is to say, the task of the Court should be to determine whether the taxing state has assigned to itself only a proportion of the gross income of the business that is commensurate with the activities there carried on and the property there located. That portion of the business fairly attributable to the state should be a proper subject for raising revenue for the state, under whose protection the business is carried on, irrespective of whether the Court can segregate some part of the business and label it a "local" activity. That should be the crux of the constitutional issue, whether the state is trying to reach gross receipts derived from interstate sales activity, or whether the state has levied a property tax on such unitary multistate enterprises as transportation and communications systems. In short, the "in-state" event or activity should be the proper subject for state taxation, even though it is an integral part of interstate commerce, so long as the tax does not place that commerce at a competitive disadvantage with local business. In this fashion the tax burden is equalized between local and interstate business. Using this approach, it is not necessary for the Court to engage in mental gymnastics trying to find a taxable so-called "local" event which is not a part of interstate commerce. Looking at the matter realistically, it is most difficult, if not impossible, to find such an event or activity in modern unitary multistate business.

To be sure, the job of determining whether a particular tax does give local business a competitive advantage over interstate business may be difficult, but it should not be any more so than the task of weighing all the varied and complicated factors in arriving at a judgment whether a particular tax discriminates against interstate commerce. Both jobs appear to be essentially the same. The Court has always been willing to wrestle with the problem of tax discrimination. In truth, in *Gwin, White & Prince*[341] the Court concluded that a gross receipts tax which places interstate business at a competitive disad-

340. American Railway Express Agency v. Virginia, 358 U.S. 434, 441 (1959).
341. Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939).

vantage with local business by subjecting it to multiple tax burdens not borne by local business is a form of forbidden discrimination against interstate commerce.

However, when gross income is involved, the Court often clings to the view that the commerce clause renders the states impotent to tax that income unless "some local incident occurs sufficient to bring the transaction within its taxing power."[342] When a tax on gross income is involved, the Court remains impervious to the admonition of a great jurist, in speaking of such taxes, that it "was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business."[343]

PART THREE: CONGRESSIONAL CONTROL OF STATE TAXATION OF INTERSTATE COMMERCE

I. *The Shortcomings Of The Judicial Process*

Congress has at last taken a step toward devising a congressional policy in an effort to solve the tremendously complex and important problem of multiple state taxation of interstate commerce. It did two things. First, as we have already seen, Congress passed a law providing a standard for testing the authority of the states to tax the net income from outside businesses, albeit limiting the scope of its standard to taxes derived from *net* income from the sale of tangible personal property where the only connection of the out-of-state seller with the taxing state is solicitation of the sale. Specifically, Congress has prohibited taxes on *net* income from the sale of tangible personal property where the only contact of the taxing state with the extrastate seller is the solicitation of the sale. The second congressional step was the designation of the House Judiciary Committee and Senate Finance Committee to make full and complete studies of state taxation of income derived from interstate commerce for the purpose of proposing "legislation providing uniform standards to be

342. Norton Co. v. Department of Revenue of Illinois, 340 U.S. 534, 537 (1951), discussed, beginning with note 310 *supra;* Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947), discussed beginning with note 304 *supra.* The latest case upsetting a gross receipts tax is Railway Express Agency v. Virginia, 347 U.S. 359 (1954), where a franchise tax measured by gross receipts was held fatally defective because the Court thought it was a tax on the privilege of engaging in interstate commerce, even though the tax was apportioned to the gross receipts derived from business within the taxing state. This case is discussed beginning with note 229 *supra.* The Court has permitted an apportioned gross receipts tax on receipts from interstate transportation. Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653 (1948); Canton R.R. Co. v. Rogan, 340 U.S. 511 (1951). These two cases are discussed in connection with notes 306 and 307 respectively *supra.*

343. Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938), discussed, beginning with note 272 *supra.*

observed by the states in imposing income taxes on income" from interstate commerce. These committees are required by the act to report the results of such studies not later than July 1, 1962.[344]

Congress has thus made a beginning at clearing away some of the smog in an area where such action has been advocated for many years, both by the judiciary and by writers. Many sources have questioned whether recourse to the Court alone for guidance in the area of state taxation of interstate business can keep abreast of the present day, dynamic situation, as the national economy becomes increasingly complex and tax demands skyrocket. Much more than a hundred years ago, Marshall recognized that the economy of our nation was national in scope and declared that "no inconsiderable portion of the industry of the nation" is "entrusted" to Congress under the commerce clause power.[345] If that was true in Marshall's day when commerce crept slowly by pack horses and wagons by land, and in barges and sailing ships by water, how much more so is our present day economy national in scope with our high speed methods of transportation and communication which crisscross the land.

The problems of multiple taxation in our federal system do not lend themselves to a satisfactory judicial solution. Much has been said concerning the practical impossibility of a satisfactory judicial solution of this problem of maintaining the national interest in commercial freedom and at the same time bringing it into an effective harmony with the local interests for revenue—a problem calling for vigilance and regulation on a national scale. It is to be doubted whether over-all policies, fair alike to the state and the nation, can be devised within the framework of the judicial process.[346] The policy of judicial control of state taxation of interstate commerce has certain inherent weaknesses which members of the Supreme Court itself have been the first to recognize and point out.

In Mr. Justice Frankfurter's *Northwestern-Stockham* dissent he made the forthright declaration that this "problem calls for solution by devising a congressional policy."[347] By way of emphasis, he reasoned that "Congress alone can provide for a full and thorough canvassing of the multitudinous and intricate factors which compose

344. This congressional action has been discussed in some detail beginning at note 86 *supra*, and going through note 95 *supra*.

345. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 315, 407 (1819).

346. For a recent incisive analysis of this problem, taking the position that the judiciary cannot adequately handle the matter, see Braden, *Cutting the Gordian Knot of Interstate Taxation*, 18 OHIO ST. L.J. 57 (1957). For the views of a writer who thinks that the courts can make economic sense out of the decisions in this field, if they will take an approach which he proposes, see Barrett, *"Substance" vs. "Form" in the Application of the Commerce Clause to State Taxation*, 101 U. PA. L. REV. 740, 749-89 (1953).

347. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 476 (1959).

the problem of the taxing freedom of the States and the needed limits on such state taxing power." There has been much judicial thinking along the same lines. Earlier it was said by members of the Supreme Court that "judicial control of national commerce—unlike legislative regulations—must from inherent limitations of the judicial process treat the subject by the hit-and-miss method of deciding single local controversies upon evidence and information limited by the narrow rules of litigation."[348] This, of course, is true since the Court deals only with specific cases and issues as they come before it. While this has advantages for many purposes, the majority in *Northwestern-Stockham* recognized that it is not calculated to produce a comprehensive policy and seldom establishes satisfactory standards.[349] It follows that the Court does not and cannot lead the states into common action which will, in the long run, best serve the national economy. Expressing the belief that "Congress alone can formulate policies founded upon economic realities," Mr. Justice Frankfurter's *Northwestern-Stockham* dissent also points out that "Congressional committees can make studies and give the claims of the individual States adequate hearing before the ultimate legislative formulation of policy is made by the representatives of all the States."[350] Thus, only by "a comprehensive survey and investigation of the entire national economy—which Congress alone has power and facilities to make"[351] can it be determined whether a particular tax on interstate commerce is consistent with the best interests of our national economy.

Out of long years of brilliant experience in the field, that great scholar and leading authority in his field, Professor Dowling, summed the matter up succinctly in this fashion:

> I believe it is in order to say that the general problem of the maintenance of the federal system, including special problems of state taxation of multiple business . . . has all but become political in character and that the ultimate answers will have to come from Congress rather than the Su-

348. Dissenting opinion of Justices Black, Frankfurter and Douglas in McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176, 188-89 (1940). To the same effect is Mr. Justice Black's concurring opinion in Northwest Airlines v. Minnesota, 322 U.S. 292, 301 (1944).

349. The *Northwestern-Stockham* Court did some thinking along these lines in its opinion. "The resulting judicial application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457 (1959). To the same effect, see Senate Select Committee on Small Business, *State Taxation on Interstate Commerce*, S. REP. No. 453, 86th Cong., 1st Sess. 8, 9 (1959).

350. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 476-77 (1959).

351. Dissenting opinion of Mr. Justice Black in Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 449 (1939).

preme Court. This seems to me to be the composite, and salutary, result of more than a century of litigation over the adjustment of state and national power in the operation of the federal system.[352]

II. *The Power Of Congress To Control State Taxation*

Because of the inherent limitations on the judicial process, coupled with the judicially recognized "need for clearing up the tangled underbrush of past cases with reference to the taxing power of the States,"[353] where interstate commerce is involved, it is appropriate for Congress to take a hand in the matter. The limitation which Congress has already placed on the taxing power of the states in the restricted field with which it deals apparently is intended only as stop-gap legislation. It has been criticized as "nothing more than a protective measure for a few manufacturing States and a few companies which do a multistate business of a specified type."[354] The same source criticizes the act for failure to "attack the problem positively," and takes the position that "what is needed is proper allocation of taxes among the various states and not a prohibition against certain state taxes." As this criticism reveals, there is a need for congressional action more comprehensive than that taken, establishing guide lines generally for state taxation of interstate commerce, and not restricting the congressional endeavors to state taxes on net income.

Such affirmative congressional control over state taxing activities would entail no sharp break with precedent, and its exercise would be in line with some of the best efforts of the Court during the past hundred years.

In formulating national policy over interstate commerce, Congress has many times displaced otherwise valid state action that interfered with congressional policy. In like fashion, Congress has many times expanded the power of the states to control or tax interstate commerce, where the state action otherwise would have been forbidden. In the *Southern Pacific* case, Chief Justice Stone gave a clear and succinct declaration that Congress "may either permit the States to regulate the [interstate] commerce in a manner which would otherwise not be permissible," or "exclude state regulation even of matters

352. Dowling, *Introduction—State Taxation of Multistate Business*, 18 OHIO ST. L.J. 3 (1957).

353. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457 (1959).

354. Report of Committee on Finance, United States Senate, Byrd, *State Taxation of Income Derived From Interstate Commerce* (minority views), S. REP. No. 658, 86th Cong., 1st Sess. 12 (1959).

of peculiarly local concern which nevertheless affect interstate commerce."[355]

The power of Congress over interstate commerce is so complete and paramount in character that Congress has displaced state action even in fields which are admittedly local, where Congress has used that power as the basis for the affirmative establishment of national policy over interstate commerce, and conflicting state *regulatory* action has been held inoperative.[356] The doctrine of congressional displacement of state action where Congress has acted in connection with the same subject matter has also found lodgment where the questioned state action is *taxation*, as well as regulation. *McGoldrick v. Gulf Oil Corporation*[357] furnishes a ready example. There the Court curbed, as in conflict with a congressional regulation of commerce, the taxing activities of New York City. The tax in question was struck down, not because it ran afoul of the commerce clause, but because it was antagonistic to the congressional policy expressed through legislation.

Congress likewise has given permission to the states to regulate and tax interstate commerce in a manner which would otherwise not be permissible. The case of *International Shoe Co. v. Washington*,[358] apparently for the first time, called for a square holding on the power of Congress to permit the states to levy a tax on interstate commerce. This case involved a state unemployment tax and Congress had provided that the employer should not be "relieved from compliance therewith on the ground that he is engaged in interstate commerce."[359] So confident was the Court that Congress possessed the power to consent to the state tax that it disposed of the argument against the power in one sentence. In this one sentence, sustaining the power of Congress to consent to the state tax, the Court gave one of the most sweeping and unequivocal declarations found in its opinions on the subject: "It is no longer 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."[360]

355. Southern Pacific Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 769 (1945). The writer has discussed the subject of congressional consent to state action over interstate commerce, and congressional displacement of state action in matters of local concern, in considerable detail, elsewhere. See HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE 247-57 (1953).

356. Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942); New York v. United States, 257 U.S. 591 (1922); Railroad Comm'n of Wisconsin v. Chicago, B. & Q. R. R., 257 U.S. 563 (1922); Houston, E. & W. T. Ry. v. United States, 234 U.S. 342 (1914) (Shreveport Rate Cases); *cf.* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

357. 309 U.S. 414 (1940).

358. 326 U.S. 310 (1945).

359. 49 Stat. 642 (1935), 26 U.S.C. § 1606(a) (1946).

360. International Shoe Co. v. Washington, 326 U.S. 310, 315 (1945). Chief Justice Stone's confidence that Congress can remove the commerce clause barrier to state action was justified by decisions of the Supreme Court. *In re*

Prudential Insurance Company v. Benjamin[361] represents perhaps the most conspicuous example of judicial approval of congressional consent to an otherwise forbidden tax on interstate commerce. There the Court sustained an act of Congress giving permission to the states to tax interstate insurance business which the Court assumed, without deciding, would otherwise have been in conflict with the commerce clause.[362]

There seems little doubt, therefore, that under its power over interstate commerce, Congress can fix the bounds of state taxation of that commerce. It can either authorize such taxation by the states as Congress deems appropriate, or it can prohibit facets of state taxation, otherwise valid, when Congress uses its power as the basis for the establishment of national policy over interstate commerce.[363]

III. *Suggested Areas For Congressional Action*

The House Judiciary Committee and Senate Finance Committee are instructed to make a study for the purpose of proposing legislation providing uniform standards to be observed by the states in imposing taxes on income from interstate commerce. That appears to be a worthy objective. However, as has been suggested, there is need for these committees, or some other committees, to give attention to a much more comprehensive examination of the tremendously important, but equally vexatious, problems of all the major facets of state taxation of interstate commerce.

By legislation, Congress should promulgate policy rules, giving a declaration as to permissive limits of state taxation by means of

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Rahrer, 140 U.S. 545 (1891), and Clark Distilling Co. v. Western Maryland Ry., 242 U.S. 311 (1917), sustained congressional consent to state control over the interstate liquor traffic. Whitfield v. Ohio, 297 U.S. 431 (1936), and Kentucky Whip & Collar Co. v. Illinois Central R.R. 299 U.S. 334 (1937), sustained congressional consent for state control over convict-made goods shipped in interstate commerce. As early as 1789, Congress enacted a statute which put pilots for interstate commerce under state law. This statute was sustained in the famous case of Cooley v. Board of Wardens, 53 U.S. (12 How.) 298 (1851).

361. 328 U.S. 408 (1946).

362. This case sustained the McCarran-Ferguson Act, 59 Stat. 33 (1945), 15 U.S.C. § 1011 (1958), which was passed to remove doubts as to the continued operation of state laws after the Supreme Court decided in 1944 that the business of insurance is interstate commerce, in United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944).

363. "Commerce between the States having grown up like Topsy, *the Congress meanwhile not having undertaken to regulate taxation of it,* and the States having understandably persisted in their efforts to get some return for the substantial benefits they have afforded to it, there is little wonder that there has been no end of cases testing out state tax levies." Mr. Justice Clark speaking for the Court in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457 (1959). (Emphasis added.) "Congress, through the commerce clause, possesses the . . . power of control of state taxation of all merchandise moving in interstate or foreign commerce." Chief Justice Stone speaking for the Court in Hooven & Allison Co. v. Evatt, 324 U.S. 652, 679 (1945).

authorization and *prohibition* in various areas of state taxation, not limiting its action to taxation of income. That is to say, Congress should sweep away the commerce clause barrier in certain areas and consent to state taxation of certain facets of interstate commerce where such taxation would not now be permitted; and Congress should limit other state taxing activities, although they have met constitutional approval. The latter, of course, is what Congress has undertaken in its recent efforts, upsetting the *Northwestern-Stockham* doctrine.

Among other things, Congress should take steps to try to insure fairer tax treatment between interstate and local business. The recent congressional enactment does not do that. In enacting this statute, Congress has permitted the feared costs of compliance with the tax laws of the various states where sales were made, which *Northwestern-Stockham* was thought to have spawned, to outweigh the revenue needs of the states even as to *net* income taxes. It may be that this was a proper balancing between the national needs for commercial freedom and the local needs for revenue. However, it may have created as many problems as it solved.[364] It is felt that Congress might well give considerably more attention in this and other areas to try to insure more nearly equal tax treatment between local and interstate business. There are areas where it is believed that interstate business has received too much freedom from state taxation, although the forbidden tax was nondiscriminatory and fairly apportioned to business done within the state, so that the taxed interstate business would not have been subject to multiple tax burdens not borne by local business.[365] Of course, it would be practically impossible for Congress or the states, taxwise, to insure competitive equality of similar goods in the same market. Tax burdens will vary from state to state and from product to product. Thus, tax costs incurred in the production of goods will vary greatly, depending upon the tax structures of the particular states. Hence, if a heavier tax burden happens in some instances to fall on interstate commerce than on local business, that is attributable to the fact that interstate commerce is subject to more than one taxing jurisdiction. Such inequality cannot be avoided under our federal system, but it is just as likely to work to the advantage of interstate commerce as it is to its disadvantage. In any event, interstate business should not be given

364. For a discussion of this congressional legislation, see material beginning at note 86 *supra,* and going through note 96 *supra.*

365. *E.g.,* Spector Motor Service v. O'Connor, 340 U.S. 602 (1951), discussed earlier, beginning at note 56 *supra,* and going through note 60 *supra.* Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947), discussed earlier, beginning at note 304 *supra,* and continuing through note 305 *supra.*

a competitive advantage over local business by preferred tax treatment under the aegis of the commerce clause.

Any study which Congress makes should take into account the formulation of sound fiscal policy. Such a study should envisage the problems of whether to permit only those state taxes thought desirable from the viewpoint of national economy as a unified process, and the prohibition, perhaps, of some taxes now sustained by the Court, but thought undesirable from the standpoint of trade and economics. That is to say, Congress should try to arrive at some sort of value judgment whether or not the national interest is outweighed by the local needs for revenue of particular kinds of state taxes. Thus, any tax which would bear more heavily upon interstate business than upon local business—which in effect discriminates—should be prohibited. In this connection, Congress should consider whether to prohibit certain fiat fee license taxes which are invariant with the volume of business done, and many of which are thought to be aimed at suppressing out-of-state business.[366]

In the step which Congress has already taken to limit the taxing power of the states, Congress has given much consideration to the cost of compliance with the tax laws by the taxpayer.[367] Along this same line, Congress might consider the wisdom of insulating interstate transactions from tax levies by political subdivisions of a state. Especially the smaller, distant interstate competitor undoubtedly is at a disadvantage in keeping informed as to the tax laws of political subdivisions of a state, particularly so since there is but little uniformity in regard to municipal taxes.

One important area in which Congress should soon undertake to improve the tax climate for interstate business lies in the area of allocation and apportionment of income for tax purposes. Already we have seen that because of the divergent apportionment formulas found in the various state tax statutes, along with the varying definitions of factors in superficially identical formulas, an interstate business may be forced to pay a tax on more than 100% of its net income, or it may escape much taxation.[368] Congress should undertake to bring some degree of uniformity to state taxation of income from multistate business, so that a corporation will pay its fair share of tax but on no more than 100% of its income. There is but little hope of

366. See McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, (1940); see Barrett, *"Substance" vs. "Form" in the Application of the Commerce Clause to Taxation*, 101 U. Pa. L. Rev. 740, 780-84 (1953).

367. See Senate Select Committee on Small Business, *State Taxation on Interstate Commerce*, S. Rep. No. 453, 86th Cong., 1st Sess. (1959). For a discussion of this concern of Congress, see materials beginning at note 84 *supra*, and going through note 86 *supra*.

368. See discussion beginning with note 121 *supra*, and going through note 203 *supra*.

achieving any sort of uniformity through state action alone. The present lack of uniformity in state tax structures is, by and large, attributable to variations inherent in conditions of the states. Each state has a different combination of natural resources and industry and has constructed its taxing structure in the light of such circumstances. With the states hard pressed for revenue, each state naturally may be expected to employ the apportionment and allocation formulas and techniques that will produce the greatest possible returns.

As we have seen, the outstanding effort, to date, to achieve uniformity in net income taxes was the proposal put forward by the National Commissioners on Uniform State Laws in the form of the "Uniform Division of Income for Tax Purposes Act."[369] While it has been approved by the American Bar Association and the Council of State Governments, nevertheless it has encountered stiff opposition.

The manufacturing and producing states oppose the "sales" factor definition of the Uniform Act, which attributes the sale to the "consumer" state, where the goods would come into competition with locally produced and marketed goods. The manufacturing and producing states want the sales factor allocated to the states of "origin," where the goods are produced. Already we have seen the *pros* and *cons* of this question and nothing further will be said here.[370] It is mentioned here for the sole purpose of demonstrating the unlikelihood of anything constructive being accomplished by way of working out a uniform apportionment solution by means of state action alone. Efforts toward state cooperation should be encouraged, but it should never be forgotten that any sort of useful uniform apportionment formula inevitably will provide for factors which will be politically unacceptable somewhere. Even though attempts to bring about uniformity by state cooperation were begun forty years ago, little concrete evidence of achievement exists.[371]

Congressional efforts to bring about uniformity in taxation should not be limited to taxation of net income, but might well extend to such fields as taxation of gross income and gross receipts, as well as other taxes.[372] Congress should be able to contribute a great deal by denying to the states power to impose these taxes unless specified uniform apportionment and allocation formulas for each type of tax are used.

369. This act is discussed, beginning at note 205 *supra,* and going through note 216 *supra.*
370. *Ibid.*
371. See Senate Select Committee on Small Business, *State Taxation on Interstate Commerce,* S. REP. No. 453, 86th Cong., 1st Sess. 10 (1959).
372. Professor Dowling has lately stated that he would welcome the enactment by Congress of a law exhibiting and built around three major features: (1) establishment of a substantive rule against state taxation which unreasonably interferes with the national interests in commerce; (2) creation of

No detailed recommendations will be made here as to what taxes on interstate commerce should be permitted and which forbidden by Congress. This is so for two reasons. First of all, this article is limited in scope to taxes involving corporate income. In the second place, a judgment as to the types of taxes that should be permitted or proscribed can properly be made only after Congress has all the facts at hand, resulting from competent research and investigation. The foregoing rather cursory treatment of possible facets of congressional action is simply suggestive of the areas where Congress might well take some action.[373]

This approach to the knotty problem of state taxation of interstate commerce should provide flexibility in the accommodation of the national interests in commercial freedom and local revenue interests. At the same time it would preserve the judicial and amplify the legislative function. From the judicial point of view it would preserve to the Supreme Court the function of determining whether the local tax measures were in harmony with congressional policy. From the legislative viewpoint, the fullest power of Congress, the representative of all the states, would be guaranteed. In no event could the Court forestall or obstruct congressional action. If the judicial decision with respect to a particular state tax law was not in harmony with the congressional policy, Congress could step in and take corrective action.

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an administrative agency for effectuating the substantive rule; and (3) postponement of the operative date of the substantive rule for at least six months, possibly a year. This postponement of the effective date, would cushion the impact of the rule on the states and other interested parties, and it would afford the members of the administrative agency a period of grace to inquire into and reflect upon their assigned task in preparation for the days of hard decisions ahead. See Dowling, *Introduction—State Taxation of Multistate Business*, 18 Ohio St. L.J. 3, 7-8 (1957).

373. On other occasions the writer has discussed in considerable detail certain legislative history that should be helpful in promulgating congressional policy. See Hartman, State Taxation of Interstate Commerce 279-284 (1953); Hartman, *State Taxation of Interstate Commerce: An Appraisal and Suggested Approach*, 1953 Wash. U.L.Q. 233, 265-68.

Appendix

TABLE I TYPE OF TAX, RATES, AND REVENUE YIELD, BY STATES

State	Type of Tax	Statutory Provisions	Tax Rate	Total Tax Revenue (1957) (a)	Revenue from Corporation Tax (1957) (a)	Per Cent of Total Tax Revenue Attributable to Corporation Tax (a)
Alabama	Direct	Ala. Code Ann., tit. 51, Sec. 373-424 (1940)	3%	$229,647,000	$30,182,000*	13.14*
Alaska	Direct	Alaska Comp. Laws Ann., Sec 5(A)(B)(C) (1949)	.9%	20,974,000	1,065,000	5.1
Arizona	Direct	Ariz. Code Ann. Sec. 43-101-199 (1956)	Progressive**	107,029,000	15,061,000*	14.07*
Arkansas	Direct	Ark. Stat. Sec. 84-2001-2048 (1947)	Progressive**	125,260,000	9,777,000	7.81
California	Franchise & Direct	Calif. Rev. & Tax Code Sec. 23001-26481(a) (1958)	4%	1,637,187,000	167,339,000	10.2
Colorado	Direct	Colo. Rev. Stat. Ann. Sec. 138-1-1-60 (1953)	5%	153,255,000	4,399,000	3.5
Connecticut	Franchise	Conn. Gen. Stat. Sec. 12-213-242 (Supp. 1958)	3%	227,614,000	29,765,000	13.1
Delaware	Direct	Del. Code Ann., tit. 30, Sec. 1901-20 (Supp. 1958)	5%	—	—	—
Dist. of Columbia	Franchise	D. C. Code Ann. Sec. 47-1551-1595 (1951)	5%	—	—	—
Georgia	Direct	Ga. Code. Ann. Sec. 92-3001-3317 (1937)	4%	314,513,000	21,850,000	6.9
Idaho	Direct	Idaho Code Ann., Sec. 63-3001-3087 (Supp. 1959)	9.5%	50,714,000	4,135,000	8.2
Kansas	Direct	Iowa Code Ann. Sec. 422.32-422.41 (1949)	2%	247,906,000	3,681,000	1.6
Iowa	Direct	Kan. Gen. Stat. Ann. Sec. 79-3201-3247 (1949)	3%	158,035,000	4,605,000	2.9
Kentucky	Direct	Ky. Rev. Stat. Ann. Sec. 141.010-141.990 (1955)	Progressive**	201,160,000	17,470,000	8.7
Louisiana	Direct	La. Rev. Stat. Ann. Sec. 47:21-285 (1952)	4%	372,927,000	29,284,000*	7.8*
Maryland	Direct	Md. Ann. Code, art. 81, Sec. 279-323 (1957)	5%	250,637,000	19,457,000	7.8
Massachusetts	Franchise	Mass. Ann. Laws c. 63, Sec. 1-81 (1953)	Complex***	413,595,000	30,449,000	7.4
Minnesota	Franchise & Direct	Minn. Stat. Ann. Sec. 290 (1945)	6%	292,567,000	21,706,000	7.4
Missouri	Direct	Mo. Ann. Stat. Sec. 143 (1949)	2%	266,152,000	29,284,000*	11.0*
Montana	License	Mont. Rev. Codes Ann. Sec. 84-1501-1519 (1947)	5%	52,632,000	2,360,000	4.5
New Jersey	Franchise	N. J. Stat. Ann. Sec. 54:10(a) (Supp. 1958)	Complex***	280,729,000	—	—
New Mexico	Direct	N. M. Stat. Ann. Sec. 72-15 (1953)	2%	97,114,000	5,187,000*	5.3*
New York	Franchise	N. Y. Tax Law Sec. 208-219 (1944)	Complex***	1,440,454,000	251,284,000	17.4
North Carolina	Direct	N. C. Gen. Stat. Sec. 105-161 (1958)	6%	369,779,000	45,582,000	12.3
North Dakota	Direct	N. D. Rev. Code Sec. 57-3801-3857 (1943)	Progressive**	51,750,000	1,174,000	2.2
Oklahoma	Direct	Okla. Stat. Ann., tit. 68, Sec. 871-918 (1954)	4%	235,720,000	10,457,000	4.4
Oregon	Franchise & Direct	Ore. Rev. Stat. Sec. 317-318 (1957)	6%	.193,985,000	20,713,000	10.6
Pennsylvania	Franchise & Direct	Pa. Stat. Ann., tit. 72, Sec. 3420(a-n) (Supp. 1958)	5%	985,222,000	164,059,000	16.6
Rhode Island	Direct	R. I. Gen. Laws Ann. Sec. 44-11-1—44-11-39 (1956)	Complex***	62,563,000	7,880,000	12.6
South Carolina	Direct	S. C. Code Sec. 65-201-65-367 (1952)	5%	184,344,000	17,412,000	9.4
Tennessee	Franchise	Tenn. Code Ann. Sec. 67-2701-67-2724 (1955)	3.75%	268,896,000	19,647,000	7.3
Utah	Franchise	Utah Code Ann. Sec. 59-13-1-59-13-64 (1953)	Complex***	76,746,000	8,224,000	10.7
Vermont	Franchise	Vt. Stat. Ann. Sec. 32-5901-5910 (1959)	5%	34,916,000	2,283,000	6.5
Virginia	Direct	Va. Code Ann. Sec. 58-77-58-151 (1959)	5%	315,908,000	27,453,000	8.7
Wisconsin	Direct	Wis. Stat. Ann. Sec. 71.01-71.373 (1957)	Progressive**	355,977,000	55,646,000	15.6
TOTAL				$10,070,887,000	$1,078,870,000	

Key: (a) These figures derived from—U.S. DEPARTMENT OF COMMERCE, COMPENDIUM OF STATE GOVERNMENT FINANCES IN 1957 (1958).

*—Corporation and individual tax is tabulated together, therefore revenue and percentage columns do NOT present an accurate picture of the corporation tax.

**—See footnote 112.

***—See footnote 113.

TABLE II METHODS OF ASSIGNING INCOME, BY STATES

STATE	SPECIFIC ALLOCATION ALLOWED	SEPARATE ACCOUNTING ALLOWED	FACTORS INCLUDED IN ALLOCATION FORMULA							
			Sales	Property	Payroll	Gross Receipts	Manufactur. Costs	Purchases	Average Inventory	Business Factor
Alabama	No Provision	Ala. Inc. Tax Reg. Sec. 398.2(a) (1959)	x	x			x			
Alaska	Alaska Comp. Laws Ann. Sec. 5(B) (1949)	Alaska Comp. Laws Ann. Sec. 5(c) (1949)	x	x	x					
Arizona	Ariz. Code Ann. Sec. 43-135(g) (1956)	Ariz. Code Ann. Sec. 43-135(g) (1956)	x	x	x		x	x		
Arkansas	Ark. Stat. Sec. 84-2020 (1947)	No Provision	x	x						
California	No Provision	No Provision	x	x	x					
Colorado	Colo. Rev. Stat. Ann. Sec. 138-1-28 (1958)	Colo. Rev. Stat. Ann. Sec. 138-1-28(1) (1953)		x		x				
Connecticut	Conn. Gen. Stat. Sec. 12-218 (Supp. 1958)	No Provision	x	x	x					
Delaware	Del. Code Ann., tit. 30, Sec. 1903(b) (Supp. 1958)	Del. Code Ann., tit. 30, Sec. 1903(c) (Supp. 1958)	x	x	x					
Dist. of Columbia	D. C. Income & Franchise Tax Law Sec. 10.2(c)(3) (1956)	D. C. Income & Franchise Tax Law Sec. 10.2(c)(4) (1956)	x				x			
Georgia	Ga. Code Ann. Sec. 92-3113 (1937)	No Provision			x	x			x	
Idaho	Idaho Code Ann. Sec. 63-3027(a) (Supp. 1959)	Idaho Code Ann. Sec. 63-3027(d) (Supp. 1959)	x	x	x					
Iowa	Iowa Code Ann. Sec. 422.33 (1949)	No Provision	x							
Kansas	Kan. Gen. Stat. Ann. Sec. 79-321B (Supp. 1957)	Kan. Gen. Stat. Ann. Sec. 79-3217 (1949)	x	x			x			
Kentucky	Ky. Rev. Stat. Ann. Sec. 141-120(3) (1955)	Ky. Rev. Stat. Ann. Sec. 141.120(4) (1955)	x	x	x					
Louisiana	La. Rev. Stat. Ann. Sec. 47:242 (Supp. 1958)	La. Rev. Stat. Ann. Sec. 47:244 (Supp. 1958)	x	x	x					
Maryland	Md. Ann. Code, art. 81, Sec. 316(a) (1957)	Md. Ann. Code, art. 81, Sec. 316(b) (1957)	x	x	x					
Massachusetts	Mass. Ann. Laws c. 63, Sec. 38 (1953)	No Provision		x	x	x				
Minnesota	Minn. Stat. Ann. Sec. 290.17 (1945)	Minn. Stat. Ann. Sec. 290.20 (Supp. 1958)	x	x	x					
Missouri	Mo. Ann. Stat. Sec. 143.100 (Supp. 1958)	Mo. Ann. Stat. Sec. 143.080 (1949)	x							
Montana	No Provision	Mont. Rev. Codes Ann. Sec. 84-1503 (Supp. 1958)	x	x	x					
New Jersey	N. J. Stat. Ann. Sec. 54:10A-5(d) (Supp. 1958)	N. J. Stat. Ann. Sec. 54:10A-8 (Supp. 1958)		x	x	x				
New Mexico	N. M. Stat. Ann. Sec. 72-15-32 (1953)	N. M. Stat. Ann. Sec. 72-15-32 (1953)	x							x
New York	N. Y. Tax Law Sec. 210 (1944)	N. Y. Tax Law Sec. 210 (1944)	x	x	x					
North Carolina	N. C. Gen. Stat. Sec. 105-134 (1958)	N. C. Gen. Stat. Sec. 105-134 (1958)	x	x	x					
North Dakota	N. D. Rev. Code Sec. 57-3812 (1943)	N. D. Rev. Code Sec. 57-3814 (1943)		x						x
Oklahoma	Okla. Stat. Ann., tit. 68, Sec. 878 (1954)	Okla. Stat. Ann., tit. 68, Sec. 878(h) (1954)	x	x			x			
Oregon	Ore. Rev. Stat. Sec. 314.280 (1958)	Ore. Rev. Stat. Sec. 314.280(2) (1951)	x	x	x					
Pennsylvania	Pa. Stat. Ann., tit. 72, Sec. 3420 (Supp. 1958)	No Provision		x	x	x				
Rhode Island	No Provision	No Provision	x	x	x					
South Carolina	S. C. Code Sec. 65-279.3 (Supp. 1958)	S. C. Code Sec. 65-279.14 (Supp. 1958)	x	x	x					
Tennessee	No Provision	No Provision	x	x			x			
Utah	Utah Code Ann. Sec. 59-13-20(1) (Supp. 1959)	No Provision		x	x	x				
Vermont	No Provision	No Provision	x	x	x					
Virginia	No Provision	Va. Code Ann. Sec. 58-131.1 (1959)		x		x				
Wisconsin	Wis. Stat. Ann. Sec. 71.07(1) (1957)	Wis. Stat. Ann. Sec. 71.07(2) (1957)	x	x			x			