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In the

Supreme Court of the United States

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EVCO, dba EVCO INSTRUCTIONAL DESIGNS,

Appellant,

v.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, et al.

No. 71-857

Washington, D. C.
November 8, 1972

Pages 1 thru 40

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IN THE SUPREME COURT OF THE UNITED STATES

EVCO, dba EVCO INSTRUCTIONAL DESIGNS, Appellant, v. FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, ET AL.	:	No. 71-857

Washington, D. C.,

Wednesday, November 8, 1972.

The above-entitled matter came on for argument at 2:00 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

KENDALL O. SCHLENKER, ESQ., 925 Public Service Building, P.O. Box 925, Albuquerque, New Mexico, 87103; for the Appellant.

JOHN C. COOK, ESQ., Assistant Attorney General of New Mexico, Santa Fe, New Mexico; for the Appellee.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-857, EVCO against Jones.

Mr. Schlenker, you may proceed whenever you are ready.

ORAL ARGUMENT OF KENDALL O. SCHLENKER, ESQ.,

ON BEHALF OF THE APPELLANT

MR. SCHLENKER: Mr. Chief Justice, and may it please the Court:

The case of EVCO v. Jones is before the Court the second time.

The issue is whether the gross receipts of EVCO from sales of tangible personal property to customers outside the State of New Mexico,where delivery is made outside the State of New Mexico, are exempt from the New Mexico Emergency School Tax and the Gross Receipts Tax.

New Mexico, of course, is a State which is not a heavily industrial State and, as a result, perhaps, of the Atomic Energy Commission and some of the other Government agencies' instrumentalities in our State, there have evolved a number of businesses which deal in scientific and technological materials of which EVCO is one.

EVCO designs educational programs. Its customers are many Government agencies for the State and Federal Government. It does certain contract work for the Bureau of Indian Affairs.

And, typical of the kind of work it does which is involved in this case, is the designing of instructional programs for the IBM Corporation up in Endicott, New York, for its use in training people how to use its typewriters, magnetic tape selectric typewriters and other modern types of business equipment.

The products which evolve from this work which EVCO does consist of camera ready copies of books and training manuals, film strips for instruction and audio tapes.

Now, this case arises under two different New Mexico statutes, and for our purposes I believe they can be considered the same.

The first one was the so-called Emergency School Tax Act which came about in 1939 and continued along until about 1961, when we changed the name to the New Mexico Gross Receipts Tax.

The practical effect of those taxes is the same and in each case an exemption was contained from the tax for the sales of tangible personal property to Government agencies and instrumentalities and to certain non-profit corporations.

In this case, in the lower court's opinion, typical of these were these sales to the U.S. Forest Service and to the University of Toledo, and so forth.

Now, the first issue involved in this case initially was whether EVCO was actually selling tangible personal property

or whether it was in fact selling a service which was not subject to this exemption.

The New Mexico Emergency School Tax contained no provision regarding interstate commerce.

The New Mexico Gross Receipts Tax provided an exemption in the case of sales which were in interstate commerce.

Notwithstanding this absence of a provision in the New Mexico Emergency School Tax, I don't believe anyone has ever contended that New Mexico -- that the presence of this provision one way or another would have any effect, since I think it has always been fairly clear that if these sales are in interstate commerce that they would be just as exempt as they are stated to be under the Gross Receipts Tax.

The New Mexico Court of Appeals decided that EVCO was selling tangible personal property which took care of a considerable part of this case, that relating to sales to the Government and sales to these tax exempt institutions.

However, the Court of Appeals decided that notwithstanding their determination that tangible personal property was involved, these sales where delivery was made to IBM, for example, in New York, were not exempt as being in interstate commerce.

We came to this Court before on petition for Writ of Certiorari and the New Mexico Attorney General's office, at

that time, filed a brief in which it was stated that, so far as the second point was concerned, that the State would now agree that these sales were exempt as being in interstate commerce. They expressed their dissatisfaction with the determination still about this services versus tangible personal property point.

This Court sent the case back, using language in view of the New Mexico Attorney General's position or concession, that the case was being resubmitted for reconsideration.

And, in effect, what the New Mexico Court of Appeals said was, we have reconsidered but we don't change our mind on this point.

And, we again came back with a petition this time which was granted.

The State raises this point about the tangible personal property versus services, but the State's position on the second point is that if this is the sale of tangible personal property that we are correct in our position that these sales are exempt as being in interstate commerce.

We would like on the case of Adams Manufacturing Company v. Storen, in which the sales there involved were so-called mailshipments, in which this Court determined that those sales were exempt as being in interstate commerce --

Q I understood it, in reading the briefs, and I

understood it when the case was last here, you and the State of New Mexico are in agreement, are you not, that if these sales are on personal property the tax cannot be imposed?

MR. SCHLENKER: Yes, Your Honor, we are.

Q -- And then -- but the State says that if these are services then the tax can be imposed. And what do you say about that, if these are services?

MR. SCHLENKER: I would say that if these had been determined to be services that the tax could be imposed.

Q So there is no disagreement between you, is there? And, therefore the issue for us and the only issue is whether or not these are services or tangible personal property? Is that the only issue?

MR. SCHLENKER: Your Honor, we don't believe that that would be an issue that the Court will want to even --

Q Well, I wouldn't think so either.

Well, you are in total agreement aren't you?

MR. SCHLENKER: Yes, Your Honor, except that we are obligated on several thousand dollars worth of taxes that we seem to be in complete agreement with everybody about but we nevertheless --

Q Well, isn't the issue whether or not these are services or tangible personal property?

MR. SCHLENKER: Well, Your Honor, no, the New Mexico Court of Appeals has already determined that these are tangible

personal property --

Q I read its opinion to say that we don't need to decide on the remand from this Court when it went back the second time. We don't need to decide it because whether it is services or tangible personal property the tax is a valid tax. Isn't that what it said?

MR. SCHLENKER: I think that's what they say.

I think that's the question that they had is that, in effect, --

Q And you both agree that the Court was wrong?

MR. SCHLENKER: Yes.

Q And you both agree that if it is tangible personal property the tax cannot be imposed, and that if it is services, the tax can be imposed.

MR. SCHLENKER: Yes, sir, we certainly do.

Q Well, then, isn't the only issue that divides you the factual issue of whether or not this is tangible personal property or services?

MR. SCHLENKER: No, Your Honor, because the Court of Appeals in the State of New Mexico says that it is tangible personal property, but they say that it is subject to the tax notwithstanding the fact that it is tangible personal property.

Q We have an adversary system here. Now, wait, I am talking about you and your opponent in this lawsuit.

MR. SCHLENKER: Yes, Your Honor.

Q Aren't you in complete agreement as to the controlling legal principles involved, and isn't your only difference of opinion the -- or difference between you relates to whether or not these are services or tangible personal property?

MR. SCHLENKER: Well, I believe we are in agreement about the principles which apply, but the State does have an assessment involving several thousand dollars, and it is relying on our Court's opinion to enforce that assessment.

Q Well, here it comes and says that if this is personal property this tax cannot be imposed, doesn't it? Don't you read its brief that way? The State.

MR. SCHLENKER: No, Your Honor.

Q Well, then I misunderstood what you just told me.

MR. SCHLENKER: That's our problem. I believe the State says all the way with respect to all of these if they are tangible personal property --

Q Yes.

MR. SCHLENKER: -- but they are saying that we have a right to tax this notwithstanding it, that the petitioner should apportion the tax in this case. Now, under the apportionment idea, we believe that the apportionment we are to make is between intra-State and interstate sales and we believe those are fairly clear.

It appears, however, that the New Mexico Court is concerned about apportionment of something else. They are

reviewing this as if it were a value-added tax, I believe.

Q You have a judgment of the highest Court of New Mexico against you on your liability for the tax, and I take it the only reason we would be reviewing it is to hear your contention that it is unconstitutional for the highest Court of New Mexico to have done what it did.

So you've got to show us in some way, I take it, that what the New Mexico Court of Appeals has done is inconsistent with the Federal Constitution, regardless of what label is put on it.

MR. SCHLENKER: Yes, Your Honor.

We say that the decision of the New Mexico Court of Appeals is incorrect under the authority of Adams Manufacturing Company v. Storen, and these subsequent cases that reaffirm that same position.

They are relying on the case of General Motors Co. v. Washington as authority for their decision in the case, and that case involved in-State -- or inshipments to the State of Washington.

This Court has drawn these distinctions three times, as I understand it, outshipments which cannot be taxed by the shipping State, inshipments which can, and then the manufacturing type -- manufacturing tax, which is also a constitutional tax.

Q Does the record, in fact, show that these receipts

were taxed by any other State?

MR. SCHLENKER: No, Your Honor, it does not.

Q One other question. Can we go behind the New Mexico Court's characterization of its State tax? It seems to disagree with its revenue commissioner.

MR. SCHLENKER: Yes, Your Honor, our gross receipts tax is very much like the Indiana gross income tax of 1933, which was the -- which was involved in Adams and Freeman v. Kmit and International Harvester, all of those cases. It is a gross receipts tax.

The Commissioner of Revenue, under the Gross Receipts Tax Act which came in 1961, did issue a ruling which is to the effect that our sales would be exempt if, in fact, they are tangible personal property.

That is the determination that has been made, that they are.

Q I share Justice Stewart's confusion. I get the impression here that your side and the opposing side have a common enemy in the finding of the Court of Appeals.

MR. SCHLENKER: Well, Your Honor, initially, the Attorney General's office took the position that the Court of Appeals followed. The Attorney General's office changed its position after the decision.

The real vice in that, I believe, is that we also have a use tax, and I believe that the use tax would be placed

in jeopardy if we had a Court decision that we could impose the gross receipts tax on the outshipments, the use tax on the inshipments.

Q I am groping for the controversy between you and your friend here.

MR. SCHLENKER: Your Honor, when we went back to the Court of Appeals, we didn't really know what we were going for, except that we had a substantial tax liability which had been sustained by their decision.

This Court had sent the case back for reconsideration and, in effect, our Court has said that even though these are outshipments of personal property, nevertheless we can impose the tax.

Q Two opinions, and they happen to be by the same judge, Judge Oman.

On page A-9, this is his first opinion, he said, "The sole question is therefore whether or not the contracts constitute a sales of tangible personal property within the contemplation of the statutes or were contracts for the performance of services."

And so he said that's the sole question for him to decide, and then the case came up here and it was remanded. And, on remand, on page A-31, same judge for the same Court, says, "We fail to understand how a tax on this aspect of interstate commerce can be constitutionally fair and valid if

the -- it arises out of a contract for services, but constitutionally unfair and invalid when these same incidents arise out of a contract of sale.

"In our opinion, taxable incidents are equally apparent and are ascertainable with equal ease whether they arise out of a contract of sale or out of a contract for services."

So the first time around, he said the sole question was whether they were tangible personal property or services, and the second time around, he said it didn't make any difference.

Isn't that part of the problem in this case?

It is part of my problem in reading this.

MR. SCHLENKER: In the case where he said it's the sole question, he went on subsequently in the same opinion to consider the second question.

Q Which is the second question?

MR. SCHLENKER: The matter of the taxability once its determined that the products are tangible personal property.

Q Where is that in these opinions?

I understood, as I suggested in my questions, that the only difference between you and your adversery here in this Court --

MR. SCHLENKER: It is on A-11, Your Honor, where it

begins, "Under its second point..."

Q That's the opinion that accompanied the judgment that was vacated and set aside, isn't it?

MR. SCHLENKER: No, that's in the first opinion, Page A-11.

Q No, I didn't think so. I thought the -- I see, that's the one before us now.

MR. SCHLENKER: Yes, Your Honor.

We had the two questions squarely presented, one on the tangible personal property versus service and then the second one, that was a threshold question, once the determination was made.

I believe that the New Mexico Court of Appeals is just saying that it does not agree with the laws established by this Court.

Q May I follow up on this question that you have been discussing?

Look at Appendix A-8, where it says the first opinion of the New Mexico Court, the first full paragraph starts out by saying, "The taxpayer contends that these contracts constituted sales of tangible personal property."

Then, in the last sentence, the Court says, "We agree with the position of the taxpayer."

MR. SCHLENKER: Yes, Your Honor.

Q Now, I construe that as a finding and a holding by

the New Mexico Court that it construes these sales to be of tangible personal property under your statute.

Now, in its second opinion, after the remand, although it did say, as you and Justice Stewart have pointed out, that it doesn't see any legal consequence following that would be different if it construed the sales to be of services, nevertheless it concludes by saying we reinstate and reaffirm the first opinion.

Now, I have construed that,until this argument, that that was a reaffirmation of a prior holding that the sales were of tangible personal property.

MR. SCHLENKER: Yes, Your Honor.

Q Is that your position?

MR. SCHLENKER: Yes, Your Honor, they did reaffirm that, but then they went on to say about this second point that the parties were in agreement on if this was tangible personal property, that we can't see the distinction that the U.S. Supreme Court has drawn that this would be taxable if it was services and not taxable if it was tangible personal property.

Q But if we accept the position of your Court that this is tangible personal property, then you are both in agreement that that's the end of this case, as I understand it.

MR. SCHLENKER: Yes, Your Honor. Except that we've

asked this time that the remand be with instructions as to the kind of relief which should be granted.

We got back for reconsideration before and the reconsideration --

Q What you are really asking us to say is that your Court is wrong, that there is a distinction between services and sales. And where it is sales, as they say it is, comes tax as unconstitutional reverse.

That's what you want us to do?

MR. SCHLENKER: Yes, Your Honor, exactly.

Q You are both asking to be reversed, are you not?

MR. SCHLENKER: We are except that the State would like to raise this tangible personal property versus services issue.

Q How can that be? It maybe can't. We'll have to hear him. But, if we are concluded by the holding of your Court that it is on tangible personal property, then, thus, isn't that the framework within the constitutional question should be decided?

MR. SCHLENKER: We maintain that that's exactly correct, Your Honor.

Q Mr. Schlenker, incidentally, where do we find the facts in this case? I don't seem to have an appendix.

MR. SCHLENKER: The facts upon which we rely were stipulated in the stipulation which is material. It is in the

opinion of the Court.

Q Aren't there two stipulations in the file?

MR. SCHLENKER: Not that I recall, Your Honor.

Q Has there been a supervening change in the New Mexico law that would make -- I got that intimation from one of the briefs -- that, perhaps this would not be a recurring question in New Mexico?

MR. SCHLENKER: It would not be in the sense that if the Bureau of Revenue follows its existing regulation that it would just not raise it in any subsequent case.

It does have a ruling in effect which is in the Court's opinion at the -- beginning on the bottom of A-13.

We believe that that exactly fits our situation. "Receipts of New Mexico sellers from sales of property to non-residents of New Mexico where delivery is made out-of-state by seller's vehicle, U.S. Mail, or common carrier are receipts from transactions in interstate commerce and such receipts may be deducted from the gross receipts of the seller."

Now, that was in existence and our Court expressed doubts about it. They said, well, if that is a correct statement of the law, then it wasn't in effect at the time that the taxable transactions arose here.

Q Was there something about the handling of the case that could be explained to us to shed some light on it, that maybe you feel a little reticent about explaining?

MR.SCHLENKER: Your Honor, I wish I could explain more about the case.

I can understand why it is confusing, It is confusing to all the lawyers involved in the case, and our clients, we know that.

There are no hidden --

Q Was this argued earlier before the New Mexico Supreme Court?

MR. SCHLENKER: Twice, Your Honor.

Q Is there anything in the colloquoy between you and the members of that Court which would shed light on this?

MR. SCHLENKER: One of the judges of the three stated that he wanted me to know that the decision had not been unanimous, as it appeared the first time.

Q And the second time?

MR. SCHLENKER: I don't know, I haven't --

Q Haven't been back.

Q Mr. Schlenker, won't about one more trip up here eat up the whole tax?

MR. SCHLENKER: Well, we didn't get to come up last time, Your Honor, the case was sent back --

Q It was sent back on what was basically a confession of errors, maybe by the State, and now reinstating the words that Mr. Justice Powell read to you, reinstating the previous opinion, the State has confirmed and repeated the error.

And your adversary, as I read his brief, agrees with that.

Isn't that true?

And, yet, as you say, you still have a tax bill to pay.

MR. SCHLENKER: Yes, Your Honor, that's what we believe our situation is today.

Q What it comes down to is that the State and the State's Supreme Court seem to have some disagreement.

MR. SCHLENKER: Actually, the Court of Appeals, Judge Oman is now on the State Supreme Court.

Q Well, I meant the Court of Appeals.

MR. SCHLENKER: Yes, sir.

Q May I say again, the Court of Appeals is your common adversary?

MR. SCHLENKER: Apparently so, Your Honor.

Q Perhaps the Attorney General will shed more light on it than we have had.

MR. CHIEF JUSTICE BURGER: Mr. Cook.

ORAL ARGUMENT OF JOHN C. COOK, ESQ.,

ON BEHALF OF THE APPELLEES

MR. COOK: Mr. Chief Justice, and may it please the Court:

This case involves two issues which were presented to the New Mexico Court of Appeals.

The first issue decided by the lower court was that certain instructional materials which were developed and created by the petitioner and sold as camera ready copies were as a matter of law tangible personal property.

Receipts from sales of this tangible personal property to the United States and the Research Foundation of the University of Toledo were decided to be exempt from the taxes at issue here.

Q As a matter of your statute, isn't that right?

MR. COOK: As a matter of law, by the Court.

Q By your statutory law, your tax law, isn't that right?

MR. COOK: Well, Your Honor, we say that the grounds are ambiguous with regard to why the Court of Appeals reached the decision on the services-tangible issue.

Q Well, doesn't your tax law exempt sales to governmental bodies?

MR. COOK: Sales of tangible personal property to governmental bodies, yes, Justice.

Q And as I read this first opinion, they -- you were just applying your statute in exempting those.

MR. COOK: Once they decided what was being sold was tangible personal property, yes, Justice.

The second issue concerns sales to buyers who were outside New Mexico and delivery was outside New Mexico.

The subject matter of those sales was not materially different. The New Mexico Court of Appeals held that the petitioner's receipts from these sales were subject to tax. These sales were clearly under the New Mexico Court of Appeals reasoning outshipments of tangible personal property.

However, the Court held that petitioner's receipts from these transactions were subject to tax, and decided that these receipts could be subject to tax without doing violence to the Interstate Commerce Clause of the Federal Constitution.

Respondent contends that the New Mexico Court of Appeals incorrectly decided both issues. However, the error with regard to the first issue caused and resulted in error in the second issue.

Q May I be sure I understand? You now are contending that the Court was wrong in holding that these were sales of tangible personal property?

MR. COOK: Yes, Your Honor.

Q And you are further saying that, if these were sales of tangible personal property, the Court was wrong in holding that the tax could validly be imposed.

MR. COOK: Yes, Justice.

Q How do we second guess the Court of Appeals whether these were sales of tangible personal property? That's an inter -- that's -- as applied, in any event, your Court of Appeals said these were for the purposes of your statute.

Isn't that so?

That's a matter of statutory construction in the sense of application of these particular materials, isn't it?

How do we then -- do you agree with that?

Or have we any jurisdiction of disagreement?

MR. COOK: Well, if I might expand a little on my answer.

The Court of Appeals stated in the first opinion that the -- regarding the issue of services versus tangibles -- said the adoption of the position taken by the Commissioner would result in the ultimate imposition of taxes, such as those here involved, upon agencies and institutions which the Legislature intended should be exempt therefrom, or result in a tax burden being shifted to other taxable customers of the taxpayer.

Neither of these results would be consistent with the legislative intent.

Shifting the tax burden would be inconsistent with the object of requiring a tax burden to fall with uniformity and equality upon the class of persons sought to be taxed.

In support of this statement, the Court of Appeals decided -- on another Court of Appeals case -- in New Mexico Electric Service Company v. Jones.

The reasoning that resulted in the statement I have read seems to be that if the Commissioner's decision in order

with respect to the issue of service versus tangible personal property had been affirmed by the Court of Appeals, the effect would be a denial of equal protection to taxpayers performing services for the United States or any agency or instrumentality thereof.

The New Mexico Electric Service Company case which was decided by the Court of Appeals raised issues under both the Equal Protection Provisions of the United States and the New Mexico Constitution.

Respondent contends that this reasoning of the New Mexico Court of Appeals regarding the requirements of equal protection is erroneous because the imposition of the tax was on the seller and there was no showing that sellers of services to these agencies or organizations, as a class -- that sellers as a class -- were treated differently for purposes of taxation.

If the imposition of the taxes at issue here is on receipts from the performance of services rather than receipts from the sale of tangible personal property, the respondent contends that the tax is not repugnant to the United States Constitution.

And that seems to be the basis for part of the New Mexico Court of Appeals decision with regard to the first issue.

There appears to respondent to be at least obscurity

as to the precise grounds for the judgment in the New Mexico Court of Appeals on the first issue.

Although we haven't cited this case in our briefs, in view of the --

Q I don't see, however erroneous may be the basis in supporting these -- for our holding that these -- that this particular taxpayer was taxed on tangibles -- however, erroneous that basis is, how can we set aside that conclusion of your Court of Appeals? Whether the error -- if it is error -- has its roots in misapplication of the Federal Constitution or not, as to this taxpayer, at least.

MR. SCHLENKER: Well, Justice, we take it that the Court of Appeals was deciding a Federal question -- or possibly deciding a Federal question -- when they held that the sales were of tangibles.

Now, if that was a Federal question which was decided erroneously, then under the rules regarding certiorari we say that that Federal question can be presented to this Court.

Q Do you want us to affirm the judgment of the Court of Appeals?

MR. COOK: No, Your Honor, No, Justice.

We want the decision reversed.

Q And you are the appellee. Generally, it is the appellant who wants the decision reversed.

MR. COOK: Well, appellant wants the decision reversed, but he wants it reversed on the second issue -- for a different reason

Q Well, didn't the (inaudible)

MR. COOK: The Court of Appeals gave us direction regarding the assessment -- gave the Bureau of Revenue direction.

Q Can they do that under your law? Legally.

MR. COOK: We are to abide by the decisions of the Court of Appeals once cases are presented to them regarding tax liability.

Q But you can't, on your own -- the Attorney General's office can't -- withdraw an assessment once it is made?

MR. COOK: We can abate the assessment. The procedure is abatement, Justice, and we can abate it if it is erroneous as a matter of law or erroneous as to the figures.

Q Well, aren't you now saying this is related to the matter of law?

MR. COOK: We are saying that. However, the Court of Appeals, who decided this case, says it is not erroneous.

Q You want us to say it?

Q If you've got a judgment on behalf of your bureau and the other side complains that it violates the Federal Constitution, why don't you come in and try to uphold it?

Q Or else go back home and compromise it.

Q Tell me, Mr. Cook, had your Court of Appeals correctly said this was services and not tangibles, which is the position you are urging on us, then, I take it, this assessment -- your view would be the taxpayer had to pay? Isn't that right?

MR. COOK: Yes.

Q Well, aren't you -- or should you -- really be here asking us to affirm the assessment of the Court of Appeals on the ground that they were wrong in saying that this was on tangibles, that really it was on services, and, therefore, you were entitled to make the assessment and to collect it?

MR. COOK: Yes, Justice.

Q Well, now, really, you should be asking us to affirm judgment of assessment, shouldn't you?

MR. COOK: Well, to reverse on the grounds --

Q Well, you want us to say that we affirm the assessment because the reasons they gave are wrong and the right reasons would be that this is on services and not on -- isn't that it?

MR. COOK: Yes, Justice.

Q Well, that's not really reversal, I suppose.

Q The reason is basically a factual one, not a question of State law, I take it.

You are saying that as a matter of fact these transactions were of a particular nature. However, the Court

of Appeals of New Mexico may have characterized them under the statute.

MR. COOK: That's correct, Justice.

In the case of State of Minnesota v. National Tea Company which is not cited in respondent's brief -- it is 309 US 551 -- there was obscurity in the decision of the Supreme Court of Minnesota in a tax case involving graduated gross sales tax on chainstores.

This obscurity arose because of discretion by the Supreme Court of Minnesota of the Equal Protection Provisions of the Fifteenth Amendment, and referencing the syllabus of that case to a provision of the Minnesota Constitution, which provided that taxes shall be uniform upon the same class of subjects.

In Minnesota v. National Tea Company, it was contended that the United States Supreme Court should not take jurisdiction because of the rule that jurisdiction is not taken where a judgment of a State Court rests on two grounds, one involving a Federal question and the other not.

However, there was found to be obscurity as to the grounds for the decision. Jurisdiction was taken. The case was remanded to the Supreme Court to resolve the ambiguities of the decision.

In the course of the opinion, this Court stated: "This Court has frequently held that in the exercise of its

appellate jurisdiction, it has the power not only to correct errors of law in the judgment and the review, but also to make such disposition of the case as justice requires."

Q Mr. Cook, would you be satisfied if we took the following action: having remanded this case to the Court of Appeals, having accomplished nothing by that, at the urging of both parties, we now reverse decision of the Court of Appeals, period. Would that satisfy?

MR. COOK: We would rather have the decision reversed than have it stand as now, but we would prefer that the decision be changed as to the grounds with regard to --

Q You all imposed the tax, because you submit that you can constitutionally and lawfully do so if it is a tax on personal services, is that right?

Q Why would you prefer to have it reversed along the lines Justice Marshall has suggested than to have it stand as it is now?

MR. COOK: We would prefer to have the reasoning changed and have it affirmed; but if we can't get that, we would prefer to have it reversed.

Q Why?

MR. COOK: Because as it stands now, we think that the case is an improper construction of the law.

Q Of State law?

MR. COOK: With regard to taxation of outshipments

of tangible personal property --

Q You don't think you have any constitutional power to tax outshipments of tangible personal property?

MR. COOK: That's our argument.

Q And the way the Court of Appeals is construing the position, you do have it, they say. And you say you don't have it under the decisions of this Court.

Q And this is going to embarrass the administration of your tax program in many other situations, is that it?

MR. COOK: Well, it will cause difficulties in administration of the tax program. The administrator -- the Commissioner of Revenue -- has reviewed this, he has directed counsel to argue in this manner. I feel that the case is arguable. I don't feel that as counsel that I am shirking my duty.

However, the position of the administrator is the one, as client, that we adhere to.

Q In that position, do I understand it correctly, you are submitting that the basic issue before us is whether or not this is personal property or services. And if the Court below was wrong in holding it was personal property, then you are asking us to hold that these were services.

MR. COOK: Yes, Justice.

Q And, having held that, you are then saying -- or asking us to hold that the tax imposed on services was

constitutionally valid.

MR. COOK: Yes, Justice Stewart.

Q Is that it?

MR. COOK: Yes.

Q What do we do with the judgment of the Court? We affirm it then, don't we?

MR. COOK: Yes, Justice.

Q And your key submission, I gather, has to be that this is whether it's on tangibles or on services, is a Federal question. Not otherwise can we pass on it.

MR. COOK: Yes, Justice.

Q This really is exactly the same position you had when the case was here before, isn't it?

MR. COOK: Yes, Justice.

Q Which caused us to remand the case to the Court of Appeals --

MR. COOK: Yes, Justice.

We requested that we be allowed to submit briefs after the case was remanded to the New Mexico Court of Appeals. They said no briefs.

We made this same argument regarding the Federal question involving the Equal Protection Clause at oral argument before the New Mexico Court of Appeals, although it is not referenced in their second opinion, as such.

Q Out of curiosity, was there a certiorari

jurisdiction of your Supreme Court from the Court of Appeals?

MR. COOK: Yes.

Q And did they refuse to review it?

MR. COOK: Yes, Justice.

Q How many on your Supreme Court?

MR. COOK: Five, Justice.

Q And one of them sat in this case on the Court of Appeals?

MR. COOK: Yes, Justice.

He is now moved. He was the judge who offered the original opinion.

Q Can you shed any light on why they denied certiorari? Was it possibly on the grounds that it was de minimus in their view?

MR. COOK: Excuse me, Mr. Chief Justice, on the reason why the New Mexico Supreme Court denied?

Q Yes.

MR. COOK: I have no idea.

Q Did you oppose it officially?

MR. COOK: No.

Q Did you join in requesting it?

MR. COOK: No.

We did after the initial case. After the remand, we didn't join in petitioning the New Mexico Supreme Court for certiorari.

Q How much tax is involved here in this case?

MR. COOK: I believe that the total assessment was about $35,000.

Q Is that the tax?

MR. COOK: Tax.

Q Do I understand, is it likely to happen again in the future, as far as EVCO is concerned?

MR. COOK: Well, with regard to the question Justice Rehnquist asked, the statutes of New Mexico have been remanded.

Section 72, 16A, 14,12, came in after the period involved in this assessment.

That deduction provides for deduction for services performed in New Mexico when initial use of the product of the services is outside New Mexico.

However, the buyer outside New Mexico was required to deliver a non-taxable transaction certificate regarding this sale, so if this matter had come up under current law and a certificate had been issued then the sale would have been deductible from the gross receipts tax.

Respondent submits that there was error of law present in the decision of the New Mexico Court of Appeals on the first point. That error presented a Federal question on the ground that the State statute was held repugnant to the Equal Protection Clause of the Fourteenth Amendment.

I've been over that.

Even if it is decided that the New Mexico Court of Appeals did not completely decide the first issue on the grounds that the State statutes were repugnant to the Equal Protection Provisions of the Fourteenth Amendment of the United States Constitution, the decision does not present -- does present -- an uncertainty as was present in Minnesota v. National Tea Company.

Respondent submits that if ambiguity is present, that ambiguity should be resolved before the interstate commerce question is considered.

If the first issue of the case was decided on incorrect grounds, that the exception or deduction provisions which were limited to receipts from selling tangible personal property, were repugnant to the Equal Protections Provisions of the Fourteenth Amendment, then the issue could be resolved as a question of fact rather than a question of law.

However, facts which would substantially support the Commissioner of Revenue's decision that the transactions which resulted in the tax were from the performance of services, if it is a fact question.

If it is decided that the first issue was decided as a matter of State law or that the issue was fully decided on both Federal grounds and State grounds, then respondent agrees with petitioner as to the decision of the Court of

Appeals on the second point, which concerns the application of the commerce clause, Article 1, Sec. 8, of the United States Constition.

The decisions of this Court in Freeman v. Hewit J. D. Adams Manufacturing Company v. Storen hold that if there is a risk of a double tax burden, the tax would be forbidden under the Commerce Clause, and that this would be so even if apportionment was accomplished.

The reason we think this is the rule is because the destination State could impose a use or compensating tax on full value of the items when they came to rest in the destination State.

The destination State could also impose, as an alternative, impose a gross receipts tax on the receipts from the subsequent sale of the items, if the seller had sufficient contact with the destination State, as was done in General Motors v. Washington.

Respondents emphasize that our contention is that the risk of a double tax burden is all that is required to forbid the tax on receipts from an outshipment of tangible personal property.

This, we think, is clear from the following statement in J. D. Adams case. The statement reads: "The vice of the statute, as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts

derived from activities in interstate commerce, and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by States in which the goods are sold as well as those in which they are manufactured."

Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the Commerce Clause forbids.

The Adams case distinguishes a gross receipts tax on outshipments from a tax on manufacturing measured by gross receipts.

The taxes at issue here are clearly not taxes imposed on the activity of manufacturing.

In this case, there was no showing in the record and no argument that there was a possibility of another State taxing or attempting to tax any receipts from the activities incident to the performance of the contracts.

Therefore, this Court said that EVCO then had failed -- the Court of Appeals said -- in its burden of showing an unconstitutional tax on interstate commerce, and the question of multiple taxation was not before the Court.

Respondent points out that it would be very difficult, if not almost impossible, for the record to reflect the possibility of another State taxing these transactions.

Also, with respect to this, the following statement from Freeman v. Hewit seems particularly applicable:

"The immunities implicit in the Commerce Clause and the potential taxing power of a State, can hardly be made to depend, in the world of practical affairs, on the shifting incidents of the varying tax laws of the various States at a particular moment."

I have no further argument.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Schlenker, you have a few minutes left. Do you wish anything further?

REBUTTAL ARGUMENT OF KENDALL O. SCHLENKER, ESQ.,
ON BEHALF OF THE APPELLANT

MR. SCHLENKER: Yes.

Mr. Chief Justice, and may it please the Court.

I would like to respond to Mr. Justice Marshall's question about the relief to be granted.

Mr. Justice, you asked if the State would be satisfied with a reversal.

It sort of terrifies us to think that maybe the Court is considering that.

We -- if the reversal is to the whole case, we have been in Court any number of times now about this liability. We have asked that the Court reverse and remand with directions with regard to that second point, which is the -

Q Well, you want to be -- you want the State told that they can't collect your $35,000, that's what you want.

MR. SCHLENKER: Yes, Your Honor.

This is not just an exercise on our part. We -- the question was asked of counsel about why couldn't, you know, whether we could settle our own differences.

Certainly, we would have liked to have done that and we thought we had an opportunity when this case was sent back previously.

Q Doesn't the Attorney General of the State have that power?

MR. SCHLENKER: If the Attorney General has that power, they've declined to exercise it in this case.

Q Of course, we can't compel the Attorney General to do anything.

MR. SCHLENKER: Yes, Your Honor, however, if the Court of Appeals is reversed, I believe the action will be clear then for the Bureau of Revenue.

Q You are the petitioner in this case. Do I understand you to say that you dreaded the idea of a reversal?

MR. SCHLENKER: Well, if it is a reversal on the whole case, because --

Q There is one judgment, isn't there?

MR. SCHLENKER: Yes.

Q One and only one, isn't there?

MR. SCHLENKER: Except we keep facing this question about are they tangible personal property or services. We have done that three times now, although the Court decided that we are selling tangible personal property.

It was reargued in the Court of Appeals again. They held this same way, that it is tangible personal property, and now we are faced with the --

Q And you and your opponent agree that if it is tangible personal property, as the Court has held, no tax can be imposed.

MR. SCHLENKER: Yes, Your Honor.

Q That's what you want us to say.

MR. SCHLENKER: Yes.

Q Both sides want us to rewrite the Court of Appeals opinion.

MR. SCHLENKER: On the second point. It is clearly in violation of --

Q You say first point and second point. I am so confused by this. What is the second point?

MR. SCHLENKER: There were two different amounts of tax involved. The tangible personal property won us a good portion of this case with respect to sales to the Government and sales to foundations and others.

Q Right. Because those sales were statutorially exempt, if they were of personal property.

MR. SCHLENKER: Yes.

And the second point are these IBM type of sales.

Q To private buyers.

MR. SCHLENKER: Yes. That's the point we are seeking relief on.

Q Well, it is not a reversal that you fear. It is a reversal short of cancelling that $35,000 tax. That's what you fear.

MR. SCHLENKER: Yes, Your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:55 o'clock, p.m., the oral arguments in the above-entitled case were concluded.)