In the

Supreme Court of the United States

ROBERT J. KOSYDAR,
TAX COMMISSIONER OF OHIO,

Petitioner,

vs

NATIONAL CASH REGISTER COMPANY,

Respondent.

No. 73-629

Washington, D. C.
March 19, 1974

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ROBERT J. KOSYDAR, TAX COMMISSIONER OF OHIO, Petitioner,	:	
v.	:	No. 73-629
NATIONAL CASH REGISTER COMPANY, Respondent.	:	

Washington, D. C.,

Tuesday, March 19, 1974.

The above-entitled matter came on for argument at 1:57 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
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

DWIGHT C. PETTAY, JR., ESQ., Assistant Attorney General of Ohio, State House Annex, Columbus, Ohio 43215; for the Petitioner.

ROGER F. DAY, ESQ., Dargusch & Day, 218 East State Street, Columbus, Ohio 43215; for the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 73-629, Kosydar against National Cash Register.

Mr. Pettay, you may proceed when you're ready.

ORAL ARGUMENT OF DWIGHT C. PETTAY, JR., ESQ.,

ON BEHALF OF THE PETITIONER

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

This case concerns the continuing conflict between the State's power to tax and the prohibition from taxing exports contained in the import-export clause, which is Article I, Section 10, Clause 2.

This case originated by the Tax Commissioner of Ohio issuing a tangible personal property tax assessment against National Cash Register, NCR, and issuing it against their international inventories, which were located and resting in Dayton, Ohio, on tax listing date which was December 31st, 1967.

National Cash Register appealed this assessment to the Ohio Board of Tax Appeals, which is an administrative body, and it did affirm the Tax Commissioner.

Upon appeal to the Ohio Supreme Court by NCR, the Court, in which we consider an unprecedented decision, five-to-two, overturned one hundred years of this Court's carefully developed definition of export, and held that the

property in question was in fact an export.

It is our contention that tangible personal property located in a State on tax listing date is subject to the State's right to tax, and that's especially clear where, in a situation like this, the property has received something from the State for which the State can ask something in return, and where no movement of any sort has occurred toward a stream of exportation.

The facts in this case basically are not in dispute.

The National Cash Register Company has its world headquarters, main production facilities and warehouse in Dayton, Ohio. It primarily manufactures cash registers, accounting machines, and data processing machines.

It markets these throughout the United States and in 124 foreign countries.

When a foreign order is placed with NCR, it's sent to the factory in Dayton, where the product is manufactured. NCR maintains no inventory of machines capable of meeting incoming orders from foreign customers.

This is because many countries will not allow a partial shipment, and because, in some cases, the import licenses cannot be gotten.

After the machine is produced and inspected, it is packaged for export shipment.

The property involved in this case was specifically

constructed for foreign customers, finished, crated, and in storage in inventory in NCR's warehouse awaiting foreign shipment on December 31st, 1967, when Ohio personal property taxation was assessed.

So on tax listing date, which was December 31st, 1967, payment had not been made to NCR by the prospective purchasers, no export license had been issued, no letter of credit authorized, the machines were in complete control of NCR, and, of most importance, no movement toward a foreign destination had occurred.

And according to NCR's own witness, this means the items were in inventory, and that is prior to when the items had been put on board a commercial carrier, or had actually left the shipping dock.

Some machines have remained in storage in the warehouse awaiting shipment for up to three years. The record does show that no machines manufactured by NCR were ever diverted or are capable of being diverted to the domestic market.

Due to special construction, the machines cannot economically be converted from domestic use and sale. The records shows that against NCR's profit margin of about five percent, the conversion costs would be approximately 16 percent of the cost of the machine.

QUESTION: Do those machines have any scrap value

at all?

MR. PETTAY: I would imagine they would, Your Honor. The record does not show that, but I am sure they would.

It is our position that in interpreting the import-export clause of the U. S. Constitution, this Court has had at least seven occasions in which to consider the question, and these started in 1886 and the last one was in 1949.

In each of these cases, the Court has taken a consistent position, that being that there is not an export until movement, final movement does occur.

I would like very briefly to discuss three of these cases, if I may, which we think represents this Court's opinion.

The first case of importance is Coe vs. Errol, this was an 1886 case. In that case this Court dealt with the factual situation of spruce logs which were cut in New Hampshire and placed in a stream, to be floated down the river to Maine.

They were detained in Errol, New Hampshire, by low water, and they were taxed there.

This Court struggled with the issue of whether the products of the State are liable to be taxed like other property in the State, though intended for exportation. And the answer was yes.

This Court held that, until there is actual final movement, that the goods are a part of the general mass of property of the State and are subject to taxation.

The Court also stated that the owner's state of mind, in other words his intent, did not cause the exemption from taxation to occur.

The next important case, we believe, is A. G. Spaulding, which this Court considered in 1923, and the reason that case was important was because Mr. Justice Holmes noted that a point must be fixed at which the export must be said to begin.

He said it was important to note that, because in some cases there is a point very near, on one side or the other, and unless the point is fixed, any determination may seem arbitrary.

The most recent decision of this Court, and one in which the facts are most similar to this case, is the Empresa case in 1949.

In that case a cement plant in California was sold to a South American corporation for export. An export license was issued, title passed, and a common carrier was hired to dismantle and package the plant for shipment.

The county levied a personal peroperty tax on the parts of the plant that had not been shipped out of the country.

Mr. Justice Douglas held that it was taxable, stating that: It is not enough, intent to export is not enough; it is, in fact, the entrance of the articles in the export stream that marks the start of the process of exportation.

And he stated that nothing less would suffice.

QUESTION: Your recital of the facts just a few minutes ago would make that case enormously distinguishable; the cement plant could be used anywhere, couldn't it? In any country.

MR. PETTAY: Yes, it basically could, Your Honor. But --

QUESTION: And you've just told us that there's even doubt about whether there's scrap value to these cash registers.

MR. PETTAY: There's nothing in the record to indicate whether there is scrap value or not.

QUESTION: Well, so that it leaves the matter in doubt.

MR. PETTAY: That is correct.

QUESTION: And you've indicated that they are not suitable for the American market.

MR. PETTAY: That is correct, Your Honor, they are not.

QUESTION: The cement plant was suitable for the

American market, wasn't it?

MR. PETTAY: It may have been, I do not know from the record.

QUESTION: In the cement plant, wasn't the tax imposed only on those parts thereof not already in the stream of commerce?

MR. PETTAY: That is correct. Those that --

QUESTION: So it was only part of the cement plant that was taxed.

MR. PETTAY: That is correct. Those that had been shipped, there was no tax assessed on them.

QUESTION: Are you not relying on the Joy Oil case, when you cite those other three?

MR. PETTAY: Yes, we did discuss it in our brief, Your Honor.

QUESTION: The part of the cement plant that wasn't taxed in Siderurgica had actually left the country, hadn't it?

MR. PETTAY: That is correct. There was actual movement, and it had left the country.

In this case there has been no actual movement at all, other than from the actual manufacturing facility to the storage facility, which is in the same town, Dayton, Ohio.

We contend that these cases, which represent almost

one hundred years of Supreme Court precedent, stated that -- say that a State can tax tangible personal property which is located in that State, and the export exemption only attaches when the property is exported. And that means when it has actually begun its final movement in the export stream.

QUESTION: Is there any historical justification for the view that the original meaning of this clause was to prevent a second State -- was only to prevent a second State from imposing tax on imports, i.e., take this case of Ohio and contiguous to Ohio is Pennsylvania, Ohio has no access to the ocean or the seas or to international trade, Pennsylvania does, and that the purpose was to prevent Pennsylvania from laying a tax on exports from Ohio to the port, say, of Philadelphia to go overseas?

MR. PETTAY: Yes, sir. We believe that to be true, and Madison's Debates, which we mention in our brief, state that we believe -- or that the intent was to insure the free flow of goods among the States, and not from --

QUESTION: That the seacoast States couldn't discriminate against the interior States and thereby get a competitive advantage in international trade. Wasn't that the --

MR. PETTAY: That is correct.

QUESTION: -- historical background of this?

MR. PETTAY: Yes, I believe it to be.

We believe that the test is not whether there is certainty of export, as the respondent states here. The ultimate certainty at some time in the future is not enough.

In the case at bar on tax listing date, the property was resting in Ohio. It was also part of the general mass of property in Ohio, and it was receiving something from Ohio, in which Ohio -- for which Ohio had a right to ask something in return.

For example, take the property that was in Ohio for three years. If respondent's position is correct, then during each one of those three years the property was receiving services from the State of Ohio, yet, since there was certainty of export, that Ohio could not levy a tax on these goods.

And we do not believe that has ever --

QUESTION: Would not that same principle that you're now arguing apply, if they took these items off of the end of the production line in the factory and loaded them on trucks on that very day, took them to Philadelphia or Baltimore and put them on ships?

MR. PETTAY: Yes, sir.

QUESTION: We've got some protection.

MR. PETTAY: Some protection, but --

QUESTION: Yes.

MR. PETTAY: -- what we're saying is they get a lot more by staying in the warehouse for three years. And during that three-year period, the services provided by the State of Ohio make it more certain that these goods will in fact be in salable condition when their export journey actually does commence.

So there is an additional service.

QUESTION: Well, aren't those services covered by the tax on the warehouse?

MR. PETTAY: It may be again in part, Your Honor.

QUESTION: "May be"? Well, I assume that any warehouse in the wilds is paying property taxes.

MR. PETTAY: That is correct, Your Honor.

But this is also a tangible personal property tax assessment. The question is not whether NCR has paid a great deal of taxes.

QUESTION: But you're emphasizing that Ohio was doing so much for them. I thought you were doing it for free.

MR. PETTAY: No, we're certainly not, Your Honor.

We believe that policy also dictates that the Ohio Supreme Court's decision be reversed. The effect of recognizing an earlier point would curtail the power of the State to tax, and we believe that would be in conflict with the trend of recognizing the importance of meeting State revenue needs.

There is a tremendous growing need for State services, and we feel that when property is in a State and located there, and it's part of the general mass on tax listing date, that the right should be granted to the State to tax that property.

I believe I would like to save the rest of my time for rebuttal if necessary.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Day.

ORAL ARGUMENT OF ROGER F. DAY, ESQ.,

ON BEHALF OF RESPONDENT

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

I think that we agree that there is a point in time where the immunity provided by the Constitution will preclude a State or locality from levying a tax upon it. The question is simply when that time, and if that time has arrived in this case.

I will not dwell on the facts of this case, because they are entirely not disputed. There is no controversy whatever, I think, between the State and the company over the facts.

But I would like to spend a few moments in addressing myself to the question: Why should physical motion be required to be shown before the immunity provided

by the export clause attaches?

It's our position that in this case there is no need whatsoever for showing physical motion before immunity does attach.

Why not, simply because the physical character of the goods in question demonstrates conclusively that the goods can't go any place else but overseas. These machines are unique, they were built pursuant to foreign orders, they were constructed to serve foreign customers, they can't be used in the United States. So when these machines have moved to the NCR warehouse, have been packaged and crated and the stamp of their exportation destination placed upon them, they are at that moment exports in every real sense, just as much as the day when they are loaded aboard a carrier.

Now, the State --

QUESTION: Would that be true, Mr. Day, even if they were kept in the warehouse for three years in that condition?

MR. DAY: Yes, Your Honor, I think that is true. It has been pointed out that there are some instances where this has occurred. Those instances are not the everyday occurrence, I want to make that clear.

There is certainly no incentive for National Cash Register to keep its goods stored in the warehouse. The sooner they can move them out, the sooner they can get paid.

These instances that have occurred like that have

occurred not because of NCR's desire, but solely because of problems with the foreign license problem, the foreign exchange problem that prevents them from sending them.

QUESTION: Well, you don't say that they're not in movement?

MR. DAY: These goods that are in question are not in movement as of tax day. They are in the warehouse of NCR.

QUESTION: Well, why are they not being moved?

MR. DAY: They are there for about three reasons, Your Honor. The shipments that are made are made of an order, and this order may be --

QUESTION: The reason is because you haven't got your money.

MR. DAY: Well, that may be one reason, Your Honor, yes.

Another reason is we have --

QUESTION: Well, if you've got the money, is there any other reason?

MR. DAY: Yes, there is, Your Honor.

The other reasons are these: the goods are not -- these machines are not all produced on one, at one time. They are produced day by day, so they have to be collected until the entire order is ready for shipment. That's another reason.

Another reason is --

QUESTION: Well, several reasons -- I assume that whole-order groups are still sitting there.

MR. DAY: I'm sorry, I didn't understand your question.

QUESTION: Well, you don't send them until you get the money, do you?

MR. DAY: In some -- on some occasions, yes. They will sent on open account in some instances. In some instances they will be sent on letters of credit --

QUESTION: And there are some countries you won't send them to until you get the money and put the money in the bank and make sure it stays there; isn't that right?

MR. DAY: I think that's probably true, Your Honor. Yes.

QUESTION: But the whole point is that they are not -- they are not in transit by any stretch of the imagination.

MR. DAY: That is absolutely correct. We do not contest that one bit.

QUESTION: Right.

MR. DAY: The question to which I want to address myself is: Why should motion be required?

Now, the State, I am sure, would concede immunity --

QUESTION: Mr. Day, in that connection, how does your case differ from the old case involving the logs that were

detained up in New Hampshire on the way to Maine?

MR. DAY: It differs in this respect, Your Honor: we're dealing there with logs. Logs is a commodity that has a domestic use equal to a foreign use. In short, logs can be used anywhere to make lumber.

Now, in that instance, like Joy Oil, which involved gasoline, like the other cases which involved goods of that type, there is no way on tax listing date that you can say for sure that those products or those goods are going to go abroad, unless they have been evidenced to be in motion.

QUESTION: Well, then you're placing everything on fungibility, aren't you?

MR. DAY: Fungibility is one word that can be used, yes.

I think more accurately, whether or not the goods have a domestic use, whether they're fungible or not, is the crucial inquiry.

QUESTION: Was the cement plant part fungible?

MR. DAY: It was not fungible, Your Honor, and that's why I alluded to the domestic use.

The Empresa case dealt with what was termed a cement plant. That was only a convenient term of reference. As a cement plant, it involved a whole host of things: machinery and equipment, supplies, parts, and a cement plant which was in process of being dismantled.

As of tax listing day, I think the record in that case reveals that about ten percent of it had been shipped. I don't know what that ten percent was, whether it was ten percent in weight or value; but ten percent had gone. The remaining 90 percent rested where it had always been, and it had been used there domestically year after year.

Now, my point is this: that plant had been used in the United States, it could be used again.

QUESTION: You mean the 90 percent of it could be?

MR. DAY: Yes, I think it could. Ten percent could have been replaced. The record did not show it could not be.

I wonder if the decision might not have been different in that case if 90 percent had gone and ten percent remained.

QUESTION: But 40 percent was crated, wasn't it?

MR. DAY: There was 78 percent -- and again I don't know of what -- in the Empresa case that remained either uncrated or unassembled. There was a small part that was crated, and then there was ten percent that had been shipped.

QUESTION: It seems to me what your argument comes down to, maybe it's perfectly sound, is really certainty of destination.

MR. DAY: That is the point, I think, Your Honor.

QUESTION: And this sounds to me like it's a single

test rather than a double one that the old cases seem to propose.

MR. DAY: I don't believe that the old cases really set up a double test, Your Honor. I think that the cases that have been cited and argued to this Court show this: that movement, physical movement is one of the indicia of certainty of exportation.

How can anyone say, with things like gasoline and oil, or a cement plant for that matter, that on tax listing day they're bound to go abroad. They might just as well find a domestic home. You can use gasoline, oil, cement plant, baseball bats, just as well in Iowa as you can in France or Germany.

That's not true of all of these machines here.

QUESTION: Well, what you're saying, really, is that all of these machines were irreversibly committed to interstate commerce -- international commerce.

MR. DAY: Your Honor, Mr. Chief Justice, that's exactly what we're saying. They were committed irrevocably and irreversibly to the export process.

And they were just as firmly and irrevocably committed the day before they were shipped as five minutes after they might have been put on board a carrier.

QUESTION: How about during the period while they were being manufactured? Would you say that this test would

say they were exempt then?

MR. DAY: No, Your Honor, we've made no claim for any goods during the course of manufacture.

Now, we have not made that claim for two reasons.

Before the goods are entirely assembled, they are just a collection of parts; and during the course of manufacture, one part is added to another, and the assemblies are put together. So until they are completely made, they're not so distinguishable from any other machines.

That is why our claim goes only to those machines which have been fully manufactured, have been moved to the warehouse and crated and stored there, awaiting the carrier's arrival.

QUESTION: With the label on them?

Isn't that right?

MR. DAY: With the label, Your Honor, yes.

QUESTION: Mr. Day, before you go on, does respondent manufacture these machines only where they have specific orders for them, or does it manufacture them generally for inventory, the finished-goods inventory?

MR. DAY: Mr. Justice, the record is very clear on this point. The machines in question are manufactured solely pursuant to foreign order. Not one of these machines is built prior to that time. None of the machines would have existed were it not for advance prior order.

QUESTION: This is a specific order for so many machines of such-and-such a type?

MR. DAY: That is correct, Your Honor. Or, more accurately, a collection of machines arising from specific orders.

QUESTION: Right.

And you said, I think, that they were crated and the destination of each crate is on the crate, is it?

MR. DAY: That's correct, Your Honor, they're in the warehouse, stamped and packaged.

QUESTION: So you know whether it's going to Venezuela or to Britain?

MR. DAY: That's correct, Your Honor.

QUESTION: Does the record show if any of them in the past have ever been diverted and not shipped?

MR. DAY: The record shows that every machine that has gone into the international division has, without exception, found a foreign destination.

Without exception, I say. There is one -- there was an instance or two where, unfortunately, the original order aborted because of one reason or another, but the company was able to find a home for those goods in another country that could accommodate them, or the language was the same.

But even that is a rarity.

I think that your question raises an important point in this case. All the prior cases have been singular instances. That is, one order for a million gallons of gasoline, one order for a cement plant, one order for a thousand gallons of oil.

Here we don't have one order. We have here a continuing business proposition of shipment after shipment after shipment, day after day, month after month, and I think that this must affect the legal conclusion.

Most certainly if the evidence showed that only fifty percent of these machines actually found a foreign destination, I don't believe we would be here today. Because if they all did not go, it would certainly raise a substantial question as to the remaining machines back in the warehouse.

We can't overlook that point. I think it's an element of proof that's almost conclusive.

I would like to address myself further to this concept of motion. The State argues and, I expect, would concede that if these goods were just simply loaded on a carrier on tax listing date, just bringing them out there and putting them on a railroad car, a truck, maybe an airplane, then at that magical moment this veil of immunity would settle over them.

I think that is a too superficial view of what immunity means here. Most certainly these goods are as much

an export two seconds before they get on that carrier as they are two seconds afterwards.

And if they are to be diverted, I suppose NCR could order them taken off, but that does not occur.

Why doesn't it occur? Because there's no place else for these goods to go but to the foreign destinations, to serve those prior orders.

QUESTION: I guess everybody would agree, too, if you put them in a railroad warehouse; wouldn't they?

MR. DAY: I'm sorry, sir, I didn't understand.

QUESTION: I assume both sides would agree if you put the cash registers in the warehouse of the railroad.

MR. DAY: I expect the State would concede, I wouldn't know about that without asking them.

The State argues one further question, one further point. It alludes general to what I call a quid pro quo argument. The State says, "We've done something for you, we should receive something in return."

QUESTION: May I ask, Mr. Day, is there any average time that a given machine sits there in the warehouse? That is, is there something like an average of two months, three months, two years, or something?

MR. DAY: The record does not reveal that, Your Honor, and I'm unable to answer it.

QUESTION: Well, do I understand that an order may

be for a number of different machines, and the order all has to be shipped at once, and some things are manufactured and stored but not shipped because you have to wait until the rest of the order has been manufactured; is that so?

MR. DAY: That's one of the reasons, yes, sir.

QUESTION: And then what's this about foreign countries sometimes won't take import permits or something? What's that?

MR. DAY: Yes, in order for the goods to be exported abroad, --

QUESTION: Yes.

MR. DAY: -- there must be an import license granted by many countries.

QUESTION: Yes.

MR. DAY: They simply will not let goods come in willy-nilly unless they approve it.

QUESTION: And even though some purchaser there may be anxious to get what he ordered from you, he can't until he gets the permit to bring it in; is that it?

MR. DAY: That's correct, Your Honor.

QUESTION: Sometimes that takes a long time, does it?

MR. DAY: That's correct. It does at times.

QUESTION: And is there any average about that, or is it --

MR. DAY: I cannot answer that. The record does not

state it and I do not know, as a matter of fact. All I know is that they try to speed up the process as much as they can.

QUESTION: And is there any problem of shipping which accounts for the delay sometimes?

MR. DAY: Yes. They have problems in shipping at times.

QUESTION: And then, I gather, there is also, as Mr. Justice Marshall asked earlier, sometimes problems of financing?

MR. DAY: Yes, that is a big problem.

QUESTION: Unh-hunh.

MR. DAY: You cannot -- many countries of the world will not permit goods to be brought into that country unless they're sold on certain financial terms. This is a balance of trade, balance of payments problem.

QUESTION: Yes.

MR. DAY: That's encountered often.

I was going to allude briefly to the State's argument on quid pro quo, which is simply: they ought to be paid something for having done something for NCR.

Now, I don't know for sure what that something is. It is an argument of general governmental services, by and large. But we point out in our brief that the National Cash Register Company has already paid its way here.

The parts, the assemblies of these machines have

been subjected to Ohio personal property tax, and we have paid on those. And we can scarcely see why the general argument that the State ought to receive money should in any way dilute the immunity granted by the Constitution.

I suppose that the State of Ohio is saying that this Court should in some way waive the export immunity, as it has in the commerce clause area.

We do not believe that the commerce clause can be equated with the export immunity clause. Simply because the import-export immunity granted is a very clear prohibition, there is not the room for interpretation as there is in the commerce clause area.

I believe that the Supreme Court of Ohio put their finger on this case, right on the crux of it, when they said that in this case the certainty of exportation has been fully proved and it's fully equivalent to any other test this Court has used in the past, whether it be delivery to a common carrier, delivered to a private carrier, or physical movement.

In short, on tax listing day, these goods were as much export as they would be at any other time.

That, I think, is the only question involved here.

I'll not do more than allude to the national interest in exportation at this time. I think it's a self-evident proposition. I do not know how much weight that

should be given, but if the State argues that the State's interest in taxation is a great one, then I would submit to this Court that the national interest in fostering exportation at this time is greater than it ever has been in our history.

This has been evidenced by congressional actions, executive actions, et cetera, et cetera.

QUESTION: Well, would a decision against your client in this case prevent or impede or impair exportations?

MR. DAY: I think it might, but it's very difficult for us to prove that. I believe that maybe this is an instance where the State should have to prove this.

Who can say when a tax will become such a burden that it becomes difficult or an insurmountable burden? Any tax is an item of cost, and in order to compete abroad, all these items of cost build up, to the point where ultimately -- ultimately -- you can't compete. I don't know where the point is, but there will be a time when there is an additional straw that will break the camel's back. I don't know where it is, though.

QUESTION: And this, Mr. Day, ten years hence might cut the other way.

MR. DAY: It might indeed, Your Honor.

QUESTION: You're not suggesting that the law should change because the factor changes?

MR. DAY: No, Your Honor. I'm not suggesting in this case that the law should change. In fact, our whole argument is that this case in no way cuts across any prior decisions.

The prior decisions of this Court have been fashioned for specific factual circumstances: with the ball bats, with the oil, with the gasoline. Those were all commodities that could be used here in the United States.

So, in determining when the certainty of exportation of those goods was to be fixed, it was a very reasonable conclusion to say: only upon delivery to a carrier.

Not so here. The time for fixing immunity here is in the warehouse. That is when they have become fixed, irrevocably committed.

QUESTION: Mr. Day, this is really not very relevant to this case, but I've had, from time to time, discussions with some of my brothers about the syllabus rule in Ohio. My recollection is that, by reason of a statute in Ohio, the syllabus is the law and only the syllabus is the law in the case in the Supreme Court of Ohio, except when it's a per curiam opinion, in which case the whole per curiam is the law, and there is no syllabus.

Is my recollection correct, and, if so, is that still the case?

MR. DAY: I think your recollection is essentially

correct on that, Your Honor.

QUESTION: Unh-hunh.

MR. DAY: If there are no other questions, that concludes our argument.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Day.

Do you have anything further, counsel?

REBUTTAL ARGUMENT OF DWIGHT C. PETTAY, JR, ESQ.,

ON BEHALF OF THE PETITIONER

MR. PETTAY: Yes, Mr. Chief Justice.

We believe the issue in this case is the State's right to tax tangible personal property located within that State, and that that's the primary issue, not whether there is -- the test is not certainty of export, it's the State's right to tax.

And in that sense I'd like to quote from Joy Oil, where this Court said that:

"The export-import clause was meant to confer immunity from local taxation upon property being exported, not to relieve property eventually to be exported from its share of the cost of local services."

Now, there's nothing in the record to show that these specific machines have been taxed. They have not. So that although National Cash Register is paying real property taxes and may be paying other types of tangible personal property taxes on other things, it has not paid

any taxes on the specific machines in issue here today. Although some of them, conceivably, could have been in Ohio for several -- or at least for a period of time, and derived services during that period of time.

Secondly, there is no evidence in the record to show what effect, if any, Ohio tangible personal property taxation had upon these goods in question, whether they had any effect whatsoever on their salability or NCR's ability to compete in the foreign market.

The amount of tax here in question today is slightly less than $50,000, although the actual assessment was one million dollars. When you reduce that by the applicable percentage, we're only talking about $50,000, not one --

QUESTION: Annually?

MR. PETTAY: We don't -- it varies from year to year.

QUESTION: Well, $50,000 what?

MR. PETTAY: It would be for this one year 1968, --

QUESTION: The one year.

MR. PETTAY: -- additional assessment. There was another assessment.

QUESTION: How does this case arise now? Hasn't this been going on for some time; did the Tax Division just catch up to it, or what?

MR. PETTAY: No. An assessment was made, and there

generally is a several-year lag between when property is returned and when audit is made by the Tax Commissioner staff, and then the various levels of litigation involved.

QUESTION: But I take it NCR has been doing this for years. I just wondered what made it important as of 1967, or whenever it was?

MR. PETTAY: I believe in this specific year National Cash Register filed what they call a 902 claim, in which they ask that the international inventory be released from tangible personal property taxation, based upon this issue, at the Tax Commissioner's level; and the Tax Commissioner refused.

QUESTION: Does that imply it was taxed before?

MR. PETTAY: To the best of my knowledge, it was. But there's nothing in the record to that effect.

Also --

QUESTION: So that in many respect it has a 1930 character to it, it's the kind of litigation that was fashionable then rather than now.

MR. PETTY: It may well be.

Finally, I think it's important to note that the present test that this Court has provided for us is objective, whereas the test of certainty of export is very subjective. We believe that, contrary to respondent's position, that the -- one of the primary reasons there has

been little litigation on this subject is because the test, as it currently exists, is objective rather than subjective.

And we believe that the test, if adopted by this Court, as proposed by the respondent, would become a subjective test and would be much more difficult for tax personnel to administer. And also much more difficult for taxpayers to perceive and follow adequately.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:34 o'clock, p.m., the case in the above-entitled matter was submitted.]

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