In the

Supreme Court of the United States

Standard Pressed Steel, Co., a
Foreign Corporation,

Appellant,

v.

NO. 73-1697

Department of Revenue, State OF
WASHINGTON

Washington, D. C.
December 16, 1974

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HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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STANDARD PRESSED STEEL CO., a foreign corporation,

Appellant,

v. : No. 73-1697

DEPARTMENT OF REVENUE, STATE OF WASHINGTON,

Appellee.

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Washington, D. C.

Monday, December 16, 1974

The above-entitled matter came on for argument at 11:12 a.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:

KENNETH L. CORNELL, ESQ., Keller, Rohrback, Waldo, Moren & Hiscock, 1220 IBM Building, Seattle, Washington 98101, for the Appellant.

SLADE GORTON, ESQ. Attorney General of Washington, 415 General Administration Building, Olympia, Washington 98504, for the Appellee

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 73-1697, Standard Pressed Steel Company against Department of Revenue.

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

ORAL ARGUMENT OF KENNETH L. CORNELL

ON BEHALF OF THE APPELLANT

MR. CORNELL: Mr. Chief Justice, and may it please the Court: This is an appeal by appellant Standard Pressed Steel Company from a final decision of a Washington Court of Appeals sustaining the assessment of a Washington business and occupation tax on appellant for the privilege of engaging in wholesaling activity within the State of Washington. The Washington State Supreme Court declined review in this case.

The tax is measured by unapportioned gross receipts resulting from sales of products manufactured outside of the State and sold to Washington customers.

The basic questions in this cause are very simply stated to are appellant's activities within the State of Washington sufficient to justify the imposition of the subject tax, and, two, is the tax constitutionally defective as applied to appellant in that it is measured by gross receipts derived largely from activities accruing outside of the State of Washington?

Appellant is a Pennsylvania corporation with facilities located in Pennsylvania and California. The in-state activity conducted in Washington was conducted solely by appellant's resident employee in the State of Washington who received a salary for his services, a flat fee, and worked out of a portion of one room of his home. And I think since the general principles in this taxing area are rather easy to state but I believe rather difficult to apply to the particular facts situation, it might be well to review the facts briefly.

Mr. Martinson's activity in the State of Washington, as far as the customer is concerned, brought him into contact solely with Boeing qualification engineers. His primary function was to, through this contact, become aware of Boeing's possible needs for appellant's products and to forward this information, together with Boeing's specifications on that product to the out-of-state offices where if the decision were made to attempt to qualify as approved Boeing source in this product, sample pieces would be manufactured and submitted to the Boeing qualification engineers who would conduct tests and evaluate the product. And if it met Boeing's minimum specification, appellant would be approved as a qualified source for the product and sales negotiations and sales promotion would then ensue, which could possibly lead to a sale.

As reflected by the record, competing companies would also have qualified, in many cases on particular parts, and they would also be attempting to negotiate sales as well.

Appellant's resident employee is not involved in the sales negotiation or sales promotion at any time, rather he is bypassed completely. All of these activities take place and occur with appellant's employees located outside of the State, in Pennsylvania and California. Mr. Martinson's activities also -- and this is approximately 10 percent of his time; the duties I just mentioned consume approximately 90 percent of his time -- the remaining portion of his time was spent in what the State has characterized as a problem-solving process.

In this regard, if Boeing experienced a problem in the use of one of appellant's products, Mr. Martinson would be contacted and he in turn would forward this information to the out-of-state employees of appellant, who would resolve the problem and Martinson would present the solution to the Boeing engineers.

Two cases, I believe, which are probably the most closely in point on this issue involve General Motors Corporation v. Washington where this Court considered the same tax in Washington on different facts, and Norton Company v. Department of Revenue.

The court below and the State have placed heavy reliance on the General Motors decision, and I believe it represents the furthest extension of the ability of a State to tax which is sustained by this Court as regards an unapportioned gross receipts tax. And the State has characterized the basic issue before this Court as whether or not the General Motors decision can be factually distinguished on a constitutional basis from the present case.

In this regard, the General Motors decision can be distinguished in several significant respects. First, and I think the most critical distinguishing factor was that General Motors maintained in Washington a very large and substantial intrastate business making sales to Washington customers on which it voluntarily paid the Washington business and occupation tax. Additionally, General Motors made sales in interstate commerce which the Court indicated would not be subject to the tax were it not for the presence of this intrastate business. And the Court held that because of the existence of the intrastate business and because General Motors had mingled its interstate sales with the intrastate business, that the burden was on the taxpayer to show the activities of the intrastate business were not associated with the sales in interstate commerce, and further to show that such activities were not decisive factors in establishing and maintaining the market for the interstate sales.

In the case at bar, it's an undisputed fact and it's clear from the record that there is no question there is no intrastate business per se in the same terms as General Motors making sales to customers.

The General Motors decision is further distinguishable in that General Motors, in channeling its interstate sales through the local outlet, gained the advantages of a local business, and the Court held that interstate sales cannot be channeled through a local business so that the advantages of local commerce are obtained and still maintain immunity as to the sales in interstate commerce.

In this regard, I think it should be apparent that there would be delivery and communication problems, for example, which a Washington customer would face in dealing with appellant that would not be present were a local business present within the State of Washington.

QUESTION: Did either Pennsylvania or California tax these gross receipts?

MR. CORNELL: No, they did not.

I think the kind of tax that is imposed by the State of Washington here because of its -- I think it's an unwise economic policy, it's a very tough tax. Very few States impose this kind of a tax. And therefore, Pennsylvania and California do not impose a tax measured by gross receipts.

QUESTION: Was it briefly a tax on the gross receipts of your client from its sales to Boeing?

MR. CORNELL: Yes. And other Washington customers, although our contact is solely with Boeing.

QUESTION: You're not urging apportionment here if you should lose on the basic petition?

MR. CORNELL: Yes, I am. Apportionment comes up in several different ways in the Court's language. Is the State taxing activities which occur outside of the State? Is the tax such that the State is exacting more than a fair return? And my brief does raise the apportionment question. But I think many of the principles really can be said in many different ways. It comes down to one point. Is it fair in this case, and is it in violation of both due process and the commerce clause to impose an unapportioned gross receipts tax on a business where the gross receipts are derived largely from activities occurring outside of the State?

QUESTION: Do you know of any fair way to apportion here if we get to that?

MR. CORNELL: That's a difficult question. For example, this Court in General Motors v. District of Columbia case, while it hesitated to get into the apportionment, I believe did mention that there are instances where payroll, for example, is measured, the payroll by Washington employees would be prorated or compared with the payroll of employees outside of the State also involved in these sales. And I believe there are other factors as well -- property located within the State, although in this case there is no property located within the State and there never was.

QUESTION: Isn't this .. you are talking about you are starting to tax the gross income and then you have to divide it up by these percentages rather than just the gross receipts of sales which conceivably occur in the State?

MR. CORNELL: I don't believe I follow your question.

QUESTION: Well, you were citing the cases where you say that you have to show what percentage of payroll in the taxing jurisdiction is to the payroll elsewhere. And I was asking you if that kind of analysis hasn't been more commonly applied to a situation where the taxing jurisdiction seeks to tax gross income, period, not simply gross sales which conceivably occur within the States.

MR. CORNELL: Yes. I think that's correct. I believe in the General Motors v. District of Columbia case, however, that all of the income there being taxed resulted from sales to individuals within the District of Columbia and the Court urged apportionment in that case as well, and that was the basis of the Court's decision striking down the tax.

I believe that the General Motors decision is further distinguishable in arriving at whether or not appellant's activities in Washington are sufficient local incident on which to justify the tax in that the General Motors personnel, without going into detail, engaged in substantial sales promotion and other kinds of activities in the State of Washington which are in sharp contrast to the activities of appellant in

Washington. And I believe it strains the imagination to equate the activities of our one employee with a bundle of corporate activities and maze of local connections which the Court felt were present in the General Motors decision.

QUESTION: This employee worked out of his own home, did he?

MR. CORNELL: Yes, he did, a portion of one room.

QUESTION: Was he full time?

MR. CORNELL: Yes, he was full time.

QUESTION: He used a portion of one room in his house.

MR. CORNELL: Um-hmm.

QUESTION: To perform this full-time work for you.

MR. CORNELL: Yes.

QUESTION: And would you say it's engineering work, although the fact is his degree was in animal husbandry, I think.

MR. CORNELL: Um-hmm.

QUESTION: How about in the telephone book, was he listed?

MR. CORNELL: I believe, if I recall the facts correctly, that there was an answering service and the Standard Pressed Steel telephone number was listed in the telephone book.

QUESTION: And what number was that? Was that this man's home?

MR. CORNELL: No, it was an answering service, and the answering service would contact this man. That is how he got his telephone messages.

QUESTION: Did he have any secretarial help?

MR. CORNELL: Not in the State of Washington, no.

QUESTION: What did he do when he wanted to communicate with --

MR. CORNELL: Many of the exhibits are handwritten, and at least my copies are somewhat illegible. He either handwrites them, or on occasion he would apparently telephone and a secretary located in Pennsylvania or California would type the message.

QUESTION: I see.

QUESTION: You referred to General Motors v. District of Columbia at one point. What's the citation of that case? I don't find it.

MR. CORNELL: It's not cited in the briefs. 380 U.S.

QUESTION: That would be about right. Don't stop your argument now for about five --

MR. CORNELL: I believe also that the nature of the activities conducted by appellant in Washington has to be considered. For example, the General Motors personnel, they were involved very heavily and the Court made repeated reference to the intimate relationship between General Motors personnel in Washington, in the Washington General Motors decision, in connection with the dealer organizations within the State of Washington, and pointed out that the promotional activities in that case were the nature of fostering or creating a consumer need or demand for the product and the further promotion of General Motors parts, products, or services being superior to those of competitors and best able to meet the needs of the consumer.

There was no similar activity which takes place in the State of Washington in this case. Rather, the activity, if it's promotion in nature, you might say that Mr. Martinson's activities do assist in seeing that minimum standards for Boeing are met so that the possibility of sales negotiations taking place is present.

The Norton decision, I believe, is closer in point on the facts and appellant relies, I think, very heavily on this case because of the similarity in the facts. The Norton Company again, just like the General Motors' operation in Washington, had present within the State of Illinois a large intrastate outlet making sales directly to Illinois consumers and on which it voluntarily paid the Illinois privilege tax measured by gross receipts. In addition there were sales in interstate commerce which the Court indicated would not be subject to the tax were it not for the presence of the local intrastate business, and again held that the taxpayer had to meet the burdens of showing that the activities of the interstate business were not associated with the sales in interstate commerce and that such activities were not decisive factors in establishing and maintaining the market for interstate sales.

And, again, since we don't have an intrastate business here, at least appellant does not have to meet this same kind of burden in this case.

There was one class of sales in interstate commerce, however, which this Court held was exempt, and these were a direct order type of situation, and the Court held there that it was beyond the realm of permissible judgment to attribute the activities of the intrastate business to this type of sale, and therefore, these sales were so clearly in interstate commerce as to be exempt from this kind of a tax.

Similarly, in the present cause, all orders are the direct order type, and I believe on the authority of Norton are exempt from this kind of a tax.

The State,however, and the court below focused on Martinson, his presence within the State and his activities. But in this regard, as I read the Norton decision, the same kinds of activities were conducted by Norton engineers in the State of Illinois, and those activities were not of sufficient local incidence to justify the imposition of the gross receipts tax on the direct order type of sales.

We are told, for example, that the Norton engineers consulted with prospective customers as to their needs and offered technical and engineering assistance and advice in the use of the Norton products. And I believe these activities closely parallel the activities of Martinson in connection with the qualification duties and problem-solving kinds of duties in the State of Washington.

QUESTION: I thought Martinson was not an engineer.

MR. CORNELL: Martinson was not an engineer as such, but his activities were geared toward engineering kinds of activities. Before he started performing his duties, appellant did give him training. This is a very specialized kind of business involving a part which is used for -- it's aerospace fasteners, and they are highly machined nuts, bolts, and rivets used in the aerospace industry. So it involves a very narrow area of engineering. Martinson did receive training initially, Martinson also received ongoing training. His dealings with Boeing were solely with Boeing engineers. The kinds of information he forwarded onto Boeing or onto appellant concern engineering kinds of things. What are the specifications of the Boeing company as to a particular product? What are they looking for here? And I think it requires some engineering knowledge.

I believe that the court below in the State perhaps have confused in-state activity with an in-state business, and the two are not synonymous. As pointed out by this Court in Nippert v. City of Richmond, interstate commerce of necessity always involves activities in more than one taxing State, and you can always point to an activity as some sort of a local incident. But the question is is that local incident sufficient to justify the imposition of the tax? And I believe in this case here -- for example, solicitor cases involve activities within a State attempting to impose the tax. But that activity is not a sufficient local incident on which to justify the imposition of the tax.

I believe the circumstances in the case at bar here present an even clearer case for exemption than would exist in the Norton decision because there is no local intrastate business present here, and I think it makes the Court's work somewhat easier in deciding this case than it faced in the Norton decision.

Appellant would also submit that the solicitor cases support appellant's position in this cause. And in this regard I would submit that the activities of traveling salesmen in Washington would be a far more substantial activity, far more instrumental in bringing about sales to Washington customers than the activities of Martinson in Washington.

QUESTION: Your typical solicitor or drummer case, though, is a man who didn't reside in the State, wasn't he? He was just a transient?

MR. CORNELL: Well, he may. And in this regard I believe Justice Douglas complained in his dissent to the Nippert v. Richmond case that the decision would apply equally to resident or nonresident traveling salesmen. And I don't believe that the fact of residency also would be a significant factor because that doesn't pertain to their activities. The same activities could take place in a taxing State whether or not they are a resident of that State. That would be a mere coincidence.

QUESTION: If Martinson had just flown in one day a week and done everything that he did from a place in California, do you think the State's case would be just as strong as it is here?

MR. CORNELL: I think it might be as strong or as weak, depending on how you look at it. I think basically it would be the same case, because the contacts would be -- and this is a distinguishing point, I believe, from the solicitor cases as to a particular customer here, the contacts are I believe systematic and continuous, and I think we would have to concede on that point. And I believe if you flew in every week to meet with the customer, that that would be a systematic and continuous contact. But the nature of the activities, I think, in the case of a traveling salesman in terms of exploiting the entire Washington market and making sales to Washington customers would be a far more significant kind of activity than the activity of Martinson. While there is a systematic and continuous contact, we have to look at the nature of his activities and what is he doing? What does he have to offer Boeing here?

QUESTION: Interstate commerce requires some servicing by the vendors in interstate commerce, doesn't it?

MR. CORNELL: Yes. And many of the cases in which a tax has not been sustained by this Court have involved what you might call continuous and systematic kinds of activities within a State. But, again, it's the type of activity and it's perhaps the extent of the activity within the taxing State that is the governing factor in all of these cases.

Cases where this kind of a tax has been sustained involve clearly localized activity, such as manufacturing where you have a sales office through which sales are channeled. Martinson here does not have any participation in sales. He does not promote the product and sales are not being channeled through his office. If you wish to contact the consumer, the customer, or, I'm sorry, the manufacturer, the seller, you have to call them generally in Pennsylvania, and there are time factors which make that communication somewhat difficult. It's not face to face. And appellant has chosen to operate on this basis in interstate commerce and to accept the competitive disadvantages which flow from that, because they are operating in interstate commerce.

QUESTION: Mr. Cornell, I suppose it's of no consequence -- are we talking about much money here?

MR. CORNELL: Well, the money involved is a stipulated amount before this Court, it's about $34,000 roughly. The State has --

QUESTION: Over how long a period?

MR. CORNELL: January 1 of 1965 through June 30 of 1969. In addition there is another assessment -- this is not in the record -- which was assessed up to the time that Standard Pressed Steel decided to avoid further hassle, at least until this case is decided, they pulled their man out. So there is an assessment up to the point he is terminated, which is about the time his deposition was taken, and there is no further assessment. So there is a greater dollar amount involved.

QUESTION: But it's of great consequence to the State, of course, because there must be other taxpayers in similar positions.

MR. CORNELL: I can presume that there probably are who would be operating in some sort of a similar capacity. And, of course, appellant would like to operate in this way in the future as well. So it does have an impact on them that would go beyond the amount of the dollars that are involved in this case.

Appellant in this case would concede, of course, as has been stated by this Court on many different occasions that the State can exact a fair return for benefits provided and according to the level of activity occurring within the State. And the same rule, of course, should be applied here.

In this regard, I would point out two things: First of all, a nonapportioned gross receipts tax does not make any allowance for activities occurring outside of the State, and in this case where there is a significant amount of activity occurring outside of the State from which these gross receipts are derived, in this case, I think by the very nature and incidence of the tax, the same tax is payable whether or not all these activities take place within the State. They are taxed as if they do take place within the State. The State here is exacting more than a fair return.

There are also always benefits provided to any business, including a business operating in interstate commerce. And I would submit here that the benefits given by the State are no more substantial in this case than would be supplied in the solicitor cases, perhaps General Motors v. District of Columbia, other cases involving taxes being struck down because of a failure to properly apportion -- Evco v. Jones, a very recent case decided by this Court in 1972, it's recent in the context of this kind of a situation, where the Court there in citing from Adams Manufacturing Co. v. Storen, presenting a quote, and I believe the quote is of some benefit to this case, said that the vice of the statute as applied to receipts in 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 be in substance laid to the fullest extent by States in which those goods are sold -- here that would be Washington -- as well as those in which they are manufactured -- which would be Pennsylvania or California. 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.

I would like to reserve some time for rebuttal, so I will end my remarks now if there are no further questions.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Attorney General.

ORAL ARGUMENT OF SLADE GORTON

ON BEHALF OF THE APPELLEE

MR. GORTON: Mr. Chief Justice, and may it please the Court: This case on the surface at least appears to involve primarily a question as to the required nexus or jurisdictional threshold necessary to sustain the Washington gross receipts tax. But a closer look shows that it involves much more. The nexus or jurisdictional threshold question cannot realistically be looked at in isolation. We must also examine the assertion that the tax here imposed discriminates against interstate commerce or exposes the taxpayer's interstate business to multiple burdens.

I propose to discuss each of these problems, and the relationship between them. Put in terms of your decision in General Motors, I intend to establish two propositions: First, that the imposition of our gross receipts tax in this case is consistent with the criteria established by the majority in General Motors . Indeed, that it is even more soundly based than is the decision in that case.

Second, I propose to show that our tax here is imposed in a manner which will satisfy the basic concerns expressed in the two dissenting opinions in the General Motors case and that the answer to those concerns is to be found in decisions of this Court dating back more than 40 years.

Standard Pressed Steel is the manufacturer and wholesaler of highly technical and specialized aerospace fasteners with plants in Pennsylvania and California. One of its major customers was the Boeing Company in Seattle. The State of Washington levied a gross receipts tax on Standard's wholesale sales to Boeing which Standard here seeks to recover.

During the early part of the period for which the taxes were levied, Standard had an office in Seattle. That office was closed early in 1966, at which time Standard assigned one full-time employee, one Martinson, to its Boeing account. Martinson was a Washington resident with an office in his home.

Standard denominated him a sales engineer and he reported to the company's sales managers.

Martinson spent 100 percent of his time representing Standard in its relationship with Boeing. Most of his time he spent in qualifying Standard's products for purchase by Boeing. That qualification procedure was an absolute prerequisite to Boeing purchase or use of any of Standard's products.

Martinson also worked with Boeing's engineers in solving problems arising out of Boeing's use of Standard's products after they were qualified, calling in outside technical assistance which came into the State when necessary. He kept Standard informed as to who was who in Boeing's constantly changing purchasing hierarchy, suggested sales campaigns, and did some promotional hosting.

Martinson's activities were clearly more decisive factors in establishing and holding Standard's market with Boeing than were those of the Washington employees of General Motors in holding its local market considered in your last case involving our gross receipts tax. General Motors is our largest national corporation, selling perhaps our most widely advertised all-national products. Standard, on the other hand, sold specialty products to a single customer which imposed rigid standards on its suppliers. There can be no question as to the overwhelmingly more decisive nature of Martinson's activities in establishing and maintaining Standard's market in Washington State than was the case with the service of General Motors' local employees in your decision involving that corporation.

QUESTION: Mr. Gorton, does the record show what percentage of Standard's gross income was derived from the sales to Boeing?

MR. GORTON: Of its whole gross income? No, the record makes no such showing. This was obviously a relatively small portion of it.

Moreover, it can be calculated from the records of the two cases that Martinson's activities resulted in a greater dollar volume of sales in Washington than the volume, at least of the Chevrolet Division of General Motors, divided by the number of its employees in the State.

Next let's compare Martinson's activities with the facts in the Norton case. In Norton a gross receipts tax based on that firm's sales volume in Illinois was upheld to the extent that it was based on sales to which Norton's in-state office was connected only by reason of having taken orders for items not in stock, or for special equipment, or in order to reduce freight charges by accumulating and reconsigning shipments originating out of state. These services were found to be in the Court's own word "helpful" to Norton in competing for business in Illinois, thus subjecting those sales to taxation.

Only sales to Illinois customers in which Norton's Illinois office played no part at all except for making available engineering and technical advice were exempt from taxation.

Martinson's role in Standard's sales to Boeing was more vital to those sales than that of the Illinois office of the Norton Company in its contested sales which were held taxable. If the only concern of the Court in this case were the degree to which Martinson's activities were decisive factors in creating Standard's market with Boeing, the answer is so obviously in the affirmative as to render the controversy insufficiently important to have been brought before this Court at all.

But nevertheless, both Norton and General Motors and for that matter the vast majority of other significant cases involving State taxation of what was asserted to be interstate commerce were decided by this Court by less than unanimous decisions. The expressed concern of the dissenters in General Motors and I suspect of members of the majority as well, was the threat of multiple taxation or discrimination against interstate commerce and the consequent advisability or necessity of apportionment of a gross receipts tax.

It is perhaps sufficient to respond that appellant has utterly failed to show the existence of multiple taxation in fact in this case. Indeed, it could not do so. Standard's interest in this case is not the avoidance of multiple taxation, but the avoidance of all taxation on its Washington business. If Pennsylvania or California were to attempt to levy a tax on Standard's sales transactions with Boeing in Washington State, Standard's challenge to that attempt would be completely successful under the doctrine of Evco v. Jones, Gwin, White & Prince, Freeman v. Hewitt, and Adams Manufacturing v. Storen. In fact, as far as we can ascertain, this Court has never permitted the originating State to tax the receipts from sales to customers beyond their borders. Standard here seeks to avoid paying its own way, its fair share of the State tax burden by escaping taxation measured by the proceeds of those sales in either the originating or the destination State.

It's appropriate, however, to go beyond the fact of the absence of multiple tax burdens and to examine the question of whether such burdens are possible in theory. Tiven as a result of the pattern of Washington gross receipts taxation, they are not. As I have just pointed out, this Court has never permitted the State or origin to impose either a gross receipts tax or a sales tax on the proceeds of the sale to a customer beyond its borders. Thus, there is no need for requiring apportionment on the part of the destination State. You consistently have preferred the destination State in your decisions.

The concept of apportionment has never arisen in connection with sales or use taxes, for example. It should not, by the same reason, apply in connection with gross receipt taxes on sales of tangible personal property. In concept such taxes are identical to sales taxes; each is measured by the proceeds from or the price of a transaction or transactions.

QUESTION: On that basis, Washington could charge a gross receipts tax on any sales made to local residents, whether there are any employees of the seller in the State or not.

MR. GORTON: From the point of view of the commerce clause --

QUESTION: Isn't that right?

MR. GORTON: -- Mr. Justice Blackmun.

QUESTION: I mean, your argument would be just as good in that situation.

MR. GORTON: The argument would be just as good from a conceptual point of view; it would not from the point of view of the history of your decisions, as they relate to due process. We have already established the due process jurisdiction of the State. Once we have established that, we are saying that a sales tax and a gross receipts tax is identical. We are admitting that we must establish that jurisdictional nexus to impose any tax at all in the first instance.

QUESTION: How about the National Bellas Hesse case. Did that involve both the commerce claim, the due process claim?

MR. GORTON: Yes. In that case, there was, however, no real jurisdiction. It was a mail order catalog seller. It had no employee, it did nothing in the State of Illinois other than to send catalogs into the State and send by common carrier its goods into the State.

QUESTION: But that was the due process claim. What about the -- it also involved the commerce claim, didn't it?

MR. GORTON: They made a commerce claim in it. Theoretically at least the Court never needed to reach that, because Illinois had no jurisdiction to levy a tax at all. And the Court said under those circumstances that perhaps apportionment would solve the problem.

The point I am making, Mr. Justice Stewart, is that apportionment doesn't solve the problem, or apportionment solves the problem of multiple tax burdens while creating a greater problem of the escape from any taxation at all of many transfers in interstate commerce. We believe that the actual results of your case are consistent with the proposition that a preference for the destination State which you have invariably granted solves both problems, both the problem of multiple taxation and the problem of the escape from their fair share of taxes of any company.

QUESTION: In National Bellas Hesse Illinois was the destination State.

MR. GORTON: Illinois was the destination State.

QUESTION: And we held that Illinois did not have power to impose that tax.

MR. GORTON: Yes. At least in part, I think in controlling part, because there was no presence whatsoever of National Bellas Hesse in the State of Illinois.

QUESTION: That was the due process part.

MR. GORTON: Yes.

QUESTION: The economic effect of this tax is the same as a use tax, isn't it?

MR. GORTON: It's identical to a use tax. It's identical to a sales tax.

QUESTION: You are not trying to collect it from the buyers?

MR. GORTON: We are not trying to --

QUESTION: You are collecting it from some local citizens using some property that was bought somewhere else.

MR. GORTON: Though you have gone a long way in use taxes in permitting its collection from the seller if he fails to make collections from the buyer and to forward it to the State. The only difference between a sales tax and a gross receipts tax, I mean really, is that the sales tax is separately stated.

QUESTION: And its ultimate burden, if the seller doesn't pay it, is on the buyer.

MR. GORTON: That's right. But both taxes go into the cost of the goods sold. The only difference is in the sales tax, on the invoice it's separately stated; in the business and occupation tax and the gross receipts tax, it is just simply included in the price.

QUESTION: It doesn't literally purport to be on interstate sales.

MR. GORTON: No, it purports to be --

QUESTION: This purports to be specifically on interstate sales.

MR. GORTON: No, this purports to be on the privilege or act of wholesaling in the State of Washington. The incidents in the State of Washington are two in nature really --

QUESTION: It's measured by the gross receipts in interstate commerce.

MR. GORTON: Measured by the gross receipts of the transaction exactly and precisely as the sales tax is. Exactly.

QUESTION: Isn't this conceivably an interstate -- aren't these sales conceivably interstate sales?

MR. GORTON: Of course they are interstate sales. There is no question about that.

QUESTION: So my Brother White is quite correct, isn't he, in saying that the tax is imposed directly upon interstate activity.

MR. GORTON: That depends on your technical definition of the incidents. It is a tax which is going to cost a dealer in interstate commerce money, there is no question about that. It affects interstate commerce.

QUESTION: It is a tax on his sales in interstate commerce.

MR. GORTON: It is, Mr. Justice Stewart.

QUESTION: Virtually every time this question comes up it's on something involving interstate transportation --

MR. GORTON: It will not come up unless it is, Mr. Chief Justice.

In International Harvester v. Department of Treasury at 322 U.S. 340, some 30 years ago, this Court dealing with an Indiana gross receipts tax conceptually indistinguishable from Washington tax involved here said, and I'm quoting now, "In this case as in sales tax cases, the taxable transaction is at the final stage of an interstate movement," which I think answers your question, Mr. Justice Stewart, "and the taxes on the gross receipts from an interstate transaction. In form the use tax is different, but we recognize the sales tax and the use tax had no different effect upon interstate commerce. There is the same practical equivalence whether the tax is on the selling or the buying phase of the transaction. Each in substance is an imposition of a tax on the transfer of property. In light of our recent decisions it could hardly be held that Indiana lacked constittuional authority to impose a sales tax or use tax on these transactions, but if that is true, a constitutional difference is not apparent when a gross receipts tax is utilized instead."

In every case in this Court involving a gross receipts tax based on sales transactions for more than 40 years, the result has been totally consistent with your contemporary sales tax decisions. both when the gross receipts tax was upheld and when it was struck down. Perhaps it is time to recognize that the concept behind the two taxes are identical and that for the ease of both judicial and tax administration, it is appropriate to treat them identically reaffirming International Harvester. Once the destination State has demonstrated a sufficient presence of the seller within its borders and a sufficient connection between that presence and the transaction it seeks to tax to meet the jurisdictional requirements of due process, it is as fair to permit it to base its tax on the entire gross receipts of the sale as it is to permit it to levy a sales or use tax on that same measure, the entire proceeds of the sale. It is as completely free from the possibility of multiple taxation by reason of your consistent prohibition of a similar tax on the part of the State of origin. A sales transaction, after all, can only be consummated by delivery to the buyer, and that can occur in only one State, the destination State.

QUESTION: Your answer to the commerce aspect of the thing as opposed to due process aspect is not apportionment, but to limit the levy to the State of destination.

MR. GORTON: Precisely, Mr. Justice Rehnquist, and I don't think I am making a new proposal. It's totally consistent with what this Court has always held in fact whatever its theoretical discussions of apportionment.

The problem of multiple taxation which leads to the consideration of apportionment is not solved by a higher jurisdictional threshold. No matter how high you set that threshold, some of the activities causing consideration of apportionment will have taken place in the State of origin. The solution is not apportionment, nor a high jurisdictional threshold, but a preference in all cases for the destination State.

One final point on the subject of multiple taxation. In his dissent in General Motors Mr. Justice Goldberg expressed concern that if the State of origin had a tax pattern identical to that of the State of Washington, the State of origin would levy a gross receipts tax on the manufacturing process while Washington would levy a gross receipts tax on the wholesaling function, both taxes measured by the sales price.

In contrast, where both of the functions confined to Washington State, only one of the two taxes would be imposed because Washington exempts from the manufacturing tax those goods which are subject to the wholesaling tax. The vice of the system described by Mr. Justice Goldberg is best understood in terms of discrimination against interstate commerce rather than multiple taxation. The system treats the manufacturing and wholesaling processes as a single activity with the imposition of a single tax if both processes are confined to one State. But the system does not treat both processes as a single taxable activity if they are split between two States.

The State's statutory policy of otherwise permissible pyramiding of the tax is not extended evenhandedly to both local and interstate business. But this system does not exist in fact in Washington State. Our gross receipts tax statute exempts transactions, the taxation of which would violate constitutional standards. It is the position of my office to which the Department of Revenue accedes, that the system described by Mr. Justice Goldberg would be unconstitutional were it applied to any actual case. Our statute would thus eliminate from the tax base wholesaling transactions consummated in Washington if the seller's manufacturing process had been subjected to a valid gross receipts tax in another State.

QUESTION: Do you have a net income tax, too?

MR. GORTON: We do not have a net income tax.

Standard here has not established either the risk or actuality of multiple taxation, not because of the negligence of the officers or attorneys, but because there was no such risk or actuality. Under your decision, neither Pennsylvania nor California could have levied a tax on the wholesaling transaction. Neither of the States has attempted to do so on the manufacturing process. Standard seeks here purely and simply an exemption from all taxation on its Washington business transactions. Such an exemption would be unsound in policy as it would grant Standard's commerce a free ride, freedom from its fair share of the burden of government, thus either limiting the ability of the government of the State of Washington to provide the blessings of civilized government to everyone utilizing the facilities of the State, including Standard, and including its resident sales engineer, or casting an undue burden on other taxpayers.

MR. CHIEF JUSTICE BURGER: We will resume there at 1 o'clock.

(Whereupon, at 12 noon, the Court recessed until 1 p.m. the same day.)

AFTERNOON SESSION

(1 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Gorton, you have about nine minutes left altogether.

ORAL ARGUMENT OF SLADE GORTON

ON BEHALF OF APPELLEE (continued)

MR. GORTON: Thank you, Mr. Chief Justice, and may it please the Court: To return very briefly to one of the two principal questions involved in this case, that of the necessary threshold or amount of activities within the State to justify any form of taxation whatsoever, I discussed this morning the proposition that the actual activities of Standard within the State of Washington exceeded in their relationships to its business in the State those of either General Motors or Norton.

I also pointed out the very close parallel in your previous decisions between cases dealing with sales taxes and those dealing with gross receipts taxes. In that respect the most significant case which is not cited in our brief, regrettably, is McGoldrick v. DuGrenier ? at 309 U.S. 70 in 1940 in which a sales tax was allowed to be imposed on an out-of-State company which did an exclusively interstate business in New York City through, not a resident, but a general agent, shipping all of its goods on which the taxes were levied in interstate commerce directly to the purchaser without the general agents having had anything to do with them.

Secondly, in connection with this threshold matter was the question asked of my brother about the applicability or relativity of the drummer cases, such as Nippert v. Richmond and Memphis Steam Laundry. Whatever may have been the case in the 19th century and the early 20th century, those two cases, the only recent cases on drummers, deal in one case with an out-of-state laundry which was subjected in terms to a far greater tax burden, quite specifically simply because it was from out of State, than was its in-State competition.

In Nippert the tax was a flat license fee in large part with no relation to the amount of business done which the Court determined would certainly hit sporadic solicitation harder than full-time resident solicitation, and in addition was subject to repetition in every community in the State. Also, of course, all of the solicitors in both of those cases were itinerant, each of which identifies it from the case we have here.

Finally, Mr. Justice Blackmun asked my brother whether there was an acceptable method of apportionment in this case, and I believe the answer was none of which he knew. I don't believe that he was giving away anything in connection with that acknowledgement as that was one of the questions which very seriously troubled Mr. Justice Goldberg in his dissent from General Motors where he said that the attempt to determine the fairness of an interstate sales tax of a given percentage imposed on given activities in one State would be almost as unseemly as an attempt to determine whether that same tax was fairly apportioned in light of taxes levied on the same transactions by other States. The infinite variety of factual configurations would readily frustrate the usual process of clarification through judicial exclusion and inclusion.

QUESTION: The _McGoldrick_ case was long before _Norton_ and _Norton_ specifically cited _McGoldrick_ as being quite distinguishable, and I'm not sure _McGoldrick_ is of much help to you.

MR. GORTON: _McGoldrick_ was of help to us, the particular _McGoldrick_ case. There were more than one. There were three cases in which the _McGoldrick_ name appears.

QUESTION: I am talking about the one in 309 U.S. Are you?

MR. GORTON: Yes. The one in that report.

QUESTION: The one that _Norton_ cited.

MR. GORTON: That's the one.

Now, the cite in _Norton_ is _McGoldrick v. Berwind-White Coal Company._

QUESTION: I know.

MR. GORTON: Which also involved the sales tax in which the presence in the State consisted of an in-State office, delivery in State, actually by a carrier which was owned by the out-of-State seller.

QUESTION: But it distinguished the sales tax situation generally.

MR. GORTON: It did distinguish the sales tax situation.

QUESTION: And that the Norton tax was on the seller. That's the point it makes.

MR. GORTON: It did distinguish it on the ground that the sales tax is collected -- excuse me, the sales tax is collected from the seller. A gross receipts tax, at least in theory, is collected from the -- excuse me. A gross receipts tax is collected from the seller; a sales tax is collected from the purchaser. But that's a theoretical and technical difference.

QUESTION: You do say that we must then disavow Norton.

MR. GORTON: Oh, no.

QUESTION: To that extent.

MR. GORTON: We fall directly within Norton. You need not disavow Norton whatsoever. Our jurisdictional threshold is far greater than Norton. Norton involved a gross receipts tax. The gross receipts tax was permitted in Norton on transactions with which the in-State office of Norton had far less connection than the in-State sales of Standard had with its office through Martinson.

The material to which you refer, Mr. Justice White, in Norton is dicta. It was not necessary to the conslusion of that case. In Norton there were certain sales which were found not to be taxable. Those sales in which the in-State office played no role whatsoever except theoretically having available certain engineers --

QUESTION: McGoldrick was cited in Norton as dictating a different result than the Court arrived at in Norton. Norton said not so, the McGoldrick type case is not controlling here. Now, you can call that dicta if you want to.

MR. GORTON: In any event, our case can be validly based on either McGoldrick or on the actual findings in Norton. It doesn't matter which or whether or not they are distinguishable because both of them are consistent with taxability in the case which we have here before you.

The problem it seems to me that Mr. Justice Goldberg brought up in the General Motors case is that this Court finds it very difficult to state, if not impossible, in connection with individual controversies, to state a rule dealing with apportionment that's all-inclusive, unlike the Congress which perhaps could operate in this area had it chosen to do so.

The solution to Mr. Justice Goldberg's dilemma is not infinitely to increase the jurisdictional threshold, not to require an apportionment which never seems to meet the actual circumstances of the case, but simply to follow the conclusions to which you have previously come that the destination State will be preferred. That prevents multiple taxation as well as apportionment does, but it serves another goal. Apportionment tends to increase the area which will evade taxation entirely. A preference for the destination State, however far you wish to carry it, tends to narrow that and to follow your oft-expressed doctrine that interstate commerce should carry its fair share of the load.

One other point which was brought up earlier today, only by inference, is the proposition that one of these other States might in theory at least have an income tax and whether or not we should not be required to apportion our gross receipts tax by reason of that income tax.

Now, that should be required only to the extent that every sales and gross receipts tax case which you have sustained since Berwind-White, McGoldrick v. Berwind-White, should require similar apportionment. The gross receipts tax on retail sales from the local store in Norton, for example, which everyone, including the taxpayer,assumed was valid, included in its measure incidence of value attributable to activities in the State of origin. The Sears Roebuck store in Seattle, Washington,collects a sales tax on every retail sale based on its entire sales price, even though much of that price was created by a manufacturing process in another

State which subjects Sears to a net income tax in that State. You have never purported to require apportionment of a sales tax. Since these taxes under International Harvester are conceptually and as a matter of fact factually the same, there should be no requirement here when the problem can so easily be solved by simply following your prior decision preferring the destination State.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Attorney General.

Mr. Cornell, you have a few minutes left.

REBUTTAL ARGUMENT OF KENNETH L. CORNELL

ON BEHALF OF THE APPELLANT

MR. CORNELL: Thank you.

Concerning the Attorney General's approach favoring the destination State and not allowing the market State to tax would avoid multiple taxation to me is incredible. He talks about a State being able to exact their fair share. The State of Washington here wants their share plus Pennsylvania's and California's. Sales activity occurs there. What he is saying is that in those States Standard Pressed Steel should not have to pay its fair share, the gross receipts tax cannot apply.

To me, this flies in the face of the doctrine that interstate commerce must pay its own way.

QUESTION: You lost me there a little bit with the multiple taxation.

MR. CORNELL: Well, the Attorney General's position is to avoid the risk of multiple taxation in cases such as this where you have activities occurring in two States from which the gross receipts are derived, that the easy solution is to give the destination State the ability to tax and deny the market State --

QUESTION: You don't claim that there's a tax in any other State on this same transaction, do you?

MR. CORNELL: No, I do not. I am talking now about the ability to tax. I believe that if Pennsylvania or California wanted to impose such a tax, that they could.

QUESTION: In addition to the one imposed now by Washington.

MR. CORNELL: Yes.

QUESTION: You don't think there is any barrier to that in the decided cases?

MR. CORNELL: No, I do not. The cases cited for that proposition or the taxes struck down there or struck down because of the failure to properly apportion between the destination State and the market State.

QUESTION: Well, surely, neither Pennsylvania or California could tax as such the gross receipts on wholesale sales made by your client in the State of Washington. They might be able to impose a general income tax, or excise taxes, or other taxes, but they couldn't tax as such and exclusively, could they, the gross receipts of wholesale sales made by Standard Pressed Steel Company in the State of Washington.

MR. CORNELL: I believe they can, your Honor, and I hesitate to differ, but on the other hand, the Evco v. Jones case where I pointed out the quote from Adams Manufacturing Company v. Storen, that quote pointed out that the problem with a nonapportioned gross receipts tax and the reason that tax was struck down is not something to do with destination State versus market State, but rather the tax was not fairly apportioned between those States. There does seem to be a coincidence in several of the cases that the market State has not been allowed to impose a nonapportioned gross receipts tax. But I believe that's a mere concidence. On the basis of those decisions, I think that clearly, pointing out the apportionment, both States do have the right.

QUESTION: If your client maintained a warehouse in the State and made sales out of the warehouse?

MR. CORNELL: No.

QUESTION: I know, but if it did, would you object to this particular gross receipts tax?

MR. CORNELL: That would be a much different case. I think that would involve --

QUESTION: I know, but your apportionment argument ought to be much the same.

MR. CORNELL: The apportionment argument would be much the same.

QUESTION: But you really wouldn't make it, would you?

MR. CORNELL: It would depend on how much activity occurs outside of the taxing State in relation to the activity occurring within the taxing State.

QUESTION: Mr. Cornell, do you think Washington could have levied a use tax on Boeing on the screws and fasteners that they bought from your client?

MR. CORNELL: Well, the use does take place within the State, and I believe that is -- for example, the sales tax cases make it very clear that there can be no burden of multiple taxation because the sale takes place in a particular State, and I believe it was Nippert v. Richmond where that was a very key fact. Where did the sale take place? That's the State that can impose the sales tax. And in the use tax case the same inquiry would be made and the same governing factor wo-ld have to be present. Where is the use?

QUESTION: So what do you think in this case?

MR. CORNELL: I think since the use takes place in the State of Washington, the State of Washington could impose a use tax.

MR. CHIEF JUSTICE BURGER: Justice Brennan has a question --

QUESTION: I notice at pages 18 and 19 of your brief you cited Postal Telegraph, Western Livestock, Wisconsin. Is there a page missing after page 4 of your brief? I don't have a page which lists those cites.

MR. GORTON: In your index.

QUESTION: The index. Yes.

MR. GORTON: I am informed that there is. My State printer has many gremlins in his office evidently, Mr. Justice Brennan.

QUESTION: Can you get us the pages?

MR. GORTON: We can. We will do so.

MR.CHIEF JUSTICE GURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:16 p.m., the argument in the above-entitled matter was concluded.]