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SUPREME COURT, U. S.
WASHINGTON, D. C. 20543

In the

Supreme Court of the United States

W. M. GURLEY, dda CURLEY OIL
COMPANY,

Petitioner,

v.

ARMY RHODEN, ETC.

No. 73-1734

Washington, D. C.
March 18, 1975

Pages 1 thru 41

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W. M. GURLEY, dba GURLEY OIL
COMPANY,

Petitioner,

v.

ARMY RHODEN, ETC.

Tuesday, March 18, 1975

BEFORE:

APPEARANCES:

HUNTER M. GHOLSON, ESQ., 519 Second Avenue, North,
Columbus, Mississippi 39701
For Respondent

C O N T E N T SORAL ARGUMENT OF:PAGE:

CHARLES R. DAVIS, ESQ.,
For the Petitioner

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HUNTER M. GHOLSON, ESQ.,
For the Respondent

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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 73-1734, Gurley against Rhoden.

Counsel, you may proceed whenever you are ready.

ORAL ARGUMENT OF CHARLES R. DAVIS, ESQ.

ON BEHALF OF PETITIONER

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

My name is Charles Davis of Jackson, Mississippi, along with Mr. Walter Armstrong, Mr. Hubert McBride of Memphis and Mr. Tom Tardy, also of Jackson, I represent the Petitioner in this case, W. M. Gurley, doing business as Gurley Oil Company.

This action was brought by Mr. Gurley for the recovery or refund of sales taxes imposed by the State of Mississippi.

The Trial Court and the Supreme Court of Mississippi denied Mr. Gurley's claim. This Court granted certiorari on November 18, 1974.

The issue on this appeal and in the proceedings below was stipulated by the parties and that is contained at page 36 of the tan Appendix and that issue is, whether or not federal and state gasoline excise taxes are properly or legally includable in gross proceeds of sale or in the sales price of gasoline under the Mississippi Sales Tax Act.

Now, Mr. Gurley's contention is that he collects these two excise taxes, that is, federal excise tax on gasoline and the state excise tax on gasoline and that he makes this collection as the agent of the United States and of the State of Mississippi.

QUESTION: If I get your argument correctly in your briefs, Mr. Davis, you are saying the state has no more right to tax him for being this conduit than they could tax an internal revenue agent who collects the money and passes it on, the collector in Mississippi.

Is that about it?

MR. DAVIS: That is correct, Mr. Chief Justice.

We are saying that he merely acts as an agent because of the point in the process of distribution that he happens to fall.

He is the closest to the consumer of the gasoline and logically and practically, the tax scheme of both statutes imposes this duty of collection, reporting and payment to the tax authorities on him.

QUESTION: There is something of a difference, though, in your case insofar as it turns on a federal statute and in that part of your case where it turns on two state statutes.

I take it in the latter case, the Supreme Court of Mississippi is free to decide who the tax is imposed on

and what role the tax collector has and the way that it isn't where you have got a federal statute.

MR. DAVIS: Mr. Justice, it is our contention that this Court, under the circumstances of this case, may disregard the characterization of the Mississippi excise tax by the Supreme Court of Mississippi and the designation of the tax as a privilege tax by the legislature. And --

QUESTION: What authority would we have for doing that?

MR. DAVIS: Well, we have cited authorities in our brief which we believe indicate that where constitutional questions are presented such as we have here, where if Mr. Gurley is taxed, a sales tax by the State of Mississippi is imposed upon Mississippi gasoline excise taxes in his hands, that that is to take his property without due process of law and therefore we submit that this Court may look to the operation and effect of the Mississippi statute and determine that, despite the ruling by the Mississippi Supreme Court, that it is a tax on the consumer of gasoline.

QUESTION: But that construction is the construction by the highest court of the state, is it not, of a state statute?

MR. DAVIS: That is correct. Now, this Court, in several cases, which we have cited in our brief, has

disregarded state court characterizations in similar statutes involving gasoline excise taxes and we submit that under the circumstances here, that you may do so.

Of course, there is no contention, as you point out, Mr. Justice, that this Court does not have authority to determine the incidence of the federal excise tax on gasoline.

QUESTION: You are -- in this point that we have been discussing, you are relying on that part of your brief that begins on -- point VI beginning on page 14 of your reply brief, are you not?

MR. DAVIS: Yes, your Honor.

QUESTION: That portion of your reply brief.

MR. DAVIS: And the cases cited there.

QUESTION: And the cases there cited.

MR. DAVIS: So, we are asking this Court to determine the incidence of these three gasoline excise taxes and, secondly, we are saying that the Court may -- in the case of Mr. Gurley, who is actually a retailer of gasoline, that it may determine that even though the incidence is on the seller, that if the taxes accrue at the time of sale, that it is impossible for these taxes to be included in gross proceeds or as a part of the sales price and, therefore, the State of Mississippi cannot impose a sales tax on it at that juncture.

The sales tax accruing at that time, simultaneously on the retail sale of the gasoline.

I would like to briefly state to the Court a little bit about Mr. Gurley's operation. The amount of the taxes here was actually stipulated and a summary of that is found at page 36 of the tax Appendix.

Mr. Gurley protested vigorously the payment of these taxes. He refused to pay the taxes and additional assessments were rendered by the State of Mississippi, at which time he did pay them but throughout the period involved in the case at bar, he bore himself the burden of all these taxes that he seeks the refund for.

Mr. Gurley is a small, independent gasoline operator. He is located in West Memphis, Arkansas and he has a number of retail outlets in the northern portion of the State of Mississippi.

He purchases his product there in the Memphis area and transports it by his trucks to the retail outlets where the product is sold directly to the ultimate retail consumer of the gasoline to be used on the highways.

QUESTION: Does he have any connection with Phillips?

MR. DAVIS: Not that I am aware of, your Honor. That, however, is a similar operation in the State of Mississippi.

QUESTION: Right.

MR. DAVIS: So there is no middleman or wholesaler or distributor involved here in the case of Mr. Gurley.

Now, the Mississippi Sales Tax Act imposes a five percent tax on the gross proceeds of any retail sale of tangible personal property.

Now, this sales tax is computed by Mr. Gurley and we have summarized that computation at page 12 of our grey -- Petitioner's main brief.

As I indicated, he purchases the product over around Memphis for approximately -- well, at the time of the trial --

QUESTION: These prices are a little out of date now, aren't they?

MR. DAVIS: Mr. Justice, absolutely correct --

QUESTION: These figures.

MR. DAVIS: -- but at that time, back in 1971, he bought the gasoline at about 14 cents per gallon and pushed his mark-up to a retail price of the actual gasoline of 20 cents per gallon and at that point, Mr. Gurley imposed the 5 percent Mississippi sales tax on the 20 cents.

Now, he separately -- he contends -- collects the federal excise tax on gasoline and the state excise tax on gasoline and during all of this period, he did not impose or pass on any five percent sales tax on the two excise taxes.

QUESTION: When does Mr. Gurley pay the federal tax?

MR. DAVIS: Mr. Gurley pays the federal tax -- he actually makes remittances to federal depositories in much the same manner as social security and withholding remittances are made on -- first, within three days after the first and 15th of each month.

However, he files a quarterly return which actually determines the final amount of his payment and we submit that --

QUESTION: There is no issue here about that one cent sales tax, is there?

MR. DAVIS: No. That is right, your Honor.

QUESTION: That is not in this case at all.

MR. DAVIS: That is not in issue. We are attempting to get a refund of additional sales taxes above that one cent.

QUESTION: But the general one cent sales tax is not here in issue at all.

MR. DAVIS: That is correct.

I wish to point out that Mississippi is one of the few states that actually imposes a sales tax on gasoline at all.

QUESTION: In addition -- right.

MR. DAVIS: On any part of the price of gasoline.

QUESTION: In Mississippi is the sales tax required to be passed on to the buyer and stated separately?

MR. DAVIS: Yes, your Honor, it is.

QUESTION: But how about -- but there is no requirement that an excise tax, federal excise tax be passed onto anybody.

MR. DAVIS: There is no express statutory requirement, that is correct. But we submit that a view of the entire operation and effect of both statutes compels the conclusion that these taxes be collected from the ultimate consumer on the actual number of gallons --

QUESTION: Is the federal excise tax paid only once? How about a sale to Mr. Gurley?

MR. DAVIS: It is only paid once, your Honor. It is -- the statute provides in 26 USC 4083 that the sale to a bonded producer is a tax-free sale so that the tax is only collected at the point closest to the ultimate retail sale of the gasoline.

QUESTION: So you mean to Mr. Gurley.

MR. DAVIS: In Mr. Gurley's case, there is only one case where it can be collected because he buys it from the manufacturer or supplier and makes the direct sale to the ultimate consumer. Now, another --

MR. CHIEF JUSTICE BURGER: We'll resume there after lunch.

MR. DAVIS: Thank you, your Honor.

[Whereupon, a recess was taken for luncheon
from 12:00 o'clock noon to 1:01 o'clock p.m.]

AFTERNOON SESSION

MR. CHIEF JUSTICE BURGER: Mr. Davis, you may
continue.

QUESTION: Mr. Davis, just before lunch you were
asked, I believe, by Justice White whether the Mississippi
sales tax or the federal gas tax had provisions for passing
on or for separate statement.

Let me ask you the same question about the
Mississippi gasoline tax. Is there any provision in the
statute which imposes that tax that either requires it being
passed on or prohibits it being passed on or requires it to
be separately stated?

MR. DAVIS: Your Honor, at the time of -- at the
time period of the case at bar, from 1968 through sometime
in 1971, for approximately three-fourths of that time, there
was a provision in the Mississippi gasoline excise tax
statutes that provided that the seller could pass on to the
ultimate consumer the amount of the Mississippi gasoline
excise tax.

The Mississippi legislature repealed that provi-
sion in 1970 but for most of the period of time in question,
we did have that provision.

QUESTION: What was the effect of repeal?

MR. DAVIS: It simply repealed, your Honor, the provision allowing or expressly allowing the passing on of the tax and we submit that in practice there has been no change in the operation and effect of the statute.

QUESTION: You mean, Gurley still charges the same price after the repeal as he did before?

MR. DAVIS: Yes, sir.

QUESTION: The price that included the tax.

MR. DAVIS: That is correct.

QUESTION: Well, before, did he have a sign which indicated that the tax was being charged to consumers separately from the rest of the price?

MR. DAVIS: Your Honor, there is some evidence in the record to the effect that decals were posted at most of the retail locations. There is no statutory requirement to that effect but this was done by Mr. Gurley.

QUESTION: This was done now before the repealer.

MR. DAVIS: Yes, sir.

QUESTION: And after the repealer, what then?

MR. DAVIS: The same practice applies.

QUESTION: So that the decal actually says what? "Added to the price is --" whatever that number of cents is.

MR. DAVIS: Seven cents per gallon at that time. It is now nine cents per gallon.

QUESTION: But that is what appeared.

MR. DAVIS: Yes.

QUESTION: And included in the price is seven cents per gallon, now nine cents per gallon, representing the Mississippi franchise tax. Is that it? Or excise tax.

MR. DAVIS: Excise tax on gasoline and four cents per gallon for the federal excise tax on gasoline.

QUESTION: Mr. Davis, Mr. Gurley is a retailer, isn't he?

MR. DAVIS: Yes, sir.

QUESTION: How does he come within the terms of 26 USC 4081 on page 3 of your brief?

MR. DAVIS: Yes, your Honor. A later section of 26 USC provides a definition of the term producer under the statute.

QUESTION: That is 4082.

MR. DAVIS: Yes.

QUESTION: And how does the retailer fit within that definition?

MR. DAVIS: I believe that it provides that any purchaser of gasoline tax-free is considered to be a producer under the federal statute.

QUESTION: Oh, and so Gurley didn't pay the wholesaler or the producer any tax.

MR. DAVIS: That is correct. That purchase was

tax-free and the tax does not come into play in the case of Gurley, particularly, until the time of the retail sale to the ultimate consumer.

QUESTION: Is that the way the oil business is normally conducted or is this unusual?

MR. DAVIS: Well, it is certainly not unusual in the case of those operators similarly situated to Mr. Gurley and the scheme of the statute is that the tax be collected at the source closest to the ultimate retail sale.

QUESTION: How do you derive that from this language?

MR. DAVIS: The language does not expressly state that but suppose there were a series of sales to various wholesalers or producers in a chain of distribution?

Those sales are tax-free because a sale to another producer under the statute does not give rise to the tax liability.

It only arises at the end of the chain of distribution or at the point closest to the ultimate retail sale.

QUESTION: If Gurley had bought from a wholesaler, would the wholesaler have been obligated to pay any tax?

MR. DAVIS: No, your Honor, because of the fact that Mr. Gurley is a producer under the statute and is properly qualified. That would be a tax-free transaction.

QUESTION: Suppose he just owned the one filling station and were a retailer and nothing else, if he bought from a wholesaler, who would pay the tax?

MR. DAVIS: If he was qualified under the federal statute and it is possible, I think, for him to be so qualified, then he would pay it but if he were not, then the tax would be remitted by the wholesaler.

Now, we cite in our brief a reference to the revenue ruling which indicates that it is the intent of the statute to impose the tax at the latest point of distribution and that the liability of the producer that is responsible for emitting and reporting does not accrue until there has been an ultimate retail sale.

QUESTION: Was that partially -- is that partly because that would be one way to separate tax resales from other sales?

MR. DAVIS: I am not sure I understand your question.

QUESTION: Certain purchasers of gasoline purchase tax-free, do they not?

MR. DAVIS: Yes, your Honor.

QUESTION: Depending on the use. Now is this statute geared to that proposition?

If it were taxed back at an earlier point, you'd have no way of -- at least, it would be very difficult to

separate them, would it not?

MR. DAVIS: Well, I think perhaps that is one purpose. Of course --

QUESTION: I remember reading -- where in your brief is that? What page?

MR. DAVIS: The refund provisions are referred to, I believe, on pages 14 and 15.

QUESTION: Umm hm. Well, go on with your argument. I just wanted to locate that point.

MR. DAVIS: So we submit, if it please the Court, that the resolution of this basic issue of the validity of the inclusion of state and federal gasoline excise taxes in the sales tax base is to be determined by this Court looking at the actual effect and operation of the two gasoline excise tax statutes.

The purpose of both of these statutes is unquestionably to raise funds to finance and construct highways on the state and federal level.

The intent of Congress is obviously to impose that tax upon the persons who use these highways and to measure the tax in proportion to the use of the highways by the ultimate consumer of the gasoline.

And the operation and effect of the statutes is clearly one that measures the tax on that sale of each gallon that goes into the car on the highway.

There is no tax ever paid for non-highway use of any sort. If it is used for farming purposes or local transit systems or if it is spilled out on the ground or if it is destroyed in a fire --

QUESTION: Or for lawnmowers.

MR. DAVIS: Or for lawnmowers or whatever, unless it is actually used on the highways, there is no tax paid. That is the ultimate effect and operation of both the federal and the state gasoline excise taxes in question.

QUESTION: How about the federal tax? Does it have the same wide exemption? Or does it exempt only farm, agricultural use?

MR. DAVIS: Yes, it does, your Honor. They both have the same broad exemption for nonhighway use. They break it down into different categories of refunds but basically it has that exemption of nonhighway use.

QUESTION: Well, where do you go from here? Suppose it is on the consumer?

MR. DAVIS: It is on the consumer, Mr. Justice White. We submit that it is impossible for the Mississippi sales tax to be imposed on that portion of the price that Mr. Gurley collects from the consumer.

This is not a part of his price. It is not a part of his gross proceeds of the retail sale.

QUESTION: Well, it is part of the money and part

of the price he takes from the consumer in the sense that he collects that money from him.

MR. DAVIS: That's correct. It is.

QUESTION: And if he didn't collect it from him, he would have to pay it anyway.

MR. DAVIS: That is right.

QUESTION: So he does collect it from the consumer for a reason and that is to keep it from coming out of his own pocket.

Now, why can't the state put a sales tax on that part of it? Because of immunity or what?

MR. DAVIS: Well, that is one reason. In the case of the federal tax, this is money that he holds in his hands that belongs to the United States Government and to tax that would be to tax the Federal Government.

In the case of the state tax, again, it is monies that belongs to the state government and to tax those state taxes would be to take Gurley's property without due process of law.

And we submit that this is an unconstitutional exercise of the taxing power of the State of Mississippi, to make those impositions of a sales tax.

QUESTION: I suppose in both these cases, once the -- if this case were decided against you, Gurley would never suffer any loss in the future.

He would just collect whatever it was, the total tax load, from the consumer. What he would lose is, maybe, if you go by supply and demand, you might say, I'd sell less gasoline. Because the price --

MR. DAVIS: Well, that is correct. That aspect of it is very real in the State of Mississippi where all of the bordering states, because of this sales tax, have a price of three or four cents per gallon less than we do in Mississippi.

QUESTION: Now, on the federal statutes relating to withholding taxes -- and I suspect on social security taxes -- there are some special sanctions for failing to deliver them. That is, they are constituted a trust fund, are they not?

MR. DAVIS: Yes, your Honor, and that is true in the case of --

QUESTION: Do you have a parallel? An exact parallel here?

MR. DAVIS: I would think that it would be very nearly exact.

QUESTION: Well, you have an exact parallel in terms of sanctions for not paying it other than just the normal penalties for not paying the tax.

MR. DAVIS: That is correct.

QUESTION: What are they?

MR. DAVIS: Well, there are criminal penalties.

QUESTION: That is what I am talking about.

Explain that a little, will you? What is before you.

MR. DAVIS: The federal statute and the state statute both provide that it is the absolute liability of the seller to collect and report this money.

QUESTION: I think in both cases they are a trust fund concept.

MR. DAVIS: We submit that that is the case, your Honor and that on failure to do so, he is liable for -- to criminal penalties in the statutes.

QUESTION: It is five percent on 11 cents. That is about a half-cent a gallon, isn't it?

MR. DAVIS: Yes.

QUESTION: How much money are we talking about?

MR. DAVIS: In this case we are talking about approximately \$100,000 over a period of about six years and as indicated in our brief, we have filed for a later period that involves about -- [inaudible]

QUESTION: So that is about eight, nine cents. It used to be eight and now it is nine cents.

MR. DAVIS: It was originally seven and now it is nine.

QUESTION: Mr. Davis, was the constitutional

issue raised before the Supreme Court of Mississippi?

MR. DAVIS: Yes, your Honor, it was. We did not brief it and discuss it as thoroughly as we have in this Court.

QUESTION: It wasn't addressed by the Mississippi Supreme Court, was it?

MR. DAVIS: No, it was not.

QUESTION: And was it raised in the complaint? Relied upon?

MR. DAVIS: I believe that it was pleaded and if you read the context of the factual allegations and the quotation of our statutes in their, I think it is inescapable that the constitutional issue is there, yes, sir.

QUESTION: Mr. Davis, do I oversimplify in describing your argument as one that this, in effect, is a tax on a tax?

MR. DAVIS: Well, your Honor, we do not condemn the concept of a tax on a tax as such.

QUESTION: You think that is all right?

MR. DAVIS: But in this case, we think it is not all right for the reasons that we stated.

QUESTION: When would it ever be all right?

MR. DAVIS: Well, in almost every retail sale of any product, you have built into the price taxes that accrued back up the line.

QUESTION: Directly?

MR. DAVIS: Well, we are submitting that that is the difference.

Here, the time of accrual here is different.

QUESTION: But on the state tax it seems to me that there is nothing -- if the state wants to tax its own property, there is nothing wrong with that like there is the state trying to tax what you say is federal property.

MR. DAVIS: Your Honor, I think it is, because on the state tax, they would be extracting from Mr. Gurley.

QUESTION: Well, not in the future. He could just add it on to the price.

MR. DAVIS: Well, but at the time of the collection, they would be extracting a sales tax.

QUESTION: They are not extracting it. He is charging the buyer for it.

MR. DAVIS: That is true.

QUESTION: Like he has to.

MR. DAVIS: He does pass it on.

But he makes the payment --

QUESTION: I know, but as long as he passes it on, it doesn't come out of his pocket.

And you have another ground on the federal side that you just can't tax the Federal Government.

MR. DAVIS: That's right.

QUESTION: Would you say that the State of Mississippi couldn't measure its sales tax on the gross business done by a retailer, even though some of the retailer's sales were on a credit basis and the people -- the purchasers defaulted?

MR. DAVIS: I am not sure I understand your question, your Honor.

QUESTION: Well, supposing you have a two percent sales tax on a druggist and it is on the gross business he does and his gross business is \$2 million during a particular tax period but in fact \$100,000 of those sales were for credit. He never got the cash and a certain number of those default so they are bad debts.

Would you say that the state had to constitutionally recognize an allowance for a bad debt there?

MR. DAVIS: There is the liability here in our case for collection and payment, clearly, by the seller.

If he does not make that collection, he is liable for the payment. But we submit that that situation must be distinguished from the actual legal incidence of the tax and that it is no more than a case of an agent having the duty to make this selection.

We have not covered the point of credit sale in our discussion of this case. Normally, of course, the retail sale of gasoline is not done on a credit basis.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Davis.

MR. DAVIS: Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Gholson.

ORAL ARGUMENT OF HUNTER M. GHOLSON, ESQ.,

ON BEHALF OF RESPONDENT

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

At the outset of the argument for the Respondent, I want to confess and apologize for two factual errors which appear in the Respondent's brief.

I do not think that either of them go to the merits of the argument, but I do apologize for them.

Although the Mississippi Supreme Court very clearly based its decision which is here under consideration on a treatment of the Panhandle Oil Company case decided by this Court, with respect to its dealing with Mississippi gasoline excise taxes as they existed at the time of that decision, we have incorrectly categorized those taxes as sales taxes in our brief.

They were excise taxes, as Mr. Davis points out in his brief.

specific
QUESTION: Are there any/corrections you want us to make on particular pages? Or are you just calling this to our attention?

MR. GHOLSON: I just want to apologize for having

referred to that as a sales tax.

QUESTION: Very well. All right.

MR. GHOLSON: With respect to our argument on the fact that the decision of the Mississippi Supreme Court is not subject to review by federal courts with respect to the incidence of the Mississippi tax which is in point IV of our brief, we have cited two cases and quoted from one of them.

We cite Society for Savings versus Bowers and Agricultural National Bank versus State Tax Commission.

We have attributed the quotation to the Bowers case that actually comes from ~~the~~ Agricultural National Bank case at the point where Bowers is cited.

And Mr. Chief Justice, unfortunately, you have been furnished with a copy of the first brief before it was reprinted and it is not in the proper form. This brief has been reprinted and I believe the other Justices have --

QUESTION: This is properly printed.

MR. GHOLSON: Yes, sir, it is properly printed. The other one was not.

QUESTION: Okay.

MR. GHOLSON: With respect to the constitutional argument that has been made here, I can find, in answer to Mr. Justice Powell's question -- I can find no reference in the original complaint to the Constitution of the United

States.

The statutes are cited and it is alleged in the complaint that Mr. Gurley is entitled to a refund by reason of those statutes.

I believe it would be fair to argue on behalf of the Respondent that for this Court to determine that the Mississippi case must be reversed would require this Court to rule that the Mississippi sales tax laws are unconstitutional or violative of the United States Constitution.

Section 27.65 (3) of the Mississippi Code of 1972 provides that gross proceeds of sale shall include, among other things, all taxes except those which are specifically exempt by a subsequent section.

The brief for the Petitioner on page 15 makes reference to this problem. The federal diesel fuel tax is specifically exempt because it is a part of Chapter 32 of 26 United States Code -- a part of Chapter 31 which is entitled "Retailers' Excise Taxes" and the diesel tax is a part of that. The diesel taxes are exempt.

On the contrary, the gasoline excise tax of the United States is not included in that chapter, but is in Chapter 32, entitled "Manufacturers' Excise Taxes" and it is for that reason that under the sales tax statute of Mississippi, Mr. Gurley is not entitled to deduct the federal gasoline excise tax as he is not entitled to deduct

the Mississippi gasoline excise tax.

QUESTION: Can we get back a moment, Mr. Gholson, to the suggestion that the complaint did not allege any federal constitutional defects?

MR. GHOLSON: I believe that is correct, Mr. Justice Brennan.

QUESTION: Then may I ask you a question? What did, as regards your state tax, the Mississippi Supreme Court address and decide that federal constitutional claim in respect to that tax?

MR. GHOLSON: The Mississippi Supreme Court decided that under their understanding of the prevailing rules of this Court, that the federal excise tax is legally an incident placed upon the wholesaler, Mr. Gurley and not upon the consumer and for that reason, is not -- is a part of the gross sales price.

QUESTION: So that federal question, clearly --

MR. GHOLSON: Yes.

QUESTION: -- your court decided.

MR. GHOLSON: Yes.

QUESTION: Now, how about the attack upon the inclusion of the state franchise tax, the seven cents?

MR. GHOLSON: The state franchise tax has been determined by the State Supreme Court to be illegally upon the wholesaler because it is imposed at the moment that the tax is brought into the state and I think this gets us --

QUESTION: But what I am trying to get to is, in sustaining it, did they sustain it against the claim that it violated the federal Constitution?

MR. GHOLSON: I find nothing in the complaint that alleges that.

QUESTION: No, in the opinion.

MR. GHOLSON: No, sir, no, sir, I do not believe they addressed themselves to that question.

QUESTION: But your court felt that it must decide the federal question as to where the federal excise tax has its burden or its incidence?

MR. GHOLSON: Yes, sir.

QUESTION: And you agree with that. I mean, you do agree with the way they decided that?

MR. GHOLSON: Yes, your Honor.

QUESTION: So that the federal -- you are not suggesting that this Court has no jurisdiction here because the federal question wasn't decided by the highest court of your state?

MR. GHOLSON: No, sir, we are not arguing that at all.

I simply -- I recognize that this Court has the duty to review the decision --

QUESTION: Suppose we disagreed with the Mississippi Supreme Court that the incidence of the federal

tax is on the consumer?

MR. GHOLSON: Then I think it would be the duty of this Court to reverse as to the federal tax but I do not think it would be --

QUESTION: What if we just said, we reverse, the tax is on the consumer and we reversed? What would the Supreme Court of Mississippi do then under its tax laws?

Because this isn't a constitutional question.

This question we are just talking about. It isn't a constitutional question, it is just an interpretation of the federal statute erroneously and if we decided against you and so, what would the Mississippi court do if that is all we said?

MR. GHOLSON: I believe that is a sort of two-pronged question, Mr. Justice White.

First, the sales tax statute of Mississippi, by its term, includes the federal excise tax in the base for sale --

QUESTION: No matter what.

MR. GHOLSON: No matter whether it is an incident placed on the consumer or the wholesaler.

QUESTION: Well, why, then, did the Mississippi Supreme Court go to such great pains to look at where the incidence of the federal tax was?

MR. GHOLSON: They decided it on the theory that

the incidence of the federal tax was on the wholesaler.

QUESTION: Yes, but it is irrelevant under your statute, you are suggesting.

MR. GHOLSON: I am suggesting that one can make a strong argument to the fact that in order to reverse as to the federal tax, this Court would have to declare that sales tax provision unconstitutional.

QUESTION: Well, you just told me no. You just said no, that if we disagreed with you as to the incidence of federal tax, we should reverse.

MR. GHOLSON: Then I would like to change my answer to your question because unless you find that the sales tax provision as interpreted by the Supreme Court of Mississippi is unconstitutional federally, then it would be irrelevant.

QUESTION: Well, I suggest that you are suggesting that your court went through a wholly unnecessary useless procedure and -- in deciding where the incidence of federal tax was. And I suggest they felt it was essential to decide it.

MR. GHOLSON: I would never be quoted as making the first statement. I think that they could have decided it as they decided it or on the second theory which we discussed.

QUESTION: What about the language of 27.55(11)? Maybe you have gone over that, but it went over my head if

you did.

The language is, "Shall pay for the privilege of engaging in such business," a tax equal to eight cents a gallon.

Is that just the new statute?

MR. GHOLSON: That is the new statute.

QUESTION: Now, is that the same language?

MR. GHOLSON: But it is not different from the language -- the material language, Mr. Chief Justice, has existed since 1928, when Mississippi amended its statute in response to the Panhandle decision.

QUESTION: Well, to what extent did the Supreme Court of Mississippi rely on that language that it is a tax on the privilege of doing business rather than a tax on the consumer per gallon?

MR. GHOLSON: That is the Gravelman Mississippi opinion.

QUESTION: Well, then, that is why I got lost on some of the colloquy. I thought that this statute was an explicit effort to separate this from the normal tax which is placed on the consumer, a sales tax on a commodity, and here it is a tax on the privilege.

MR. GHOLSON: We are speaking now of the Mississippi excise tax?

QUESTION: Yes. Right.

MR. GHOLSON: And it clearly is that. It attaches when the commodity comes into the state and payment must be remitted by the 20th of the following month, irrespective of any date of sale or incident of sale.

Now, with respect to Mr. Justice White's questions, I had understood they referred to the federal excise tax and its inclusion in the sales tax base by virtue of this Mississippi decision which was made on the basis of the fact that as a matter of federal law that is an incident, a legal incident placed upon the wholesaler and not upon the consumer.

I think that it is rather central to the issue here to get down to something that was asked by Mr. Justice Powell and that is, whether Mr. Gurley is a wholesaler or a retailer.

I think he is, in fact, both because under the definition of producer or distributor, he is that and becomes liable for the tax when he brings it into Mississippi.

The fact that he chooses to sell it directly to the ultimate consumer does not prevent him from being under the language of the statute, a producer or distributor.

The effect of Mr. Gurley's position being sustained would be that all those retailers who purchase from wholesalers would have to include the excise tax in the sales tax base but Mr. Gurley would be excused from including it and therefore, we would argue that if there are any federal

constitutional issues here, they mitigate in favor of the system that the Respondent has urged and that the Mississippi court has adopted.

QUESTION: Mr. Davis, I thought, said -- on the question of where this tax fell, that it was limited to tax on gasoline used on the highway.

Do you agree with that?

MR. GHOLSON: No, sir, I do not.

QUESTION: The statute seems to be pretty clear in saying, "For sale or -- for sale, use on the highways, storage, distribution or for any other purpose."

Now, does that mean lawnmower gasoline is subject to the tax?

MR. GHOLSON: Any provision for relief to people who bear the economic burden of this tax and who are not highway users come from other statutes, other sections giving rights of credit or refund.

I do not believe --

QUESTION: The farmer who uses it on his tractor can keep a record and go and get a refund?

MR. GHOLSON: That is correct.

QUESTION: And I suppose, then, the lawnmower fellow, if it was worth his trouble, could do the same, under your statute? Is that right?

MR. GHOLSON: That is my understanding. The

Illinois court, in its decision in the Martin case, very similar to this case under consideration, addressed itself to that point and said that these are not technically refund statutes. They are really credits given to people who bear an economic burden contrary to the intention of the statute.

Mr. Davis has argued that it is the intention of the Congress to tax the users of the highways to pay for highways by such taxes.

I think it could be as logically argued that it is the intention of the excise statutes to tax the people who engage in the business of selling gasoline for use on such highways. Certainly, the language of the statute itself, as pointed out by Mr. Chief Justice, says that it is a privilege tax placed upon doing that business.

I would like to mention that with respect to state court interpretations of the legal incidence of the United States excise tax, Pennsylvania, Michigan, North Dakota and lower courts of New York have taken the view that that federal tax is a consumer or user tax.

Illinois, New Jersey, Indiana, Alabama and Georgia, as well as Mississippi have taken the view which we espouse here.

Now, in the reply brief for the Respondent, a considerable attack is made upon the citation of the Ferrara case from New Jersey saying that that is only a Tax

Commission case.

That case has since been affirmed by the New Jersey Superior Court and reported and a certification has been denied by the New Jersey Supreme Court.

That brings us to the point where the highest court of New Jersey has acted on that case and I have those citations, if it would be proper to give them.

The 127 New Jersey Supreme Court, 240.317 Atlantic 2nd 80 is the opinion. The subsequent denial of certification is without opinion.

QUESTION: Mr. Gholson, could I make sure, did the State Supreme Court construe the state excise tax on gasoline to be a tax on the seller?

MR. GHOLSON: That is correct.

QUESTION: Now, that is a state law question, isn't it?

MR. GHOLSON: Yes, sir.

QUESTION: Now, assuming that is correct, do you understand there to be any challenge then to the collection of a sales tax on the total sales price including the tax?

MR. GHOLSON: I understand that the Petitioner here is challenging the validity of that determination by the Mississippi Supreme Court.

QUESTION: Well, I know, but that is just a state

law question.

MR. GHOLSON: That is our position entirely, Mr. Justice White.

QUESTION: And if he gets to his constitutional question -- only if the tax is on the consumer. If you construed the excise tax to be on the consumer.

MR. GHOLSON: We believe that the earlier precedents of this Court would say that the state's determination of that state statute as to its legal incidence is final.

QUESTION: Different from the federal question.

MR. GHOLSON: Yes, sir.

I think that if this case is -- if this Court affirms the position of the Mississippi Supreme Court as to the federal statute, then there would be no question about the state statute.

It could affirm as to the state statute but not as to the federal.

QUESTION: Well, what is the federal question involving the imposition of the sales tax on the state franchise tax?

MR. GHOLSON: I do not believe there is a federal question on the imposition of the state tax.

QUESTION: Then, is this to suggest that at least as to the sales tax as imposed on the state franchise tax of

seven cents, we have no jurisdiction?

MR. GHOLSON: It is our position that this Court is bound by its earlier precedents to honor the state determination of the state tax.

QUESTION: But you do agree that the imposition of sales tax on the federal excise tax, ^{the} four cents, is here?

MR. GHOLSON: Yes, sir. Yes, sir.

And that because of the conflict among the states interpreting the legal incidence of the federal tax, that this Court must determine that question.

I would like to point out some distinction in our situation and that of the trustee theory of tax collection advanced by the Petitioner, page 36 of his brief. The Petitioner cites the number of cases in which the merchant or some other person has been held to be a trustee for the Federal Government in the collection of certain federal taxes.

In the principal case cited in the body of the brief, Paisner versus O'Connell, the jewelry excise tax, as I understand the statute, was placed upon the retail sale to the customer and that made the jeweler a collector or trustee.

Likewise, the toll bridge tax in the United States versus Washington Toll Bridge cited in the footnote was imposed on the person who was paying for the use of the

toll bridge by statute, again a trustee.

The United States versus First Capital National Bank was a tax imposed upon the price of admission to collegiate athletic functions by the United States and, again, as a trustee situation.

We submit that that is entirely distinct from the instant case in which both the federal and state statutes are imposed upon the producer or wholesaler.

We would submit that there is nothing in the cases which have been decided by this Court since the Panhandle Oil Company decision which give credence to the argument of the Petitioner that this Court has determined that the federal gasoline excise tax is placed upon the consumer.

In the King and Boozer decision, which we think specifically overrules in part the Panhandle decision, the opinion of the Court stated to the extent that this Court had adopted a doctrine of economic burden as determining legal incidence. That doctrine was repealed.

In the subsequent case, Kern-Limerick, cited by the Petitioner, no modification of King and Boozer was done by this Court, but there was simply a finding that as a matter of fact, the United States Navy was the purchaser of tractors and therefore was immune from the placement of the Arkansas sales tax, which was placed on the consumer.

We would submit that the language of the Illinois

court in the Martin case, its rationale as adopted by the Mississippi court in this case is persuasive of the fact that the federal tax is not a tax placed upon the ultimate consumer, that it is a tax placed upon the wholesaler.

The question was asked by Mr. Justice Stewart as to whether or not the Mississippi sales tax is in issue and I understood counsel to say that the validity of Mississippi sales tax is not in issue.

We would submit, again, that if the language of the Mississippi sales tax law is accepted as constitutional and valid, that that language itself includes both of these excise taxes in the tax base from which the sales taxes are computed.

The question has been asked several times as to whether or not the Mississippi law requires that the excise tax be passed on to the consumer.

The answer to that question is, definitely no.

In the statute before its last amendment in 1970, there was a provision that the tax could be passed along to the consumer and that provision was eliminated.

There has never been a provision that the tax must be passed along to the consumer and this question was addressed by the Georgia Supreme Court in the Thoni Oil cases in which the Georgia court held that the federal tax was includable because it did not have to be passed on except

as an economic burden at the discretion of the payer of the tax while, on the other hand, the Georgia statute was so written that the Georgia tax would be passed on.

We believe that this is a valid distinction and an additional basis under which the position of the Mississippi and Illinois and New Jersey courts should be sustained.

QUESTION: What is the Mississippi situation now? That the state tax cannot be passed on?

MR. GHOLSON: The authority to pass it on has been eliminated from the statute.

QUESTION: Expressly.

MR. GHOLSON: Yes.

QUESTION: But what is the situation? May it be passed on or not?

MR. GHOLSON: As an economic burden, as this Court and others have said, all costs of doing business are, in effect, passed on.

QUESTION: And this, in practice, is passed on, is it not?

MR. GHOLSON: As an economic burden, yes, sir.

QUESTION: Well, as a tax.

MR. GHOLSON: But the question that has been asked about whether or not the price specifically showed that the tax was excluded, the price on the pump itself, did not. It

included the excise taxes in the price.

QUESTION: Without separate specification.

MR. GHOLSON: That is correct. But there were decals which Mr. Gurley in his testimony alleged that he had at his service station which showed the taxes broken out.

QUESTION: So much per gallon and so much state tax and so much federal tax.

MR. GHOLSON: Yes, sir.

If there are no further questions, this concludes the argument for the Respondent.

Thank you.

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

Thank you, Mr. Davis.

The case is submitted.

[Whereupon, at 1:45 o'clock p.m., the case was submitted.]