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

In the

Supreme Court of the United States

James H. Tully, Jr., Et Al,

Appellants

V.

Griffin, Inc.

No. 75-831

Washington, D. C.  
October 4, 1976

Pages 1 thru 55

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## IN THE SUPREME COURT OF THE UNITED STATES

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JAMES H. TULLY, JR., ET AL,	:	
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Appellants	:	
	:	
v.	:	No. 75-831
	:	
GRIFFIN, INC.	:	
	:	
-----	x	

Washington, D.C.

Monday, October 4, 1976

The above-entitled matter came on for argument  
at 2:08 o'clock p.m.

## BEFORE:

WARREN E. BURGER, Chief Justice of the United States  
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  
JOHN PAUL STEVENS, Associate Justice

## APPEARANCES:

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# C O N T E N T S

<u>ORAL ARGUMENT OF:</u>	<u>PAGE</u>
THOMAS P. ZOLEZZI, ESQ., For the Appellants	3
R. PAUL WICKES, ESQ. For the Appellee	28

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 75-831, Tully against Griffin.

I think you may proceed, Mr. Zolezzi.

ORAL ARGUMENT OF THOMAS P. ZOLEZZI, ESQ.

MR. ZOLEZZI: Thank you, your Honor.

Mr. Chief Justices and may it please the Court:

This is an appeal by the president and members of the New York State Tax Commission and by employees of the New York State Department of Taxation and Finance.

It is an appeal from an order of judgment of the United States District Court for the District of Vermont which denied the Appellants' motion to dismiss this action for lack of subject matter jurisdiction.

The Appellee originally had come before the District Court in order to enjoin the Appellants from the enforcement and the execution of various provisions of the New York State sales tax law.

Since they sought an injunction, a three-judge court was convened and the three-judge court decided against us. That is why we are here.

The basic facts leading up to the action are that the Appellee is a Vermont corporation with its place of business in Arlington, Vermont, which is located approximately six miles from the New York border.

The Appellee is engaged in the retail sale of furniture and in its operations, a large portion of the sales made are made to non-residents of the State of Vermont and are made to residents of the State of New York.

Some of the articles in the store purchased by New York residents are carried away by the residents.

Other articles are delivered by Griffin to purchasers in New York by use of Griffin's own trucks by their own employees. These employees would come in and in many cases, set up the furniture such as attaching legs to tables, et cetera, and they would also send repairmen in to do various repair and touch-up work on the furniture.

Griffin also advertises extensively in New York by way of newspapers, radio and t.v. and a roadside sign.

The New York State Tax Commission, based on the activities of Griffin within the state, were of the opinion that there was minimal contact within the state and we sought to have Griffin collect sales tax for the State of New York on those articles which are delivered into the state.

We are not seeking to have sales tax collected on any articles which are sold to New York residents at Griffin's store and carried away by the resident from the store. We are only after the tax on goods delivered in New York State.

QUESTION: When you say you sought to have that tax collected, you sent one of your auditors, didn't you, to the

store in Arlington?

MR. ZOLEZZI: Yes, sir, we sent one of our auditors to the store based on the fact that we felt that there were minimal contacts within the state. When we arrived at the store, at that time were were presented with the summons and complaint in Federal District Court.

QUESTION: What would New York have done if the Appellee here, Griffin, had simply told the auditor, in effect, to get lost?

MR. ZOLEZZI: Well --

QUESTION: And not filed the lawsuit that he did.

MR. ZOLEZZI: Had we would have been told to get lost, we would have come home and then, based on external indices, what we did in this case, really, we went to the Vermont Tax Commission and we obtained figures and facts related to Griffin's sales and those sales upon which it had not paid sales tax to Vermont.

We took a percentage of that and applied it to New York.

Basically, what you are going to say is, was it an arbitrary figure we applied? Yes.

QUESTION: No, what I was going to say was, would you have brought an action in the New York courts?

MR. ZOLEZZI: Yes. Then based on these figures that we obtained from Vermont, what we would do is come back, obtain

a judgment in New York and then, under the provisions of Article 25 of the New York State Tax Law, have gone into Vermont and sought to enforce our New York claim in the Vermont courts.

QUESTION: Well, now, would Griffin have had an opportunity in the New York proceeding to litigate its claim that this was an unconstitutional action by the taxing authority?

MR. ZOLEZZI: Oh, yes, in other words, when we went in to seek a judgment in the New York courts, we would not do it ex parte. We would have to serve motion papers and they would be put on notice that such an action was pending and they could come in and defend their course.

QUESTION: Do you mean, some sort of a long-arm service?

MR. ZOLEZZI: Correct, it would be the long-arm service under Section 302 of our civil practice law and rules which, under the theory of doing a transaction of any business within the state, would permit us to have jurisdiction over any foreign corporations.

QUESTION: What would be the situation, on your view of the case, if sales were made final and the purchaser had to arrange for the transportation?

MR. ZOLEZZI: If the purchaser arranged for the transportation? In that case, we could not really touch Griffin because Griffin would be out of state. There would be no transactions or no completion of the sale within the State of

New York because the entire operation would be completed in Vermont. The purchaser would have his own vehicle, et cetera, pick up the goods and transport them.

QUESTION: For all practical purposes, you couldn't really tax those transactions, as a practical matter.

MR. ZOLEZZI: As a practical matter we could not tax Griffin but we could try to impose the use tax upon the purchaser when he brings them in for use within the state.

QUESTION: That is what I meant by "practical matter." Could you really do anything, as a practical matter, with respect to all of these individual purchasers?

MR. ZOLEZZI: Practically speaking, the answer is no. We have to rely upon the honesty of our residents.

QUESTION: Unless they employ the United Parcel Service to make most of the deliveries. That is, if all of the purchasers went to United Parcel you might be able to track them down that way.

MR. ZOLEZZI: Yes, sir, that that would become one big administrative bottle.

QUESTION: That would be almost impossible.

MR. ZOLEZZI: Almost impossible.

QUESTION: Am I correct that some place in there you don't want that money?

MR. ZOLEZZI: That we don't want which money, your Honor?

QUESTION: You don't want the money of the person

that went up there and bought it and brought it back himself?

MR. ZOLEZZI: Oh, no, we are not saying we don't want the money. We are saying, "We are not trying to impose upon Griffin the obligations of collecting it."

QUESTION: Well, I thought that was admitted in this case. Isn't it?

MR. ZOLEZZI: Yes, we admit that we will not impose Griffin -- when the purchaser goes to Vermont, buys the article and takes it with him from the store.

QUESTION: It is not even in this case.

QUESTION: No.

MR. ZOLEZZI: Pardon me, sir.

QUESTION: It is not in this case.

MR. ZOLEZZI: No, that is not in this case. What we are trying to do is get Griffin to collect the sales tax for those goods which are delivered into New York State by Griffin's trucks by Griffin's employees.

QUESTION: Mr. Zolezzi, you assessed a deficiency of \$298,000, I think it was. Is it your understanding that that was based just on those items delivered by the Plaintiff's trucks, or was that on all sales to New York residents? If you used a percentage, I think you might have --

MR. ZOLEZZI: Well, we used a percentage. What we had done was, as I mentioned before, gone to the Vermont Tax Commission and obtained an amount of money that was used payable

payable on sales taxes and sales taxes that were not paid to Vermont.

We took Griffin's sales --

QUESTION: Right.

MR. ZOLEZZI: Then we had the sales upon which no taxes were paid. We took a percentage of that and we assessed that against Griffin.

This was done under Section 1138 of our tax law, 1138-A.

QUESTION: But the question was, were you trying to get the figure on those delivered in the Plaintiff's truck or on those goods sold to New York residents?

MR. ZOLEZZI: We were trying to get the figure on the goods that are delivered by Griffin in their trucks to residents of New York -- in New York State.

QUESTION: And they have very substantial deliveries if your figures are anywhere near correct.

MR. ZOLEZZI: We are of the opinion that they are.

QUESTION: Yes.

MR. ZOLEZZI: At this point, when we tried to have an audit, they would not permit us to see the books. We really do not have -- we don't know at this point, really, how much they are doing. This is a pure estimate.

This is one reason why we would like to have a hearing so that we could determine if they are liable, if they

have -- if they do have substantial business within the state.

If they do have substantial business, we are of the opinion that they should render and collect a sales tax for us.

QUESTION: Do they do that under the Vermont proceeding?

MR. ZOLEZZI: In the Vermont proceeding?

QUESTION: Yes.

MR. ZOLEZZI: In other words, if we had a judgment in New York and went over to Vermont?

QUESTION: Well, couldn't you have entered into the Vermont proceeding here and had your hearing?

MR. ZOLEZZI: Well, we weren't in the Vermont proceeding. We were in the federal court and since they had asked for an injunction, I had moved in a federal court to dismiss for lack of subject matter jurisdiction based on 28 U.S.C. 13 and 41 which says that the District Court shall not enjoin, suspend, restrain the assessment, levy or collection of taxes --

QUESTION: And you lost that motion?

MR. ZOLEZZI: Yes, sir. It was a three-judge court that sat on that motion.

QUESTION: I am asking if you couldn't have defended your case when you lost the motion to dismiss?

MR. ZOLEZZI: It is possible but we preferred to

come in on the motion to dismiss because we feel that this action should be within the New York courts because we feel we have adequate remedy.

QUESTION: Well, suppose you lose here? Then what are you going to do?

MR. ZOLEZZI: Well, if we lose here, then I imagine we are just going to have to go into federal court and defend our actions.

QUESTION: Then one other question; you haven't mentioned or haven't cited Miller against Maryland, Miller Brothers against Maryland in your brief. Somewhere in your argument, would you comment on it?

MR. ZOLEZZI: Well, I --

QUESTION: You don't have to do it now. Do it whenever you want to.

MR. ZOLEZZI: All right.

Having made the motion to dismiss for lack of subject matter jurisdiction, the question before the District Court in Vermont was whether the State of New York can provide plain, speedy and efficient remedies.

Unfortunately, the District Court in Vermont felt that the State of New York cannot provide plain, speedy and efficient remedies and we have now appealed and it is the position of the State of New York that such adequate remedies are available.

Griffin would have two remedies available to it in the State of New York.

One would be by an administrative agency judicial review remedy. In other words, this is a proceeding under Article 78 of our civil practice law and rules.

The second method of relief would be by way of declaratory judgment.

QUESTION: Would the Constitutional issue be raised?

MR. ZOLEZZI: In an Article 78 proceeding?

QUESTION: Yes.

MR. ZOLEZZI: Yes, it can.

QUESTION: Does your opposition agree with that?

MR. ZOLEZZI: I don't believe he does.

Under the provisions of Section 1138 of the New York State Tax Law, it specifically provides that there may be an administrative review by the State Tax Commission of any assessments determinations of the State Department of Taxation and Finance.

If the State Tax Department -- State Tax Commission has this review, the Appellee would come before the Commission, present all of those facts which it feels would support its position.

The State Tax Commission then would review the evidence as it was presented and, based upon that evidence, it would render a determination.

If the determination is favorable to the Appellee, it would conclude the entire matter.

The State Tax Commission cannot decide the constitutionality of the statute which the Appellee is claiming as being constitutionally applied to it, but it can decide whether a statute should be applied to a particular taxpayer or person who is asked for a hearing.

The Appellee contends that an Article 78 proceeding is an inadequate remedy because in order to review the decision of the State Tax Commission, he would have to commence an Article 78 proceeding which is judicial review of an administrative determination.

Prior to bringing an Article 78 proceeding, they would either have to pay the tax or post the bond for the tax.

The Appellee contends that this would render it not a speedy, plain or efficient remedy.

As I said before, the Appellee is presupposing that the determination of the State Tax Commission would be adverse to it. I think that in this regard he is trying to make the State Tax Commission a rubber stamp of the Department of Taxation and Finance. It is not.

It must review the evidence as presented and its decision must be based, in fact, upon the evidence as it has been reviewed.

QUESTION: What would it cost to put up the kind of

bond that your rule requires, your statute requires for \$298,000 of taxes?

MR. ZOLEZZI: Your Honor, I honestly don't know what the bondsman would charge for a percentage to ask for a bond.

QUESTION: I suppose it would call for collateral of at least \$300,000, wouldn't it?

MR. ZOLEZZI: I would assume.

QUESTION: And probably more.

MR. ZOLEZZI: Once again --

QUESTION: That is a pretty heavy burden, isn't it?

MR. ZOLEZZI: Well, once again, we are at a position where, while the tax is assessed at \$219,000, that is a high estimate by the Department of Taxation and Finance.

If we had an audit of the books and we actually saw how much was being delivered into New York State and then assessed our particular sales tax on that, that amount, that dollar amount could be substantially reduced.

That \$298,000 should not be taken as a figure which is absolute, that it would have to post \$298,000 bond.

QUESTION: No, cut it in half. Cut it in half, it is still \$150,000, isn't it?

MR. ZOLEZZI: Correct. It may be less than that. We don't know.

QUESTION: Would Mr. Griffin have to submit to an audit if he went into all of this?

MR. ZOLEZZI: If he went before a hearing before the Tax Commission?

QUESTION: Yes, sir.

MR. ZOLEZZI: If he --

QUESTION: He would have to open up all of his books to New York?

MR. ZOLEZZI: He would have to open up his books as to those sales which are delivered into New York State.

QUESTION: And the thing he is complaining about is, he doesn't want you to see those books.

MR. ZOLEZZI: Correct.

QUESTION: So the relief you'll give him is to make him show the books.

MR. ZOLEZZI: Well, if he --

QUESTION: Am I right?

MR. ZOLEZZI: We are not going to give him the relief of making him show us the books. He can -- let's see --

QUESTION: Well, that is why he filed the case, isn't it?

MR. ZOLEZZI: This is why he filed it, correct. But we are of the opinion --

QUESTION: That is the relief he seeks.

MR. ZOLEZZI: Correct. But we are of the --

QUESTION: Is there any way in New York he can get that relief of not being required to show his books?

MR. ZOLEZZI: He can bring an action for declaratory judgment in the state courts, in which case he can challenge the constitutionality of the applicability of the New York taxing statute as it applies to him.

QUESTION: And, can he get an injunction?

MR. ZOLEZZI: He can get an injunction under Section 6301 of the civil --

QUESTION: You wouldn't oppose it?

MR. ZOLEZZI: Pardon me, sir?

QUESTION: You wouldn't oppose it on the same grounds?

MR. ZOLEZZI: That is a policy decision of the State Tax Commission that I can't make at this point. I would assume that we would put up nominal opposition to it, basically because we would like to get Griffin to court to find out how much he owes the State of New York.

QUESTION: I thought that was what was in the works.

QUESTION: That doesn't mean that the New York court would grant it.

MR. ZOLEZZI: Even if we opposed it, the likelihood of Griffin obtaining an injunction in New York State is extremely good because under Section 6301, it says that if irreparable harm would be done to the person seeking the injunction, the courts will grant an injunction and in this case, with a \$298,000 assessment and Griffin claiming only

\$250,000 in assets, I am sure the Court would say, "If we don't grant you injunction, irreparable harm will be done," and they would.

QUESTION: But going back to this burden again, on the face of it it is a \$300,000 bond or, if we cut that in half, a \$150,000 bond on a small -- relatively small business in order to achieve the opportunity to assert the validity of the tax on non-constitutional grounds or the validity of the tax on constitutional grounds.

Now, isn't that quite a heavy burden?

MR. ZOLEZZI: This would be if you took the Article 78 procedure approach.

QUESTION: Well, what others would be available?

MR. ZOLEZZI: The other approach is, that would be available to him would be --

QUESTION: Is the tax.

MR. ZOLEZZI: If he paid the tax and came into court and his position was the same, we would not only return the tax but we would give him six percent interest on top of it.

We do not take the tax money.

QUESTION: All this is for the privilege of litigating a Vermont businessman's tax liability in another state.

MR. ZOLEZZI: This would be if he took the Article 78 approach.

QUESTION: What about the injunctive procedure?

MR. ZOLEZZI: And in the injunction proceeding, which would be an action for declaratory judgment as is provided for by Section 3001 of our civil practice law and rules, the Appellee could come into the courts of New York, apply for and most probably obtain an injunction because irreparable harm would be done if we were to force him to pay more than his total assets and net worth.

QUESTION: And that is the proceeding that Judge Kaufman and two other New York judges found was inadequate remedy.

MR. ZOLEZZI: They found out that was inadequate remedy.

QUESTION: For purposes of 1341.

MR. ZOLEZZI: Yes, in the Annex case.

QUESTION: In arguing all this, you get over 1140, don't you, and its prohibition or its statement that the other remedy shall be exclusive and there shall be no declaratory judgment.

MR. ZOLEZZI: Under 1140.

QUESTION: 1104.

MR. ZOLEZZI: Now, under the provisions --

QUESTION: You have to have an end run around that statute.

MR. ZOLEZZI: Well, it is not an end run around. We took it head-on in New York. Under the declaratory judgment

proceedings set forth by Section 3001 of 3001 of the civil practice law and rules, we have cases in New York specifically holding that even though a tax statute says that an Article 78 proceeding shall be the exclusive remedy to be followed, if the constitutionality of the statute or the applicability of the statute is challenged, you do not have to follow the Article 78 proceeding, but you can proceed in a way of declaratory judgment.

QUESTION: And you think that is of great comfort to the taxpayer?

MR. ZOLEZZI: It is a comfort to the tax department.

The answer is yes, because otherwise what will happen is, if he does not come in and challenge us, eventually what will happen is, his trucks will come into New York and we will probably confiscate one and then we are going to run into the Miller situation, which is probably going to be your next question. We are of the opinion that Miller does not apply in this particular case.

QUESTION: Why?

MR. ZOLEZZI: Miller was a situation where the State of Maryland was trying to impose the collection of the use and consumption tax of the State of Maryland upon a Delaware vendor. Under that case, residents of Maryland would go into Delaware, purchase their goods and they would bring them back into Maryland or, on occasion, Miller would have

its trucks deliver the goods into Maryland on an occasional basis.

QUESTION: So far, precisely the same as this except for the word "occasional." Is that the distinction you are drawing?

MR. ZOLEZZI: Yes, we are of the opinion that there is substantial business interest within the state. We feel that there is more than a minimum contact, that Miller did not have a minimum contact as such.

Miller did its advertising strictly in the Delaware papers. The advertising happened to carry over into Maryland and Maryland residents then went to Delaware to Miller's store, made their purchases and proceeded from there.

In the case at bar, Griffin advertises in New York newspapers which are published solely in New York. In its advertisements, as will be found on page 30 of the Appendix, there is a map which specifically sets forth the road to be taken from the Albany, Schenectady and Cambridge areas of New York to Griffin's store in Vermont.

QUESTION: Perhaps I got the facts wrong at the outset, but are you claiming that this taxpayer should collect a sales tax or a use tax on goods that are sold at its store and carried away by the customer himself?

MR. ZOLEZZI: No, sir. No, sir. Not at all. We are claiming --

QUESTION: Well, then, what is the significance of these advertisements?

MR. ZOLEZZI: Well, we say that --

QUESTION: You mean, it is perfectly all right to advertise in New York and say how to get to our store?

MR. ZOLEZZI: Right. Solicitation itself would not be doing business within the state. I --

QUESTION: And as long as the customer carries it away with him, you are not attempting to --

MR. ZOLEZZI: We are not attempting to collect it.

However, the solicitation within the state coupled with the delivery by Griffin's employees with Griffin's trucks and the sending of Griffin's repairmen into the state to do touch-up work, the cumulative effect of it would be a minimal contact of doing business or transacting business within the state.

We are of the opinion that the contract itself is not completed until the goods are delivered and the delivery takes place in the state.

The New York sales tax is a tax which is placed at time of transfer of possession or title and as this court held in the Berwind-White case back in 1939, that is a tax which can be upheld because the tax takes place at transfer of possession and/or title.

QUESTION: Have you suggested or did you suggest

awhile ago that in this declaratory judgment action available in the state courts that the tax people would hold their hands at ending a completion of that action or not?

MR. ZOLEZZI: I did not say that we would hold our hands pending. I just said that the probability of success on Griffin's part was greater than ever because of the irreparable harm which would be done prior to the hearing.

In other words, with a \$298,000 tax assessment and only \$250,000 in assets --

QUESTION: I suppose you are suggesting that there is no really flat rule in New York that he could not get an injunction pending with the --

MR. ZOLEZZI: Oh, there is no question. There is no rule saying that he could not get an injunction. He could get an injunction and the probability of success is great.

QUESTION: Well, Mr. Zolezzi, what if, in Mr. Justice White's words, the Tax Commissioner decided not to "Hold his hands." It still had a long way to go before it could ever get a judgment even in New York against Griffin; didn't it? I mean, just sending an auditor up to Arlington wasn't the same thing as getting an enforceable judgment.

MR. ZOLEZZI: No, we would send the order to Arlington. The order to would come back with his report. Based upon that, we would commence an action against Griffin in our state courts for the enforcement of the injunction.

QUESTION: Besides, it was decided to seize his trucks.

MR. ZOLEZZI: Unless it was decided to seize his trucks, correct.

But the practicalities of that are few and far between because we just don't have the manpower to sit on the roads from Vermont to New York waiting for different trucks to come.

QUESTION: Mr. Zolezzi, I am somewhat confused at this point. As I understand you, you are not trying to collect a tax from the Plaintiffs but, rather, you are trying to collect something like a penalty because they failed to collect the tax from their customers.

MR. ZOLEZZI: No, under the New York State Tax Law, a vendor who does business within the State of New York is personally liable for sales taxes. The sales tax is collected from the purchaser.

If the vendor does not collect the sales tax, at that point the vendor himself would become liable for the sales tax that he had not collected. This is --

QUESTION: Well, on the sales that they do not make deliveries, where the customer comes in and takes the merchandise back to New York, who owes what kind of a tax to New York on those sales?

MR. ZOLEZZI: On those sales, the purchaser himself

upon coming back would owe the State of New York a use tax for use within the State of New York but it would not --

QUESTION: So, regardless of whether or not Griffin does any business in the State of New York. Is that right?

MR. ZOLEZZI: Correct. Any --

QUESTION: Wholly apart from that.

MR. ZOLEZZI: Wholly apart from that. Any purchase by a New York resident out of state and brought back in, the purchaser, on his own honesty, is supposed to call the tax department and say, "I owe you money."

QUESTION: You are not trying to collect from Griffin any part of that.

MR. ZOLEZZI: No, no part thereof.

QUESTION: Or say that Griffin was supposed to collect it himself.

MR. ZOLEZZI: No, Griffin should not collect that tax. This is where we differ also from Miller because Maryland tried to get Miller to collect the use tax.

QUESTION: Are you sure of that in Miller?

MR. ZOLEZZI: I am pretty sure of that, your Honor, because / it was a use and consumption tax that Maryland was trying to impose in Miller.

QUESTION: What kind of gross do you collect from New York residents to Huntington or everywhere else and buy goods and bring it into New York?

MR. ZOLEZZI: I wouldn't even venture a guess, your Honor.

QUESTION: Anything at all?

MR. ZOLEZZI: I wouldn't venture a guess. I honestly don't know. I know that on occasion --

QUESTION: Why don't you just put a man out there at the entrance to that Paramus Center out there in New Jersey?

MR. ZOLEZZI: Well, this is exactly what happened.

QUESTION: Nine-tenths of the cars are New York cars.

MR. ZOLEZZI: Well, this is exactly what happened in -- just prior to this Griffin case. We sent people out and they had road blocks for the truck mileage tax.

As an incident to collection of the truck mileage tax for New York State, it was found that many goods were being shipped into the State of New York and no sales tax was being collected.

The sales tax in New York is a tax which is applicable at places of delivery so that even in New York State your rates vary. You can buy goods in New York City, which has an eight percent sales tax, order them shipped to Schenectady County, which has a four percent sales tax, and you only have to pay four percent sales tax.

On the other hand, if you buy in Schenectady County to ship to New York, you pay eight percent, so sales tax takes place on delivery.

QUESTION: But if Consolidated Edison buys a big generator for a location somewhere in New York State, from out of state, the Tax Commission tries to collect a use tax from it, doesn't it?

MR. ZOLEZZI: It would try to collect a use tax from Consolidated Edison ---

QUESTION: Yes.

MR. ZOLEZZI: But not from the vendor who sold the generator.

QUESTION: And Consolidated Edison will probably end up paying it.

MR. ZOLEZZI: Correct.

QUESTION: Suppose that you dropped this case, but if an arrangement was made for Griffin to have stand-by or recommended delivery services? As you indicated before, they could completely avoid New York taxes.

MR. ZOLEZZI: Well, if Griffin arranged for either mail or common carrier services, then we would fall directly into a Bellas Hess type of situation where we could not tax them. But by the fact that they are using their own trucks, their own employees and they are sending their own repairmen in --

QUESTION: But what if there is a matter of Vermont law that title passed in Vermont when goods were paid for before the delivery was made; would you still contend that you could impose the tax?

MR. ZOLEZZI: Yes, because our tax takes place upon delivery and if they can obtain a credit in Vermont for the tax they pay in New York, fine. But as far as New York is concerned, we say that our sales tax --

QUESTION: You don't pay any attention where the title passes. That is irrelevant.

MR. ZOLEZZI: Well, under the Uniform Commercial Code, I believe a title would pass upon completion of delivery and the completion of delivery takes place in New York State.

QUESTION: Well, but if as a matter of state law in Vermont, title passed upon payment for the merchandise you could, I suppose, by the intent of the parties, make the transaction one in which title passed at the time that the goods were paid for.

MR. ZOLEZZI: Well, the New York State Sales Tax --

QUESTION: You would disregard that as --

MR. ZOLEZZI: The state sales tax has been upheld by this Court in the Berwind-White case -- is the tax takes place upon transfer of title and/or possession and possession transfer is in New York State when delivered by Griffin to the purchaser in the State of New York.

MR. CHIEF JUSTICE BURGER: I think your time is up, Counsel.

MR. ZOLEZZI: Thank you, your Honor. I just request that the lower court's decision be overturned and that the

complaint be dismissed.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Wickes.

ORAL ARGUMENT OF R. PAUL WICKES, ESQ.

MR. WICKES: Mr. Chief Justice, and may it  
Please the Court:

Section 1341 of Title 28 does not, by its terms require dismissal of every federal court complaint that involves state taxes. Rather, it requires the district court to make inquiry of the quality of the remedies that are available to the particular litigant in the state court.

It is not helpful in that analysis to have a long list of cases which uphold the efficacy of the remedies of a certain state without testing to see whether they are relevant to the particular plaintiff in the case before the court.

The Appellants assert the availability of two remedies for Griffin in this case, both of which, we submit, don't pass the test of Section 1341.

The first remedy is that set forth by the statute which requires as a first step that all of the books and records of Griffin, Incorporated, be turned over to the taxing authorities of the State of New York dating back to 1965, which was when the sales tax was enacted.

The District Court for the Southern District of

New York in the United States Steel case specifically held that submitting to an audit by a taxing authority of questionable jurisdiction constituted irreparable injury and that if that audit procedure constituted irreparable injury for United States Steel Company and the other corporations that were involved in that litigation, the situation is certainly much worse when we look at this little Mom and Pop furniture store in Arlington, Vermont.

QUESTION: Well, irreparable injury, though, isn't the test under 1341, is it? You have to have that to get any injunction.

MR. WICKES: That is right, but I think that in the District Court's analysis in the United States Steel case, I think it used the term "irreparable injury" by way of demonstrating that the remedy was not plain, speedy and efficient.

QUESTION: But I, certainly reading 1341 literally, you would have to make out all the ordinary elements of an injunction which would include irreparable injury.

MR. WICKES: Absolutely.

QUESTION: And then show, in addition, that it was not plain, speedy and efficient.

MR. WICKES: That is right.

QUESTION: Incidentally, do you think that the District Court's findings and conclusions of law in your favor on the applicability of 1341 can stand side-by-side with

Kaufman's opinion in the Ammex case?

MR. WICKES: Yes, I do.

QUESTION: How would you distinguish one from the other?

MR. WICKES: I think there are important distinctions.

The most important is the fact that the Appellant tried to ignore all through this case which is that in between the offices of the New York State Tax Commission and Griffin there is a state border and Ammex had eight sales facilities that were located in the State of New York. Their challenge to that sales tax was an import-export clause challenge and a commerce clause challenge, but there was no due process issue.

QUESTION: But that goes to the merits of the constitutional claim, doesn't it?

MR. WICKES: I think it goes --

QUESTION: Not to the speedy and adequate nature of the remedy.

MR. WICKES: No, I think it goes to the quality of the remedy that is available in the state because one of our contentions has been all along that the very act of going into New York and invoking one of these remedies may constitute a submission of jurisdiction in New York which is the basis of our due process claim and if that is correct, by the act of going in and raising the claim in New York, we lose it and Ammex clearly didn't have that.

QUESTION: But if you have a due process claim, if you feel there is a constitutional objection to New York procedure, you are free at the conclusion of the New York court proceedings to bring that claim here, are you not?

MR. WICKES: Well, that is right. We are. There is another difference between the Ammex case which is important, I think, and that is that there was no issue in that case about whether or not an injunction was available in the declaratory judgment proceedings because the parties had stipulated that there would be no collection activities pending completion of the litigation and there is no such stipulation here and Judge Kaufman thought that stipulation was important.

The final thing I should say about Ammex is, when Ammex finally got into the Supreme Court in New York, the trial court in New York, that court held that a declaratory judgment remedy was improper. In an unreported opinion that is published in the New York Law Journal in January, the court said, we are not going to decide this as a declaratory judgment and then it proceeded to convert it into an Article 78 proceeding and decided in Ammex' favor on the merits but there is still, I think, even after Judge Kaufman's decision in Ammex, I think there is a substantial difference.

That case was before our district court in Vermont. That was argued fully in the district court. I think the district court deals with it in its opinion.

The second objection we have to the statutory procedure is the apparent inability of the Tax Commission based on the Hospital Television Systems case to hear a constitutional challenge to its authority.

Apparently the function of the proceeding in the Tax Commission is simply to sit and check the arithmetic of the tax auditors.

Now, the Appellants have argued that we can go in and present evidence on the constitutional claim before the Tax Commission but that really begs the question of what is going on here. The Tax Commissioners are the Appellants in this case. They have argued all along that on the facts of the case as they have been disclosed we are liable for the tax.

QUESTION: Could I ask at this point, is it your understanding that New York is seeking to collect only the tax due on the goods that are delivered by your client in New York?

MR. WICKES: Yes.

QUESTION: And it is your submission, I take it, or would be eventually, that New York is constitutionally forbidden to impose a sales tax at the point of delivery and make the deliveror collect it.

MR. WICKES: When the deliveror is separated by a state line and has the limited kinds of contacts across that state line that are present in this case. We think that except, perhaps, for the map and the newspaper, this case, in fact, is

identical to Millers Brothers.

QUESTION: Do you think you would have to be what in other context might be called, "Doing business in New York"?

MR. WICKES: Well, the sales tax cases of this Court have set up a pretty clear line between a business on the one hand which either has people on a regular basis in terms of sales and soliciting orders, which was the Scripto case, or has some kind of property or facility in the state and somebody who just goes in and out on a temporary basis to perform a delivery the way they did in Millers Brothers. That is a firm line that has been held in the sales tax cases.

QUESTION: Well, would you not concede that if there were enough trips across the state line, say millions of people crossing the state line on behalf of this mom and pop store, that that might give them jurisdiction?

MR. WICKES: I think that at some point those types of contacts --

QUESTION: And if you concede that, how is the State of New York ever going to find out when that point has been reached?

MR. WICKES: Well, I suppose they are going to have to litigate with a series of people who do an increasing or decreasing number of trips.

QUESTION: Well, they are litigating with you now. Would you agree that if they ask you in discovery

what your volume of deliveries is, you would have to tell them that?

MR. WICKES: Well, that question came up in the district court and we indicated some doubt about whether we would agree that we had to tell them that because I don't think under Miller Brothers and the sales tax cases it is relevant, but the relevance of the issue clearly can be determined in the district court and the district court --

QUESTION: How can they settle the issue without having some idea of the magnitude of the transactions within New York?

MR. WICKES: Well, the indication in the district court is that is how they decide that issue and we may well have to disclose that information.

QUESTION: If you have to disclose that in the federal proceeding anyway, what is the irreparable harm about submitting to an audit?

MR. WICKES: Well, I think there is the substantial difference between having to answer an interrogatory that asks how many trips do you do into New York or even, how many dollars of business do you do in New York to having to open up your basements where your records are kept to the sales tax department of New York.

QUESTION: It is just a matter of the burden of thumbing through a lot of records, is that what it is?

MR. WICKES: And in this situation it is a substantial burden.

QUESTION: But there is no privacy interest at stake.

MR. WICKES: Well, not a very important one, I don't think.

QUESTION: Just the matter of responding to the discovery that it is irreparable injury here.

MR. WICKES: Well, no, I don't think responding to discovery would constitute irreparable injury. I think the irreparable injury comes about when, by asserting attack in the face of Miller Brothers in a situation where the facts are as close to Miller Brothers as they are, the auditors can require us to turn over all our records. I think that is the injury.

QUESTION: Well, then you are just reading 1341 virtually out of the books. You are saying that any time a federal court determines that the imposition of the tax is unconstitutional substantively, it can enjoin the enforcement.

MR. WICKES: No, I don't think that is true. I think --

QUESTION: Even when there is a claim that withstands the motion to dismiss they can issue an injunction pending a decision.

MR. WICKES: Well, I should speak about the preliminary injunction that was issued in this case for a

minute, which is the reason we were here.

When this case was filed, we had been notified that an auditor was going to come and we filed and served the auditor when he came to Vermont.

In the initial pleadings in this case, there was no request for a preliminary injunction. We requested a declaratory judgment and a permanent injunction but there was no issue about preliminary injunction.

After the complaint was filed and after the motion to dismiss was filed, after the state's memorandum of law was filed in connection with the motion to dismiss, came this assessment for \$218,000 and the reason we then asked for interrogatory relief was that on the expiration of 90 days from the issuance of that assessment, our right to contest the amount at issue was forever gone so we asked for the interlocutory injunction just to stop that clock from running.

QUESTION: And you need it to get away from that \$218,000 because that is an awful rich mom and pop, isn't it?

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

QUESTION: And then you couldn't argue mom and pop up here, could you?

QUESTION: Mr. Wickes, suppose you were located in Troy rather than Arlington. What is the New York system? Do you have to file an annual return of this type of tax?

MR. WICKES: It is a quarterly return, I think, your

Honor. But, yes, it is a self-reporting mechanism, essentially.

QUESTION: Are you taking the position that under no circumstances are you subject to New York tax at all?

MR. WICKES: We are taking the position that under the present circumstances we are not subject to the New York sales tax.

QUESTION: Not on these deliveries of furniture to New York purchasers.

MR. WICKES: That's right. That's right. Because the issue isn't whether there is a tax due on that transaction. There clearly is a tax due on that transaction. It is the use tax which the New York purchaser is supposed to pay.

The issue is whether we have sufficient contacts in New York that New York can constitutionally require us to put on their tax collectors' hats. That is what this case is about, not whether there is a tax due.

QUESTION: Well, does Griffin or anybody pay Vermont sales tax on what is delivered in New York?

MR. WICKES: No, there is no sales tax paid on that transaction.

QUESTION: But if it is within Vermont it is paid by the Vermont person.

MR. WICKES: Not if the goods are delivered into New York. If it were delivered in Vermont or picked up in Vermont they pay the Vermont sales tax.

QUESTION: So as a matter of fact, Griffin pays neither use tax nor sales tax.

MR. WICKES: Well, the store never pays a use tax.

QUESTION: Well, Griffin sets up a deal where neither he nor the purchaser pays taxes.

MR. WICKES: Well, not under the statute because under the statute, the purchaser in that situation is required to pay the tax.

QUESTION: Well, as of now, the people in Albany who buy the property in Vermont and it is delivered in the Griffin truck in Albany, nobody pays either sales tax or use tax on that delivered furniture.

MR. WICKES: All right. Well, there isn't anything in the record to suggest that people ignore their tax statutes and the tax is due on that transaction.

QUESTION: You assume that they pay the use tax.

MR. WICKES: I assume some number of them do and I assume some number of them don't.

QUESTION: And what New York wants is double tax. Is that the case?

MR. WICKES: No, it is not. It is not. What they want is for use to be their collectors because a lot of their people, apparently they think don't pay their taxes.

QUESTION: As a matter of fact, this suit is all based on the fact that the New York furniture people complained.

MR. WICKES: Well, that is what the tax assessment was based on.

QUESTION: Mr. Wickes, there seems to be a difference between your view of the tax and your opponent's view of the tax. He told me that the tax which would be payable on the merchandise delivered by your trucks to New York people at their residences would be a sales tax.

MR. WICKES: Right. Umn hmn.

QUESTION: And you are saying it would be -- the only tax due would be use tax.

MR. WICKES: That is exactly the dispute here on the merits. That is the dispute because if it is a sales tax we would have to collect it and if it is a use tax, we don't have to collect it.

QUESTION: So that the issue is one of whether as a matter of New York law, the tax payable on the transactions in dispute is a sales tax or a use tax.

MR. WICKES: Well, that --

QUESTION: If that is the issue, can you give me some New York authority for the position you maintain?

MR. WICKES: That is not the issue.

QUESTION: Oh, I thought that was what it was.

MR. WICKES: You see, the way the New York sales tax works is that on every transaction where the sale takes place in New York, the seller is required to collect the tax and then

it goes on to say, "If there is a situation where the seller doesn't collect the tax, there is the use tax due." It is, in fact, called "The compensating use tax." It is to make up for this situation.

QUESTION: But before you get to the "if" it does say that the seller must collect the sales tax in that situation.

MR. WICKES: That is right.

QUESTION: And do not these transactions fit precisely that situation?

MR. WICKES: They do if New York can, as a matter of federal constitutional law, make them pay taxes.

QUESTION: As a matter of New York State tax law we are talking about a sales tax rather than a use tax.

MR. WICKES: That is right.

QUESTION: So you were mistaken earlier because you said it was a use tax. I just want to be sure.

MR. WICKES: No, I am sorry. I guess I am not being clear.

It is a sales tax if we lose the case, because it is a use tax only in a situation where, for one reason or another, the sales tax doesn't apply so if we win the case and don't have to collect the sales tax, then what New York collects from its purchaser is a use tax.

QUESTION: Yes, but what they are trying to collect

is a sales tax.

MR. WICKES: That is right.

QUESTION: All right. That is right.

MR. WICKES: That is what they are trying to make us collect.

QUESTION: Suppose Griffin's salesmen brought the furniture over and delivered it to an Albany home and said, "This is worth \$125. If you give me \$125 it is yours."

Would New York be entitled to sales tax?

MR. WICKES: No, New York would be entitled to the use tax is our position on that.

QUESTION: Well, if Griffin comes over and says, "Mr. Jones, I want to make a sale to you. I want to sell you this chair for \$140. You give me \$140 and it is yours."

New York is entitled to sales tax from Griffin.

MR. WICKES: That is right.

QUESTION: And the difference is what?

MR. WICKES: The difference is --

QUESTION: Is that you were paid in Vermont.

MR. WICKES: No, No. The difference is -- is under Miller Brothers -- is that given the way Griffin transacts business, it doesn't have enough contact in New York to allow New York to require it to be a tax collector to fill that function for it.

QUESTION: Suppose you make that C.O.D.?

MR. WICKES: I don't think that changes the situation. I don't think the question of where the money changes hands affects the situation.

QUESTION: Well, if the money and the property and everything else changes hands in New York, I think New York has some interest.

MR. WICKES: Well, the point is, under the Miller Brothers and the Bellas Hess analysis, you don't look at a single transaction and determine what tax applies in that transaction. You look at the way the party conducts his business and ask the question of whether he has got in this total picture enough contact and that is it.

QUESTION: And that is just what New York would like to get from you.

MR. WICKES: Yes, it is. Yes, it is.

Now, the Appellants have argued that we have got a declaratory judgment procedure available as an alternative to the state proceedings and they cite ten cases in support of that proposition.

On careful analysis, not one of those cases can safely lead us to conclude that a declaratory judgment proceeding will be available in this case.

Sections 1138 and 1140 of the New York State sales tax law are extraordinarily clear in saying that no declaratory judgment challenge is available for any kind of a

tax litigation, whether it involves constitutional questions or not.

All but one of the cases cited by the Appellants in support of their declaratory judgment argument were decided under statutes that don't talk about forbidding declaratory judgment challenges in constitutional cases and the courts as a matter of statutory interpretation said, since the statute doesn't forbid it for constitutional challenge, you can use a declaratory judgment challenge in that case.

Two of the cases quoted, including the one that is decided under this section of the act, have some language about declaratory judgment actions but on the facts of the case that is not the issue involved.

Those are the Hospital Television Systems and the First National City Bank case.

And three of the cases that are cited in support of this declaratory judgment remedy, while the court talked about the possibility that it might be available in some case, in fact, they threw the plaintiff out and sent him back to the tax commission.

It is impossible to read the declaratory judgment cases in New York and find a rationale that can lead to confidence that that procedure is going to be available in this court.

QUESTION: But now, in a sense, that is where Ammex

and the district court here conflict, do they not?

MR. WICKES: I think that Judge Kaufman's opinion in Ammex is considerably more certain about the availability of declaratory judgment than it should have been.

QUESTION: And yet, he and the other two judges on that panel were New York judges and presumably ex-New York practitioners and in your case the district court consisted, as it properly should have, of three Vermont practitioners, or former practitioners.

MR. WICKES: That is right and Judge Oakes is one of them who sits in the Second Circuit in New York City but that is right.

QUESTION: Mr. Wickes, was the First National City Bank case before the three-judge court when this case was argued and decided?

MR. WICKES: I don't remember, your Honor.

QUESTION: It was decided -- the First National City Bank case was decided late in 1975, as I recall, and as you suggest, with a very clear statement there that the word "exclusive" does not apply where you have a constitutional issue.

MR. WICKES: That is right. There is a very clear statement but it has nothing to do with the decision that the court had to make in that case.

QUESTION: Nevertheless, it is a clear statement

by the highest court of New York.

MR. WICKES: Yes, it is.

QUESTION: May I ask you this question? If you were satisfied that declaratory judgment relief followed by injunctive relief were available in the New York courts, would you be here?

MR. WICKES: I would, your Honor?

QUESTION: Why?

MR. WICKES: Because of the fear that invoking the remedies of the New York State Court may cost us our due process argument, which is an argument that says, we have such insubstantial contacts in New York State that the courts of that state don't have jurisdiction over it sufficient to support a judgment in a tax case and I think if we walk into New York and ask them for a declaratory judgment, we may well cause ourselves some problems on that issue.

QUESTION: Why? You would present that issue right there, wouldn't you?

MR. WICKES: I'm sorry, your Honor, right where?

QUESTION: You would present your due process issue right there.

MR. WICKES: Yes.

QUESTION: Well, you may lose it, but you would certainly press it on appeal.

MR. WICKES: Well, but the point is, I think we

cause risk to that issue by the act of invoking the remedy, is the problem.

QUESTION: You think that they would say you had now made a general appearance and you are now under the jurisdiction or something like that?

MR. WICKES: So far as I know there is no special appearance proceeding available to us on this issue.

QUESTION: Why, no, but whether it is a general or a special appearance isn't really the point. The point is the one my brother White makes. That would be the very basis of your complaint. You can go into any court and claim that.

MR. WICKES: I think -- I am saying that I think there is a risk to us there and a risk that 1341 does not require us to take.

Now, another problem with a declaratory injunction proceeding is the question of whether an injunction is available if the Tax Commission decides to proceed if, when we bring a declaratory judgment proceeding, the way they issued their assessment here after we went into the federal courts.

QUESTION: Well, now, have there been instances in New York practice where the Supreme Court of New York has issued a declaratory judgment holding a tax not applicable? And the State Tax Commission has nonetheless gone ahead and tried to levy it?

MR. WICKES: Our problem is different than that in

this case.

Our problem is the fact that when that assessment is issued in the first instance, a clock starts to run and at the end of 90 days the amount of the assessment is fixed and forever unchallengeable and if we go in and bring a declaratory judgment proceeding in New York and they start that clock running the way they started it here and we lose our declaratory judgment challenge, we are stuck with 218 or 298 or whatever thousands of dollars they --

QUESTION: I thought you were distinguishing between a declaratory judgment and an injunction and as I understand it, the only difference between those remedies is that, one, if the defendant violates it, he can be held in contempt and the other, if he violates it, he can't be held in contempt, that you could raise every issue on the merits in the declaratory judgment action that you couldn't in the injunction action.

MR. WICKES: That's right, but the risk here is the risk of what happens to us if we lose the declaratory judgment action. That is, it is eventually determined that we constitutionally are liable for the tax and in the meantime, we have lost the ability to contest the amount of the taxes because of its assessment in the 90-day period.

QUESTION: Well, that would be equally true if you lost the injunctive action, wouldn't it?

MR. WICKES: Oh, yes.

QUESTION: I thought you were distinguishing between them.

MR. WICKES: No, I am not. What I am saying is, the problem with the asserted remedy in New York is, that if the Tax Commission starts the clock running, there isn't anything the New York court can do to stop that clock. And --

QUESTION: Mr. Wickes, that may be so, but it may be that you might, like the other taxpayers, might have to resort to your administrative remedies if you want to have the amount of the tax reviewable in court.

MR. WICKES: Well, that is right, but the point is --

QUESTION: All right, if you have your declaratory judgment action and you are afraid about what is happening to you administratively, you litigate before the administrator, too.

MR. WICKES: Well, I think if this Court determines that these remedies in New York are plain, speedy and efficient, then that is the situation we are going to have.

If it determines that, it seems to me that what you have done is, you have read those words out of the statute because the statute doesn't say that the federal courts are without jurisdiction whenever there is any remedy available in the statute. It clearly imposes some test about the quality of those remedies.

QUESTION: Who has the burden of proof on showing the remedy issue, that it is plain and efficient and so forth?

MR. WICKES: The district court, I think, in effect treated that as a question of law. There was no -- I suppose because of the way the statute is written, it is our burden to come in and show that the remedies are insufficient. That was, you know, that was the manner in which this thing was argued out in the district court.

It seems to me there is a presumption under 1341 and under the cases that are decided under it that, just in terms of numbers, that the remedies are probably adequate and it is up to us. We pleaded in the complaint that 1341 wasn't a bar because the remedies weren't adequate and I think the burden was on us to make that argument in the district court.

Another thing I think that it is important to say is that in order to affirm the decision of the district court in this case it is not necessary to make any expansion of the categories of cases that are permitted to be heard in the district courts under 1341.

In Spector against McLaughlin and in the Township of Hillsborough case, both of which were decided in the 1940's, this Court held that the situations where the availability of appropriate remedies was unclear it was proper for the District Court to hear the case and in a couple of cases that were decided under Section 1342, which is the companion statute to

1341 that deals with administrative raid orders, this Court specifically said that the state with a statute that denies relief, when that statute has not been authoritatively overturned by the State Supreme Court, can't come into the federal court and speculate that it may not be followed and on that basis, try to get the case dismissed under Section 1341.

QUESTION: Mr. Wickes, may we come back a minute to your wanting to stop the clock from running?

MR. WICKES: Yes.

QUESTION: Suppose a three-judge court in Vermont had decided the constitutional question against you. Would you have gone into the New York State Tax Commissioner to keep the clock from running on you or what would you have done there?

MR. WICKES: If our complaint had been dismissed?

QUESTION: Suppose the preliminary injunction had not been issued by the three-judge court, what would you have done?

MR. WICKES: Well, I think we probably would have had to go into New York with all the risks that that carries and tried to stop that clock.

QUESTION: Could you have gone both ways simultaneously or sought an injunction, say, in the three-judge court and pursued administrative remedies in New York just to

protect yourself as to the amount of the tax?

MR. WICKES: I am not sure whether we could have done that or not, your Honor. I don't know of any reason why we could not. It turns out not to be necessary because the motion for the preliminary injunction was granted.

QUESTION: If you could have done it in Vermont, could you have done it in New York?

MR. WICKES: In the New York state courts?

QUESTION: Yes.

MR. WICKES: I think the answer to that is no because I think the New York law that prohibits the granting of injunctions in these kinds of cases is so clear. There is not one case that suggests that that statute is going to be --

QUESTION: But you have very substantial dicta that --

MR. WICKES: Not on the point of injunctions. On declaratory judgment there is. There isn't even a hint of dicta about injunctions, not in any of these cases, there isn't even a suggestion that that injunction ban is going to be ignored.

QUESTION: Is there any negative language?

MR. WICKES: The issue hasn't been raised so far as I know.

QUESTION: What is your -- I thought receded from what I thought was a distinction you were making about

injunction versus declaratory judgment. Is your point that even though you would get a declaratory judgment, there is some prospect that the Tax Commission would go ahead notwithstanding the state court saying the levy was unconstitutional and levying on the property anyway?

MR. WICKES: No, no, that is not the problem. Our point really has to do with the ability of the New York courts to grant a preliminary injunction to preserve the status quo, to protect our right eventually if we have to, to contest the amount of the taxes that are due if we lose on the merits.

QUESTION: For what reason --

MR. WICKES: There is no distinction between a declaratory judgment and a permanent injunction.

QUESTION: Well, what reason do you have to think that a declaratory judgment -- it won't come up on the motion calendar rather than a trial calendar.

I mean, what reason do you think that an action for declaratory judgment won't be heard within the same time span in New York as an application for a preliminary injunction?

MR. WICKES: I don't have any reason to think that.

The problem is that a preliminary declaratory judgment isn't going to tell the Tax Commission not to issue this assessment the way they did in this case.

I mean, I don't know what a preliminary declaratory

judgment is.

QUESTION: I don't, either. What I asked you, I thought, was, an ordinary declaratory judgment --

MR. WICKES: Yes?

QUESTION: -- couldn't that be heard by the New York courts within the same time span as an application for a preliminary injunction?

MR. WICKES: I doubt that we could fully litigate the merits of this case in the same time as you could hear a kind of ordinary preliminary injunction motion, any more than we could have completed this litigation in the district courts faster than we heard the preliminary injunction.

I mean, that is the point of a preliminary injunction is that it is an expedited proceeding and you don't have to make a full determination and/talk about likelihood of success on the merits and not ultimate results and that is what is unavailable to us in this case and I think it is clearly indicated.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen, the case is submitted.

[Whereupon, at 3:07 o'clock p.m., the case was submitted and the Honorable Court was adjourned until the following day.]