

SUPREME COURT OF THE UNITED STATES

In the Matter of:

D.H. HOLMES COMPANY, LTD.,

Appellant,

v.

SHIRLEY McNAMARA, SECRETARY OF
REVENUE AND TAXATION OF
LOUISIANA

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No. 87-267

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IN THE SUPREME COURT OF THE UNITED STATES

D. H. HOLMES COMPANY, LTD.,

Appellant,

v.

SHIRLEY McNAMARA, SECRETARY OF
REVENUE AND TAXATION OF LOUISIANA

No. 87-367

Washington, D.C.

Tuesday, March 22, 1988

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 12:59 o'clock p.m.

APPEARANCES:

ANDREW RINKER, JP., ESQ., New Orleans, Louisiana; on behalf
of the appellant.

ROBERT G. PUGH, ESQ., Shreveport, Louisiana; on behalf
of the appellee.

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P R O C E E D I N G S

(12:59 P.M.)

CHIEF JUSTICE REHNQUIST: We will hear arguments next in Number 87-267, D. H. Holmes Company, Limited, against Shirley McNamara, Secretary of Revenue and Taxation of Louisiana.

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

ORAL ARGUMENT OF ANDREW RINKER, JR., ESQUIRE

ON BEALF OF THE APPELLANT

MR. RINKER: Mr. Chief Justice, and may it please the Court, in this case for the first time since its decision in the Complete Auto Transit versus Brady the Court is faced with a question of whether a state may constitutionally impose a direct use tax on the value of goods while those goods are still in the stream of interstate commerce.

Appellant Holmes is a Louisiana corporation operating department stores in Louisiana and three other states. During 1979 to 1981, Holmes as a part of its marketing strategy contracting with various designers of catalogues in New York for the design, creation, printing and distribution of its catalogues.

In turn, these catalogue designers contracted with printers in Atlanta, Boston, and Oklahoma City for the addressing, printing, and mailing from their local post

1 offices direct to certain select residents of the states
2 in which Holmes does its retail business. At no time did
3 Holmes or any of its agents or employees have any contact
4 with, receive or take possession of the catalogues which
5 had been mailed directly from the out of state post offices
6 to selected residents within the State of Louisiana.

7 QUESTION: How many states did these residents
8 reside in?

9 MR. RINKER: They are in the State of Louisiana
10 and three other states located in the Gulf Coast areas.

11 QUESTION: Three? Which ones?

12 MR. RINKER: Florida, Mississippi, and Alabama.

13 QUESTION: The facts here only apply to the --

14 MR. RINKER: To the 82 percent of the catalogues
15 which actually went into the State of Louisiana. Yes, sir.

16 QUESTION: And Holmes owned those catalogues,
17 didn't they?

18 MR. RINKER: Well, sir, that question is still at
19 issue. Although the Court below determined that Holmes
20 did own the catalogues at the point at which title to the
21 catalogues was transferred to the particular residents, you
22 will note that in the particular contract as described and
23 was found by the lower courts, we actually contracted for
24 a service, that is, the construction of catalogues and the
25 subsequent sending of those catalogues directly to

1 residents. At no time did Holmes actually take title
2 because we contracted for the performance of a service
3 rather than for the purchase of particular goods.

4 QUESTION: Well, what happened to any catalogues
5 that weren't delivered?

6 MR. RINKER: If the catalogues weren't delivered
7 to the selected residents in Louisiana, the post office
8 was instructed by the instructions on the catalogue to leave
9 those catalogues with the then current resident, and if they
10 weren't distributed to the then current resident they were
11 distributed or sent back to the home store.

12 QUESTION: So Holmes got them back.

13 MR. RINKER: Holmes ultimately would get the
14 catalogues back that weren't actually distributed. That's
15 correct, Your Honor.

16 QUESTION: Even though you suggest they are
17 not taxable?

18 MR. RINKER: Those, the ones that Holmes got
19 back, yes, Your Honor, are subject to tax because in that
20 particular situation Holmes then obtained possession and
21 control over those catalogues incident to ownership. The
22 basis of a use tax --

23 QUESTION: Do you think that that much should
24 turn on an incident of title? I mean, Holmes put this whole
25 process in operation where the catalogues were created.

1 MR. RINKER: That's correct, Your Honor, but we
2 have to focus on the purpose and the incidence of a use tax.
3 A use tax is one which is designed to tax some activity of
4 the taxpayer within the taxing jurisdiction. In this
5 particular case Holmes performed no activity within the
6 taxing jurisdiction to subject it to tax. Holmes did not
7 purchase the catalogues within the taxing state. Clearly
8 the purchase would have taken place in one of the other
9 states, either in New York or where the printers are located.

10 The use of the catalogues by Holmes in connection
11 with any use by Holmes, none of that use took place within
12 the taxing jurisdiction.

13 QUESTION: Well, Mr. Harrison, I guess, though,
14 that Holmes caused the distribution in Louisiana of the
15 catalogues for its benefit.

16 MR. RINKER: Holmes -- the only activity --

17 QUESTION: So is the taxable activity the causing
18 of distribution of the catalogues for its benefit in the
19 state?

20 MR. RINKER: Basically that's correct. It's the
21 importing of the catalogues or placing an order which caused
22 the catalogues to ultimately be distributed --

23 QUESTION: Is that not an activity that can be
24 taxed in the jurisdiction?

25 MR. RINKER: In the court below the only incident

1 of taxation was causing these catalogues to be imported.
2 There was no evidence of any other activity performed by
3 Holmes in connection with these catalogues. For example,
4 there was no evidence that Holmes placed --

5 QUESTION: Is that an insufficient activity for
6 a jurisdiction to impose a tax?

7 MR. RINKER: Yes, it is.

8 QUESTION: Why?

9 MR. RINKER: This Court has focused on jurisdiction
10 to impose a tax in two separate areas. Although they are
11 separate, they are somewhat related. One is the due process
12 ground and the other has to do with the commerce clause
13 ground.

14 QUESTION: You didn't raise a due process issue
15 here.

16 MR. RINKER: That's correct. Holmes does not
17 dispute that Holmes -- that Louisiana and Holmes have a
18 due process contact, but the issue here is that there is no
19 contact between the activity or the various activities
20 involved with importing the catalogues and the State of
21 Louisiana. Simply by placing an order does not constitute
22 activity certainly in light of this Court's past decisions
23 on what constitutes activity subject to tax which is
24 sufficient to impose the tax.

25 QUESTION: I just don't understand the argument.

1 If the activity is sufficient for due process purposes to
2 permit the taxing jurisdiction to tax, then how does the
3 commerce clause change the result?

4 MR. RINKER: I don't agree with your premises,
5 Justice O'Connor, and that is that the activity does not
6 create the right of a state to tax. Holmes, because it
7 operates department stores, it makes sales, it owns property,
8 creates in Louisiana the right to actually tax Holmes, but
9 the particular activity which we are talking about here,
10 and that is the distribution of catalogues, does not
11 establish a link with the State of Louisiana which allows
12 Louisiana to tax it on commerce clause grounds.

13 On due process grounds, certainly, no one can
14 argue that Holmes has great and significant contacts with
15 the State of Louisiana. But for commerce clause purposes at
16 least as far as the way this Court has interpreted
17 so far, is that the tax has to be imposed on the activity
18 of the taxpayer within the taxing jurisdiction.

19 QUESTION: Suppose a customer of Holmes ordered
20 from Holmes an item of equipment. Holmes ordered it
21 from out of state and had it shipped directly to its
22 customer, and this customer is liable for use tax.

23 MR. RINKER: That's correct.

24 QUESTION: That is because they are going to use
25 it in the State of Louisiana.

1 MR. RINKER: You are exactly correct, Your
2 Honor. The customer would be liable for the use tax.

3 QUESTION: But also Holmes, Holmes could be
4 made to collect that tax.

5 MR. RINKER: That's correct, but --

6 QUESTION: Now, I don't -- and the activity is
7 the receipt and use of something in Louisiana.

8 MR. RINKER: You're right, Your Honor. Holmes
9 would be required to collect a use tax, and this Court made
10 the point very clearly in its National Geographic case,
11 where the question was whether or not the State of
12 California could require National Geographic to collect a
13 use tax on sales of goods made to particular residents in
14 the State of California.

15 QUESTION: Holmes certainly is having these
16 catalogues imported and delivered to its customers for use
17 by them in the State of Louisiana.

18 MR. RINKER: That's correct, the customers are in
19 fact using the catalogues. If this were a tax on Holmes --

20 QUESTION: Why can't you tax Holmes for having
21 these things imported for use in Louisiana?

22 MR. RINKER: Well, Justice White, as you just
23 pointed out, the person who is actually using the catalogues
24 within the State of Louisiana is the recipient, not Holmes.
25 Holmes cannot --

1 QUESTION: Yes, but Holmes is certainly having
2 that use provided.

3 MR. RINKER: Holmes receives the benefit of
4 people's using its catalogues within the taxing jurisdiction.
5 That is certainly correct.

6 QUESTION: Hopefully.

7 MR. RINKER: Hopefully will receive them.
8 Otherwise presumably Holmes would not have ordered the
9 catalogues in the first place. Similarly, this Court might
10 focus on the question of whether or not in the case of the
11 designer blue jeans or in the case of Gucci handbags, are
12 those retailers liable for use tax in Louisiana when
13 someone carries them around within the State of Louisiana?
14 Technically they are using and advertising those products
15 by having those particular articles of clothing or apparel
16 with them at the time.

17 QUESTION: Could Holmes have made a dollar in
18 Louisiana without those catalogues?

19 MR. RINKER: Yes, they could have, Your Honor.

20 QUESTION: How?

21 MR. RINKER: People go and shop at Holmes and
22 have been shopping at Holmes for over 150 years, long
23 before catalogues ever became --

24 QUESTION: Those are pretty old people.

25 (General laughter.)

1 QUESTION: You mean in the Holmes store.

2 MR. RINKER: Somebody would still be shopping
3 over there also.

4 QUESTION: You mean in the Holmes stores.

5 MR. RINKER: Yes, Your Honor, they have been
6 shopping at the Holmes stores, and it was not necessary for
7 the catalogues to be distributed in order for them to
8 purchase items from Holmes.

9 QUESTION: Well, why did Holmes waste all that
10 money if it wasn't necessary?

11 MR. RINKER: Holmes at one time was contemplating --

12 QUESTION: Did it have a loss or something?

13 MR. RINKER: No, there wasn't a loss involved,
14 Your Honor, but there are several reasons for distributing
15 catalogues other than the cases that you faced -- other than
16 the situations in the cases that you faced where there is --

17 QUESTION: To get business. There is no other
18 reason that I can conceive except for business purposes.

19 MR. RINKER: That is correct. It is for business
20 purposes.

21 QUESTION: And to get -- the only business they
22 were interested in was selling.

23 MR. RINKER: That's correct, Your Honor, just as
24 Holmes --

25 QUESTION: And the only interest in Louisiana was

1 to sell something to a Louisiana citizen.

2 MR. RINKER: That's right. That's why Holmes
3 caused them to be imported. There is no doubt about it.
4 But the public relations effect of the catalogues --

5 QUESTION: You say Holmes caused it to be
6 imported.

7 MR. RINKER: That's correct, Your Honor, they
8 did cause it to be imported.

9 QUESTION: And if they had picked them up and
10 delivered them themselves they would have been in trouble.

11 MR. RINKER: If they had to come up and deliver
12 it themselves, there is no question that at that point
13 Holmes would have had possession and control of the
14 catalogues within the State of Louisiana. That possession
15 and control would be sufficient to impose the tax.

16 QUESTION: I can now see the memorandum that the
17 law department gave Holmes.

18 MR. RINKER: I apologize, Your Honor.

19 QUESTION: I can now give you the law memorandum
20 that the lawyers gave Holmes. If you do it this way you
21 won't have to pay taxes. Is that correct?

22 MR. RINKER: That's basically correct. Our
23 opponents, however, suggest that we did this solely in order
24 to avoid taxes. That is certainly not the case.

25 QUESTION: Well, what other reason?

1 MR. RINKER: Holmes ordered its catalogues in this
2 manner because it participated in what is called the
3 Atkins Buying Organization. In its participation with this
4 organization in New York it obtained the design, construction,
5 printing, and distribution of catalogues at discount rates.
6 It had no control over where the catalogues were going to be
7 designed. It had no idea where the catalogues were going to
8 be printed. It simply relied on its participation in this
9 purchasing organization in New York to handle all of this.

10 If in fact the purchase organization had found
11 that the best arrangement could have been made with
12 Louisiana printers, it perhaps would have contracted with
13 Louisiana printers for this purpose. In fact, the
14 organization didn't find that. Holmes did not adopt this
15 method of distributing catalogues in order to avoid
16 Louisiana taxes.

17 We are focusing here on the obligation of a state
18 to collect a use tax versus the obligation for it to have
19 a use tax imposed upon its use of goods in the state. As I
20 mentioned in the National Geographic case, this Court
21 specifically pointed out the distinction between imposing
22 the obligation on Holmes to collect a use tax, which we
23 would not dispute in this case. If in fact this were a
24 situation where the taxing state was trying to get Holmes
25 to collect taxes on the value of the catalogues in the hands

1 of a recipient, there would be no problem, and the state
2 could do that.

3 The state could impose the obligation on us.
4 Because we have -- because Holmes has due process contacts
5 with Louisiana, the state could require us to collect the
6 tax from the recipients. However, this Court made it very
7 clear in its decision in National Geographic by stating
8 that however fatal to a direct tax, and that is the tax we
9 are talking about here, direct tax, direct use tax on Holmes
10 on the value of these catalogues, might be, that particular
11 legal argument does not apply in the case of imposing the
12 obligation on the taxpayer to collect a use tax on someone
13 else in the taxing state who actually used the goods which
14 are sought to be taxed.

15 That is the basic difference in our case.

16 In this case the operating incident of any
17 activities by Holmes took place outside of the taxing state.
18 All of the manufacture and construction of the catalogues,
19 the addressing, the mailing took place out of Louisiana.
20 None of the activity sought to be taxed to constitute use or
21 distribution with Louisiana took place in the State of
22 Louisiana.

23 QUESTION: But if one looks at the whole plan,
24 so to speak, certainly you can pick out incidents that took
25 place elsewhere, as you point out, but the idea was Holmes',

1 they wanted to engender a distribution of catalogues in
2 Louisiana that would help sell their products in Louisiana.
3 There are certainly a lot of Louisiana ties.

4 MR. RINKER: You are correct, there are a lot of
5 Louisiana ties sufficient for establishing of the due
6 process, for example. But I will give you an example. If in
7 this particular case the catalogues were printed in the State
8 of Georgia and were trucked through each of the states to get
9 to Louisiana, including Mississippi and Alabama, presumably
10 each of those states, if they had decided they could tax
11 goods in interstate commerce, as we are doing here, those
12 states could impose a use tax on the goods as they are
13 traveling through the state.

14 QUESTION: But they wouldn't have nearly the claim
15 that Louisiana would, because Holmes is located in
16 Louisiana. The stuff is going to people in Louisiana to
17 stimulate sales in Louisiana. Georgia and Mississippi do
18 not have any claims like that, do they?

19 MR. RINKER: But the due process contacts between
20 Holmes and the State of Louisiana exist in those states.
21 For example, if we dropped off merchandise there or
22 catalogues, those states also would have a right to impose
23 a use tax collection obligation, but presumably -- and also
24 in those states since the catalogues are under our
25 possession and control in the hands of the printer, those

1 states could assess a use tax on the value of the catalogue,
2 because the state in those states, at least in the State of
3 Georgia where one of the printers is located, the catalogues
4 are actually present there and we can have some control
5 over them.

6 Once goods are placed in the stream of interstate
7 commerce, no one, not even the owner, is deemed to have any
8 possession or control incident to ownership, and at all
9 times these catalogues are located in commerce.

10 QUESTION: You say no one is deemed to have any
11 control incident to ownership when goods are placed in the
12 stream of interstate commerce.

13 MR. RINKER: For purposes of use taxation. Yes,
14 Your Honor.

15 QUESTION: Well, when you add for purposes of use
16 taxation then you are relying on some cases of this Court?

17 MR. RINKER: Yes, Your Honor. In your earlier
18 cases prior to the Complete Auto Transit case, you pointed
19 out that goods in interstate commerce are not subject to
20 any type of direct tax. Presumably Complete Auto did not
21 overrule those earlier decisions. Interstate commerce
22 involving goods starts at the time that they are actually
23 shipped and ends at the time of acceptance of the
24 catalogues.

25 In this case acceptance would have taken place

1 upon the removal from the post office box by the recipient
2 of the catalogue of the catalogue. At the time the
3 recipient takes the catalogue, it is not Holmes's catalogue
4 and no use tax can be imposed on Holmes. Therefore during
5 the entire route from the time the catalogue is actually
6 dropped into the mail until the recipient takes it, Holmes
7 does not have any right to the catalogue or does not
8 exercise any rights incident to ownership. Those rights
9 mean possession or control over the catalogues --

10 QUESTION: Mr. Rinker --

11 MR. RINKER: -- incident to ownership sufficient
12 for taxation.

13 QUESTION: Why do you say that presumably Complete
14 Auto Transit does not overrule those cases?

15 MR. RINKER: Well, in -- Complete Auto Transit
16 dealt with, again, activities rather than taxation of goods.
17 Complete Auto Transit --

18 QUESTION: You can tax the activity of conducting
19 interstate commerce but you can't tax the goods that are
20 going through interstate commerce?

21 MR. RINKER: The activitiex taxed in Complete
22 Auto and its progeny are solely related to indirect
23 benefits to interstate commerce. In those cases the tax
24 was imposed, for example, in the Complete Auto case, imposed
25 upon the gross receipts of a trucking company which shipped

1 the goods. The Court didn't even consider the possibility
2 that the state might tax the goods while they were in the
3 truck being shipped. It only focused on the issue of
4 whether the trucking activities were subject to taxation.

5 QUESTION: Why is it more harmful to what the
6 commerce clause seeks to protect to allow the goods to be
7 taxed than it is to allow the activity of carrying the goods
8 to be taxed? Doesn't either one equivalently harm interstate
9 commerce?

10 MR. RINKER: In the first place, the activities
11 can be more clearly identified with a particular taxing
12 jurisdiction. For example, in Commonwealth Edison versus
13 Montana it was clear that the coal was being mined in the
14 State of Montana. There was an activity within the State of
15 Montana for which a tax was imposed.

16 In Complete Auto, the activity was the shipping
17 on particular trucks within the State of Illinois -- within
18 the State of Mississippi that was taxed. In our case, if
19 someone is allowed to impose a direct use tax on goods
20 which are the commerce itself, every state through which
21 the commerce passes would theoretically have the right to
22 tax those goods provided that those states through which
23 the goods were being transferred had due process contacts
24 with the taxpayer.

25 QUESTION: Why isn't that the same thing with

1 the trucker who carries the goods? Presumably every state
2 through which that trucker drives can tax the activity of
3 his trucking. Isn't that right?

4 MR. RINKER: That's correct, but there--

5 QUESTION: I don't see a whole lot of difference
6 between the two.

7 MR. RINKER: In the case of the goods, the goods
8 are isolated -- in the case of goods or the catalogues in
9 this particular case, there has to be some kind of
10 activity, as the Court pointed out, and the nexus test in
11 the Complete Auto case is that there must be some nexus
12 between -- and Justice Brennan, who wrote the opinion,
13 pointed very clearly that the connexity has to be between
14 the activity and the taxing state.

15 In this case there is no connection between the
16 activity and the taxing state. There is a connexity
17 between Holmes and the taxing state, but not between the
18 activity --

19 QUESTION: Well, Mr. Honchell --

20 MR. RINKER: -- involved in affording the
21 catalogues.

22 QUESTION: Now, wait a minute. If the activity
23 is causing the distribution in Louisiana, that is connected
24 with Louisiana.

25 MR. RINKER: But there is no operational

1 incidence of any activity within the State of Louisiana
2 which can be taxed.

3 QUESTION: Well, sure, it is having the
4 catalogues distributed there.

5 MR. RINKER: Having the catalogues distributed in
6 Louisiana does not involve any operational incidence, does
7 not involve any act by Holmes within the taxing state. We
8 place an order --

9 QUESTION: Holmes caused --

10 MR. RINKER: -- even assuming the state's
11 theory --

12 QUESTION: Holmes caused the distribution. He
13 ordered it. He paid for it. He caused the distribution
14 in Louisiana. Or it did, I should say.

15 MR. RINKER: Correct, it did cause the distribu-
16 tion in Louisiana simply by placing an order for the
17 catalogues, but that activity took place outside of the
18 State of Louisiana. Therefore Louisiana has no jurisdiction
19 to tax, to impose a direct tax on an activity which took
20 place outside of its borders.

21 QUESTION: I thought the distribution occurred
22 within the state.

23 MR. RINKER: The actual transfer of title,
24 perhaps, under the state's theory.

25 QUESTION: Okay. That's what we're talking

1 about.

2 MR. RINKER: But Holmes did not engage -- because
3 the catalogues at all times, even when they are in the
4 state, when they are in the mailbox, when they are in the
5 postal service --

6 QUESTION: Before they got to the mailbox there
7 was a direction by Holmes in Alabama to the printer in --

8 MR. RINKER: Atlanta, Boston, and Oklahoma
9 City. Yes, Your Honor.

10 QUESTION: Yes. Was there not?

11 MR. RINKER: Yes, Your Honor.

12 QUESTION: Directing the precise addresses to
13 which the catalogues were to be delivered?

14 MR. RINKER: That's --

15 QUESTION: And that action took place in
16 Louisiana, didn't it?

17 MR. RINKER: That is not correct, Your Honor, and
18 the record certainly does not support that.

19 QUESTION: The direction to the printer to mail
20 them to those addresses --

21 MR. RINKER: The actual instruction -- in the
22 first place, the record does not support that the Holmes
23 person who said, we want to order the catalogues, actually
24 placed the order from within the State of Louisiana. That
25 is not in the record.

1 In the second place, the person who ordered the
2 catalogues ordered them from a buying organization in
3 the State of New York. The State of New York then directed
4 the particular printers -- Holmes had nothing to do with
5 the selection of the particular printers.

6 QUESTION: Who gave the printer the addresses?

7 MR. RINKER: Holmes provided them to the buying
8 organization, which ultimately got to the printer. That's
9 correct, Your Honor.

10 QUESTION: I see.

11 MR. RINKER: But all of those activities took
12 place outside of the State of Louisiana.

13 QUESTION: Mr. Rinker, supposing that you were
14 looking at this transaction from a philosophical point
15 of view, from on high, and you looked at what took place
16 in Georgia, and what took place in Louisiana, and what took
17 place in Mississippi and Alabama and the states -- which
18 state do you think would have the greatest claim, just in
19 a perfectly common sense way, to put a tax on this
20 transaction?

21 MR. RINKER: Assuming that there was an actual
22 transfer of title to the catalogues, which I mentioned
23 earlier is still in dispute, transfer of title to Holmes
24 prior to delivery to the particular residents, any of those
25 states, assuming a sale had been completed there, could

1 have imposed a sales tax, but all of those states happen
2 to have exemptions for printed materials. All those states
3 also happen to have exemptions from their sales tax for
4 merchandise that is sent outside of the state or is intended
5 for distribution outside of the state, so presumably those
6 states could have a right to tax the catalogues, but they
7 chose not to.

8 QUESTION: Yes, but why don't you answer the
9 Chief Justice's question?

10 MR. RINKER: As to which one has the closest
11 contact?

12 QUESTION: Yes.

13 MR. RINKER: The one that has the closest due
14 process contact with the State of Louisiana is Holmes, but
15 I think the problem is, we are trying to mix two different
16 concepts, the due process concept versus the interstate
17 commerce clause concept.

18 QUESTION: Mr. Rinker, does it make any difference
19 to you -- from your response to the questions I gather
20 it doesn't -- that the tax is not upon the activity but
21 upon the property?

22 MR. RINKER: It --

23 QUESTION: I mean, so long as the activity would
24 justify a tax on the activity we can assume that the tax is
25 a tax on the activity as opposed to a tax on the property,

1 which is what it is? Is that right?

2 MR. RINKER: In brief, our argument is that since
3 there are no activities by Holmes within the State of
4 Louisiana, activities being those types of activities similar
5 to the ones that this Court has addressed in its previous
6 decisions after Complete Auto, that in fact there are no
7 activities, and because of that the tax must be imposed on
8 the goods.

9 QUESTION: But you concede that if there is an
10 activity that could be taxed as an activity, then this tax,
11 even though it is not a tax on an activity but simply a
12 property tax, must be upheld under the commerce clause?

13 MR. RINKER: Assuming there is an activity
14 which has sufficient connexity and sufficient operating
15 incidences under the state statute which requires
16 distribution, then it would be subject to tax. That's
17 correct.

18 But we are saying that there are no activities
19 in the State of Louisiana which subject the catalogues
20 to being taxed. The incidental activities that have been
21 referred to by the various Justices, such as placing an
22 order, are not operational in the sense that there is no
23 actual transportation by Holmes in the State of
24 Louisiana. There is no mining by Holmes. There is no
25 collection of a use tax obligation on the citizens who

1 actually receive and do use the catalogues. And because
2 of that we say that there is no activity in the State of
3 Louisiana upon which the state can assess its tax.

4 QUESTION: Mr. Rinker, let me ask you a question,
5 if I may. Supposing instead of mailing them they had
6 delivered the whole 100 percent of the catalogues to a
7 Louisiana location, then distributed 82 percent to
8 Louisiana residents and 18 percent to Mississippi residents.

9 Could they tax 100 percent of the goods in that
10 event?

11 MR. RINKER: Under existing jurisprudence, yes,
12 Your Honor. All those could be taxed. The reason being is
13 that Holmes took possession and control of the catalogues --

14 QUESTION: There is an activity involving all
15 100 percent.

16 But do you think the state would now claim they
17 could -- say 82 percent now to go Louisiana by mail and 18
18 percent to Mississippi. Would the state claim Louisiana can
19 tax all 100 percent?

20 MR. RINKER: In that particular case I would think
21 Louisiana might try and tax 100 percent. We of course then
22 would argue that these goods were still in the course -- as
23 long as they are not stored for our benefit --

24 QUESTION: You may the same argument you make --

25 MR. RINKER: -- and they are just temporarily

1 stopped over, that they are intended to be continuously
2 in interstate commerce and that that incidental stopover,
3 we will say, to be shifted from a common carrier to the
4 postal service is not sufficient to impose the tax on Holmes
5 of the value of catalogues sent outside of the state.

6 QUESTION: You are going to lose that once you
7 have conceded that so long as there is an activity that
8 the state could place a tax on, and if we find there is
9 such an activity here, it really wouldn't matter where the
10 catalogues were shipped, right? We just look at the whole
11 activity.

12 MR. RINKER: No, Justice Scalia. That is not the
13 case here, because there is -- if the catalogues are
14 shipped to Louisiana and they do sit in a warehouse, for
15 example, before being transshipped, we are engaged in the
16 activity of storage. We are not engaged in any activity
17 like that in the instant case.

18 QUESTION: You would also be engaged in the
19 activity of shipping 82 percent to local residents and 18
20 percent to out of state residents, and your opponent argues,
21 well, this is the -- what you have got here is the
22 functional equivalent of that but you have just used the
23 mails.

24 So they must be claiming the right to tax the 18
25 percent as well as the 82 percent.

1 MR. RINKER: But the state tax statute deals
2 with use, which can be defined as any type of use, including
3 storage. Storage is one element of use. In the case where
4 the catalogues are stored before they are distributed, a use
5 tax can be imposed on Holmes. In the case where there is
6 actual distribution activity, such as in the Complete
7 Auto case, where there were -- the distribution activities
8 involved transportation of a trucking company of particular
9 goods, that activity of distribution is subject to tax.
10 Holmes does not engage in such activities when it is in the
11 state. It simply places an order in a foreign state and
12 requires those catalogues to be sent to particular residents.

13 QUESTION: An order for transportation.

14 MR. RINKER: I beg --

15 QUESTION: An order for transportation.

16 MR. RINKER: And orders the transportation, but
17 does not perform the activities.

18 QUESTION: But if they had done it with their
19 own trucks it would be.

20 MR. RINKER: If they did it with their own trucks?

21 QUESTION: Yes.

22 MR. RINKER: The trucking activity could be taxed,
23 but not necessarily the goods in interstate commerce unless
24 the state tried to tax them because they were storing them --

25 QUESTION: But they could be taxed.

1 MR. RINKER: -- on the trucks.

2 QUESTION: And so to escape the tax you send it
3 by parcel post.

4 MR. RINKER: We didn't do it for that reason,
5 Your Honor, but that is what actually happened in fact.

6 If there are no further questions, I would like
7 to save my remaining time for rebuttal.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Rinker.

9 We will hear now from you, Mr. Pugh.

10 ORAL ARGUMENT OF ROBERT G. PUGH, ESQUIRE

11 ON BEHALF OF THE APPELLEE

12 MR. PUGH: Mr. Chief Justice, and may it please
13 the Court, I am delighted that you asked the trucking
14 question. It was of interest to me to read in one of the
15 dissenting opinions in one of the state court decisions,
16 paraphrasing, Holmes should not be required to have their
17 employees to ride around on the mail trucks.

18 As a matter of fact, what occurred here and so
19 found by the state court was that Holmes distributed the
20 catalogues. The distribution of the catalogues is a use
21 in Louisiana. Louisiana happens to be one of three states
22 that adopts that word, distribution, as it relates to use.

23 I wouldn't suggest for a moment that the word use
24 is not broad enough to include distribution, whether or not
25 it is so spelled out by the state. In this instance it is.

1 QUESTION: Now, does this include -- suppose I
2 am -- well, could you tax the mailman for distributing
3 these catalogues?

4 MR. PUGH: No, Your Honor.

5 QUESTION: You see, the property tax, it is on
6 the catalogues, isn't it? It is either on the purchase or
7 the use of the property, but you have to have a property
8 interest, right?

9 MR. PUGH: It is the use of the property,
10 Your Honor.

11 What happened is, Holmes --

12 QUESTION: Of your own property. If it is
13 somebody else's, if I borrow a neighbor's --

14 MR. PUGH: It is Holmes' property.

15 QUESTION: If I borrow a neighbor's catalogue and
16 read it, you wouldn't hit me with a use tax, would you?

17 MR. PUGH: No, sir. It is Holmes' catalogues.
18 They bought them. They paid for them. They told them
19 precisely who to send them to. They took all of the charge
20 customers to send them to them. That is where the list
21 came from, the charge customers. They admitted during the
22 trial that it is the charge customers who are more likely
23 to use the catalogues.

24 In addition to that, the catalogue itself spells
25 out in the centerfold, it gives you an 800 number. It gives

1 you all of the phone numbers for each of the local stores.
2 In addition to that, the telephone directory, which is an
3 exhibit here to the extent applicable for Holmes, has got
4 a mail order number. How can you mail order what you don't
5 know is not mail orderable?

6 In this instance, you find out by reading the
7 catalogue. It tells you if you want to ask further
8 questions to call up on it.

9 Now, Holmes owned the catalogue.

10 QUESTION: Mr. Pugh --

11 MR. PUGH: It was so found by the state court
12 below.

13 QUESTION: Mr. Pugh?

14 MR. PUGH: Yes, Your Honor.

15 QUESTION: If Holmes owned the catalogues in
16 Louisiana, did they also own the catalogues that were sent
17 to the Mississippi customers?

18 MR. PUGH: Well, Holmes would own those catalogues
19 just the same as if they had been sent in Louisiana, but to
20 answer the Court --

21 QUESTION: Could Louisiana impose a use tax on
22 the 18 percent that went to out of state customers?

23 MR. PUGH: No, sir, and would not attempt to.

24 QUESTION: Could Mississippi impose a use tax on
25 the 18 percent that went to Mississippi?

1 MR. PUGH: It could if it chose to do so,
2 Your Honor.

3 QUESTION: You think it could.

4 MR. PUGH: It may be that 18 percent is de
5 minimis. I am not sure. There were --

6 QUESTION: Well, it is a fifth of the total
7 amount. I guess it is worth fighting about. You think an
8 out of state -- in other words, if Holmes' stores were
9 located in Mississippi and all of the management went in
10 Mississippi, and the catalogues just happened to be sent
11 to Louisiana customers, you would stil have as strong
12 a case?

13 MR. PUGH: Well, I would have a case insofar as
14 Louisiana is concerned.

15 QUESTION: Right.

16 MR. PUGH: In fact, I've got a strong case
17 because the other --

18 QUESTION: But you do not rely on the fact that
19 the stores are located in Louisiana?

20 MR. PUGH: I rely on the fact that the stores are
21 located in Louisiana to assist in the nexus question, and
22 in addition to that the whole purpose --

23 QUESTION: Do you think you need that? Do you
24 think you need the stores -- because that is why I asked you
25 about Mississippi.

1 MR. PUGH: No, sir, I don't think I need the
2 stores. But I've got 13 of them there, and I've got 5,000
3 employees. I've got half a million --

4 QUESTION: But if we are focusing on the activity -

5 MR. PUGH: The activity is the distribution.

6 QUESTION: -- and their ownership of the catalogues
7 just before they are turned over to their customers --

8 MR. PUGH: Yes, sir.

9 QUESTION: -- it would be the same case, as I
10 understand it, if the stores were located in Mississippi.

11 MR. PUGH: As I can appreciate what the Court is
12 saying, I do not disagree with what the Court is saying. I
13 do say in this instance, and of course we don't have to
14 reach the Mississippi problem --

15 QUESTION: So that if any manufacturer mails
16 something to a customer in another state, even free, the
17 manufacturer can be taxed on that item in the other state,
18 or causes it to be mailed by a third party.

19 MR. PUGH: Well, I guess we had better decide now
20 whether we are talking about who is going to collect the
21 tax. In this instance Holmes is in Louisiana. They argue
22 that they don't have to pay the tax because they don't have
23 somebody up in New York that is collecting the use tax for
24 them, and of course that doesn't make a lot of sense in that
25 Holmes is in Louisiana, Holmes is directly responsible for

1 the tax and should be obligated to pay it, and we would
2 insist to the Court or suggest to the Court that they ought
3 to be liable for it.

4 QUESTION: We are concerned about who else can
5 be hit with this kind of tax. I assume that under the
6 theory that the state is running here, anybody who goes to
7 a mass mailing firm and gets, you know, has them get a list
8 of customers, every time you send a brochure to a customer
9 in Louisiana, you are telling me that the Louisiana courts
10 hold that I own the brochure, and I am using it when I get
11 it mailed to a customer, and therefore I can be taxed on
12 that? Isn't that -- that is the logic of the position the
13 state is making, isn't it?

14 MR. PUGH: That could certainly be construed
15 under the position that we are taking.

16 QUESTION: Yes. Well, that is a good source
17 of tax revenue.

18 QUESTION: What case of ours is the strongest
19 support that you can cite?

20 MR. PUGH: Well, the strongest support for the
21 position that I am primarily taking in this case is the one
22 that was handed down, Tyler Pipe, last year, when the
23 suggestion was made concerning the -- excuse me -- here it
24 is, taxpayers are better -- to establish and maintain a
25 market in this state for the sales. That is exactly what

1 they are doing. They are maintaining a market in the State
2 of Louisiana for their sales by the use of the catalogues.
3 Precisely what they are doing. In addition to that, the
4 National Geographic case speaks in terms of being, whether
5 or not it is disassociated from the local business. That is
6 the last thing this is, is disassociated from the local
7 business. It is actually promoting the local business for
8 Holmes. And that's the purpose of the catalogues.

9 QUESTION: More than that, you are promoting
10 out of state business. I mean, what is the difference? If
11 you own the brochure, as you say, you automatically own it
12 if you have ordered it.

13 MR. PUGH: You own it.

14 QUESTION: And if you are distributing it in
15 Louisiana that is enough.

16 MR. PUGH: It is. And that's what they're
17 doing.

18 Now, turning back, if I may for a moment, to the
19 state court in Louisiana ownership does not require that
20 there be possession of the item itself. You may own some-
21 thing in Louisiana without possessing it. In addition to
22 that, and so found by the lower court, in addition to that
23 these were gifts, and the gifts are not completed until they
24 are accepted by the resident and either kept or thrown away.

25 They belong to Holmes from the time and during the

1 processing, during the mailing, during their receipt in
2 Louisiana they continued to belong to Holmes. As Justice
3 O'Connor says and counsel acknowledged, Holmes is a dealer,
4 a dealer who imports or causes to be imported tangible
5 personal property into Louisiana for distirubtion is liable
6 for the tax, precisely what took place here.

7 Distribution, as I have indicated earlier, is a
8 use that is taxable. Distinguishing between the two, there
9 was some question, I believe, earlier concerning the sale or
10 use tax. The basic distinction as I appreciate between the
11 two is, a sales tax is on the freedom of purchase, and a
12 use tax in turn is on the enjoyment of that purchase. That
13 is precisely what Holmes was doing. They were enjoying the
14 catalogues that they purchased for the purpose of furthering
15 their business.

16 Did you have a question, Your Honor? Excuse me.
17 I saw you move your hand, and I thought you were about to --

18 QUESTION: Don't provoke me, Mr. Pugh.

19 (General laughter.)

20 MR. PUGH: You gave me enough trouble earlier,
21 Your Honor, I'll tell you.

22 As I have indicated, these catalogues were designed
23 by Holmes, admittedly by their own employess for the
24 purpose of promoting their sales, for the purpose of
25 generating business. They did in fact generate business.

1 They caused people to come into the stores. For that reason
2 we believe that Holmes is liable for the tax, and I do not
3 believe I need any additional time unless I may answer any
4 questions the Court might have.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Pugh.

6 MR. PUGH: Thank you.

7 CHIEF JUSTICE REHNQUIST: Mr. Rinker, you have
8 three minutes remaining.

9 ORAL ARGUMENT OF ANDREW RINKER, JR., ESQUIRE

10 ON BEHALF OF THE APPELLANT - REBUTTAL

11 MR. RINKER: Mr. Chief Justice, and may it please
12 the Court, in focusing again on Justice O'Connor's question
13 about the fact that Holmes caused the importation of these
14 catalogues, can Holmes be subject to the tax for causing
15 this importation?

16 The Louisiana use tax imposes a tax on the use
17 which defines certain terms, including the term distribution
18 and storage. Causing importation is not --

19 QUESTION: Suppose Holmes had ordered 3,000
20 travel alarm clocks to give to their best customers, and
21 they told -- they ordered them from out of state and gave
22 the names and addresses of the customers they wanted the
23 clocks mailed to.

24 Now, do you suppose -- couldn't the state charge
25 Holmes a use tax on those clocks?

1 MR. RINKER: Justice White, no, they could not,
2 because Holmes does not exercise any power or control over
3 those clocks once they come into the taxing state. A use
4 tax is on the value of the use of tangible personal property.
5 Holmes does not actually use those clocks in the State of
6 Louisiana.

7 QUESTION: They certainly made them available
8 to their customers.

9 MR. RINKER: It's true, but once those clocks
10 go into the hands of the customer, they are not in Holmes's
11 hands, and a use tax on Holmes cannot be imposed.

12 QUESTION: Say they ordered 3,000 alarm clocks.
13 They send 1,500 of them to us, send the other 1,500 to the
14 following people. They intend to give the 1,500 delivered
15 to them to other people. They can be taxed on the 1,500
16 but not the other.

17 MR. RINKER: Yes, because there is a use within
18 the taxing state. We exercise control, possession and
19 control over those clocks. We can do with them whatever we
20 want within the State of Louisiana, and those would be
21 subject to the use tax. The ones that are mailed, however,
22 are not subject to tax because we do not exercise any power
23 over those clocks within the State of Louisiana incident
24 to any ownership.

25 Power and control over the clocks in the State of

1 Louisiana is essential to impose the tax. The state statute
2 uses the words distribution. Distribution is not simply
3 causing something to be imported. Distribution involves the
4 actual deliverly.

5 QUESTION: But the construction of the state
6 statute is not for us. The Louisiana court has held the
7 state statute does cover this.

8 MR. RINKER: In determining the operational
9 incidence of the statute, you are correct, the state court
10 does determine that. This court, however, has the preroga-
11 tive of determining whether or not the incidence upon which
12 the state court imposes the tax does violate the commerce
13 clause, and we are saying that this -- the importing aspect
14 of distribution is not one of the activities which the state
15 has the power to tax under the commerce clause because in
16 that instance there is no activity within the State of
17 Louisiana by Holmes which can be taxed.

18 Remember, the key word is activity by Holmes
19 with respect to those clocks within the State of Louisiana.
20 I would like to point out also in my closing moments that
21 the severe burdens that might be caused by following the
22 state's position in this case certainly, if a taxpayer can
23 be taxed simply by having something mailed into the state,
24 provided that taxpayer has some minimum contacts with the
25 state, then all the materials mailed to particular residents

1 will be subject to tax in the hands of the taxpayer. For
2 example, Red Cross mailings. The Red Cross organization has
3 offices in virtually every state. If they send out from
4 Washington, D.C., or from the national or international
5 headquarters notices soliciting funds for particular purposes,
6 the Red Cross is using property within the State of
7 Louisiana, and to the extent it is using property under the
8 state's theory, the value of those pieces of paper in a
9 state are then subject to tax.

10 This tax would also impact universities trying
11 to solicit particular funds for their operations. You say,
12 well, there is no contact between a university, but I think
13 that you will find recruiting --

14 CHIEF JUSTICE REHNQUIST: Your time has expired,
15 Mr. Rinker.

16 MR. RINKER: Oh, sorry. Thank you, Your Honor.

17 CHIEF JUSTICE REHNQUIST: The case is submitted.

18 (Whereupon, at 1:39 o'clock p.m., the case in the
19 above-entitled matter was submitted.)
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REPORTER'S CERTIFICATE

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DOCKET NUMBER: 87-267
CASE TITLE: Holmes v. McNamara
HEARING DATE: March 22, 1988
LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence
are contained fully and accurately on the tapes and notes
reported by me at the hearing in the above case before the
Supreme Court of the United States.

Date: 3/28/88

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