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by Robert J. Firestone

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Does the Ohio CAT Violate the Commerce Clause?

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In this article, Firestone argues that the Ohio Supreme Court erred in sustaining the state's commercial activity tax in *Crutchfield Corp. v. Testa* because the tax fails to satisfy commerce clause requirements and creates an unreasonable risk of double taxation.

Business gross receipts taxes on the interstate sale of goods present the highest risk of multiple taxation when compared with other taxes. Both the goods' state of origin and the destination state have equal jurisdiction to tax the interstate sale. To limit the risk of multiple taxation, the U.S. Supreme Court has consistently applied stricter nexus requirements to business gross receipts taxes under the commerce clause. The Ohio Supreme Court's decision in *Crutchfield Corp. v. Testa*,[1] which validated Ohio's economic nexus standard under its commercial activity tax (CAT) when applied to an interstate seller of goods, conflicts with 80 years of dormant commerce clause case law.

Economic or due process nexus is inadequate to limit the risk of double taxation under a business gross receipts tax. To establish "substantial nexus" under a business gross receipts tax, the state must show that the seller has a physical place of business in the state (that may consist of as little as one independent contractor residing in the state) through which it is engaged in substantial sales-generating activities.

[1] Slip op. 2016, Ohio 7760 (Nov. 17, 2016).

Business Gross Receipts Tax Nexus

The seminal case defining the nexus standard for business gross receipts taxes on the sale of goods is *J.D. Adams Manufacturing Co. v. Storen.*[2] J.D. Adams maintained its home office and manufactured machinery and equipment in Indiana. It sold some of its machinery and equipment in other states, where orders were taken and forwarded to J.D. Adams's Indiana office for approval and shipment from its Indiana factory. Indiana imposed an unapportioned gross receipts tax on J.D. Adams's business, taxing all of its gross receipts — both its in-state sales of goods and its sales of goods in other states. The U.S. Supreme Court held that Indiana's tax created an unacceptable risk of multiple taxation:

> The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids.[3]

[2] 304 U.S. 307 (1938).

[3] *Id.* at 311.

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J.D. Adams's concern with the risk of multiple taxation instead of actual multiple taxation[4] reflects a modern view of the dormant commerce clause[5] and is indistinguishable from the Court's current internal consistency requirement: "To be internally consistent, a tax must be structured so that if every state were to impose an identical tax, no multiple taxation would result."[6] In effect, *J.D. Adams* raised the same hypothetical, positing that if the states where J.D. Adams's products were sold enacted the same tax as Indiana, where the goods were manufactured, an interstate sale would be subject to "the risk of a double tax burden."

Although *J.D. Adams* considered the multiple taxation issue from an apportionment standpoint, it presupposed that the states where J.D. Adams's manufacturing equipment was sold and delivered had sufficient nexus with the sale for dormant commerce clause purposes to subject the sale to tax. Indiana — where the interstate orders were approved, and where interstate shipments were made — also arguably had jurisdiction to tax the interstate sale, but *J.D. Adams* held that only the states where the goods were sold and delivered had sufficient nexus with the sale for commerce clause purposes.

J.D. Adams did not address the facts to establish sufficient nexus with the sale. Was the mere delivery of goods to a customer within the state sufficient? Was something more than mere shipment or delivery required, such as sending in traveling salesmen or maintaining an office? Was passage of title an important factor? *J.D. Adams* did not say. But if shipment or delivery alone was sufficient to tax the sale, Indiana would have had an even stronger connection to the sale, because Indiana was both the place of shipment and where the orders were approved. However, *J.D. Adams* held that that was insufficient to tax the sale in Indiana. The risk of double taxation would not be eliminated by treating the act of shipment or of delivery alone as sufficient to create a nexus to the sale.

In *McGoldrick v. Berwind-White Coal Mining Co.*,[7] Berwind-White mined coal in Pennsylvania and delivered it to customers in New York City, which imposed sales tax on the sale. Berwind-White maintained a sales office in New York City, and all of the sales contracts subject to the city sales tax were entered into in the city; in other words, they were solicited and approved by the New York City sales office.[8]

The Supreme Court held that New York City did not violate the commerce clause by subjecting the interstate sale to sales tax. In distinguishing the unapportioned gross receipts tax at issue in *J.D. Adams*, the Court found that the "delivery of the goods within the state upon their purchase for consumption" in *Berwind-White* was a unique local activity that no other state could reach, obviating any risk of multiple taxation.[9]

The uniqueness of the taxable event of delivery, however, does little to reduce the risk of multiple taxation. If the local delivery of the coal was the only aspect of *Berwind-White* that distinguished it from *J.D. Adams*, it is difficult to understand why both Pennsylvania, where the coal was shipped, and New York City, where the coal was delivered, did not have equally meritorious claims to tax the interstate sale. The distinction between shipment and delivery seems a slim thread by which to determine either state's nexus to the sale, and

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[4] *Armco Inc. v. Hardesty*, 467 U.S. 638, 644-645 (1984), made clear that it is no longer incumbent on a taxpayer to prove that it was actually taxable in more than one state on a particular transaction, and that a court must consider only the risk of multiple taxation:

> Appellee suggests that we should require Armco to prove actual discriminatory impact on it by pointing to a State that imposes a manufacturing tax that results in a total burden higher than that imposed on Armco's competitors in West Virginia. *This is not the test.* In *Container Corp.*, 463 U.S. 159, 169 (1983), the Court noted that a tax must have 'what might be called internal consistency — that is, the [tax] must be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade . . . Any other rule would mean that the constitutionality of West Virginia's tax laws would depend on the shifting complexities of the tax codes of the 49 other states, and the validity of the taxes imposed on each taxpayer would depend on the particular other states in which it operated. (Emphasis added.)

[5] *See Quill Corp. v. North Dakota*, 504 U.S. 298, 313 (1992) ("Thus, the 'substantial-nexus' requirement is not, like due process' 'minimum-contacts' requirement, a proxy for notice, *but rather a means for limiting state burdens on interstate commerce*." (Emphasis added.))

[6] *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989).

[7] 309 U.S. 33 (1940).

[8] *Id.* at 44.

[9] *Id.* at 58.

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formed the grounds for Chief Justice Charles Evans Hughes's dissent.[10] He reasoned that if New York could tax the delivery of the coal, then by the same rationale Pennsylvania could tax its shipment: "If, because of the delivery in New York, that State can tax the gross receipts from the sale, why cannot Pennsylvania, by reason of the shipment of the coal in that State, tax the gross receipts there?"[11]

Hughes's dissent in *Berwind-White* is supported by the stated rationale for the decision: New York City's nexus to the interstate sale turned on the "unique" event of delivery — an event that could not be reached by any other state. That same rationale, however, would have effectively overruled *J.D. Adams* by allowing the state from which the goods were shipped to also tax the interstate sale.

Berwind-White's stated rationale, however, cannot be removed from its context within the Court's decision. Berwind-White Coal Mining Co. also maintained a sales office in New York City, from which it solicited and approved all the sales contracts subjected to the city sales tax. The sales, therefore, were made out of the local sales office and were consummated by the local delivery of the coal that constituted performance under the sales contracts.[12] The sales subject to the city sales tax were consummated in New York City through the city's sales office. New York City had a sufficient nexus to the sale to satisfy *J.D. Adams*'s commerce clause concerns for the risk of multiple taxation, which today we call a substantial nexus.[13]

Reading *J.D. Adams* and *Berwind-White* together, the state of origin — where orders for sales are approved and from where the goods are shipped — does not have sufficient nexus for commerce clause purposes to tax an interstate sale if the sale is made in another state. If approval of the sale, shipment of the goods, and delivery of the goods are insufficient to create nexus to the sale under *J.D. Adams* and *Berwind-White*, what is the determinative fact creating nexus to an interstate sale of goods? The only fact remaining is Berwind-White's maintenance of a New York City sales office through which the sales were made. *Berwind-White* leaves open the question whether the in-state presence of traveling salesmen, sent into the taxing state from an out-of-state sales office to solicit orders, is sufficient to create nexus to tax the sale. Before we move on to our next case to address that question, one further point in *Berwind-White* is worth considering.

The New York City sales tax statute in *Berwind-White* defined a taxable sale as "any transfer of title or possession, or both."[14] Although either the transfer of title to the coal or possession would have constituted a taxable event under the statute, the Court nevertheless held that transfer of title was irrelevant when determining New York City's nexus to the sale for commerce clause purposes, and that the transfer of possession was the relevant taxable event. According to the Court, "*transfer of possession to the purchaser* within the state . . . *is the taxable event regardless of the time and place of passing title*."[15]

In *McLeod v. Dilworth*,[16] Dilworth, a Tennessee manufacturer, shipped its goods into Arkansas. Dilworth maintained its home office in Tennessee, where it approved orders for the sale of its goods. Dilworth placed the goods aboard a common carrier in Tennessee under contractual terms that had title passing in Tennessee. Like *Berwind-White*, Arkansas sought to impose sales tax at the point of delivery of the goods to customers — the consumers of the goods — in Arkansas. As distinguished from *Berwind-White*, however, Dilworth had "neither sales office, branch plant, nor any other place of business in [Arkansas].

[10] *Id.* at 64: "It is urged that there is a taxable event within the State. That event is said to be *the delivery of the coal*. But how can that event be deemed to be taxable by the State? The delivery is but the necessary performance of the contract of sale. Like *the shipment from the mines*, it is an integral part of the interstate transaction." (Emphasis added.)

[11] *Id.* at 68.

[12] *Oklahoma v. Jefferson Lines*, 514 U.S. 175, 189 (1995) ("but sales with at least partial performance in the taxing State justify that State's taxation of the transaction's entire gross receipts in the hands of the seller").

[13] *Complete Auto Transit v. Brady*, 430 U.S. 274 (1974).

[14] *Berwind-White*, 309 U.S. at 43.

[15] *Id.* at 49 (emphasis added). It is unreasonable to assume that the Court ignored the plain language of the sales tax statute defining "transfer of title" as a taxable event, language it had recited earlier in the decision. It is more plausible that the Court was defining a constitutional standard for nexus based on the more objective fact of delivery, as compared with the less certain transfer of title, the meaning of which is dependent on legal interpretation and contract-specific terms.

[16] 322 U.S. 327 (1944).

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Orders for goods come to Tennessee through solicitation in Arkansas by traveling salesmen domiciled in Tennessee."[17]

The Supreme Court found *Berwind-White* controlling: "The differentiations made by the court below between this case and the *Berwind-White* case are relevant and controlling." In comparing the two cases, it said, "The distinguishing point between the *Berwind-White Coal* case and the cases at bar is that, in the *Berwind-White Coal* case, the corporation maintained its sales office in New York City, took its contracts in New York City, and made actual delivery in New York City."[18] The Court reasoned that those facts comported with "practical notions" of a sale.

Unlike *Berwind-White*, in *Dilworth* "the offices are maintained in Tennessee, the sale is made in Tennessee, and the delivery is consummated either in Tennessee or in interstate commerce, with no interruption from Tennessee until delivery to the consignee essential to complete the interstate journey."[19] One critical fact distinguishing the cases was Berwind-White's maintenance of a sales office in New York City through which it "took its contracts." In *Berwind-White*, the sales contracts were solicited and approved out of the New York City office. In *Dilworth*, the sales contracts were solicited by traveling salesmen "domiciled in Tennessee" (they did not live in Arkansas) and connected to the Tennessee home office that approved the sales contracts. There was no physical place of business in Arkansas through which the sales were made, the sales having been generated by salesmen from the Tennessee home office. Would this case have come out differently if the salesmen were domiciled in Arkansas? We saw in *J.D. Adams* that approval and shipment from an out-of-state home office was not sufficient to provide nexus to the sale there. We will later examine *General Motors Corp. v. Washington*,[20] *Tyler Pipe Industries Inc. v. Washington*,[21] and other cases[22] to see how the domicile of the salesmen is treated as a fixed place of business in the taxing state, equivalent to an office, to create nexus for an interstate sale. The salesmen's domicile, however, was deemed a sufficiently critical fact worthy of mention by the Court, together with the other facts it relied on.

After the Supreme Court's reference to Dilworth's sales office and sales contracts, the key facts on which *Berwind-White* ultimately turned, the remainder of the Court's reasoning is less clear. What did it mean by "the sale is made in Tennessee" or "the delivery is consummated . . . in Tennessee"?[23]

For its conception of sale, the Court also appears to have given weight to the place where passage of title to the goods occurred: "We would have to destroy both business and legal notions to deny that, under these circumstances, the sale — the transfer of ownership — was made in Tennessee."[24]

Recall from *Berwind-White*, which *Dilworth* expressly followed, that passage of title was deemed irrelevant to establishing the place of sale. Transfer of possession or delivery was the unique event establishing nexus of the sale to New York City. Nowhere does *Dilworth* suggest that it was overruling any part of *Berwind-White*. Therefore, the fact that the transfer of ownership took place in Tennessee adds nothing to the outcome of this case, except maybe to underscore that the Tennessee seller, which made the sale out of its Tennessee home office with Tennessee-based salesmen, wanted to limit its contractual performance and its risk of loss to Tennessee.

When reading *Dilworth* or any cases preceding *Complete Auto*, it is equally important to ignore the antiquated commerce clause language describing when interstate commerce begins and ends, such as "and the delivery is consummated either in Tennessee or in interstate commerce, with no interruption from Tennessee until delivery to the consignee essential to complete the interstate journey."[25] The Court regularly cites cases from before *Complete Auto*, too numerous to name, containing that same antiquated language — and

[17] *Id.* at 328.

[18] *Id.* at 329

[19] *Id.*

[20] 377 U.S. 436 (1964).

[21] 483 U.S. 232 (1987).

[22] *Standard Pressed Steel v. Department of Revenue*, 419 U.S. 560 (1975).

[23] *Dilworth*, 322 U.S. at 329.

[24] *Id.* at 330.

[25] *Id.* at 329.

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so long as the cases share core values with current case law, they remain good law. *Dilworth* is no less concerned with the risk of multiple taxation than *Berwind-White*, the case on which it squarely relied. Under *Dilworth*'s clear rationale, if Arkansas could tax the interstate sale, so could Tennessee. The risk of double taxation was patent.

Both *Berwind-White* and *Dilworth* required an in-state office or other physical place of business to avoid the risk of double taxation. But those cases involved imposing a sales tax on the in-state consumer, not the out-of-state seller. Gross receipts taxes, imposed on the seller, have a higher risk of multiple taxation. In describing the heavier burden placed on states to prove nexus under a gross receipts tax, the Court has put to one side the sales and use tax cases: "Of course, a state imposing a sales or use tax can more easily meet this burden, because the impact of those taxes is on the local buyer or user. Cases involving them are not controlling here, for this tax falls on the vendor."[26] The clear import of this statement is that gross receipts taxes require more, not less, than sales taxes to establish nexus. Therefore, if the presence in the destination state of traveling salesmen domiciled outside the state was insufficient to establish nexus of the sale to the destination state in *Dilworth*, which held that only the maintenance of an office or other physical place of business sufficed, then a gross receipts tax must — at a minimum — meet that same nexus standard.

In *General Motors Corp. v. Washington*,[27] the Supreme Court considered whether General Motors had a sufficient presence in Washington to support the imposition of a gross receipts tax on its sales within the state. Before proceeding with its analysis, the Court explained the higher risk of multiple taxation posed by gross receipts taxes compared with income and other taxes:

> However, local taxes measured by gross receipts from interstate commerce have not always fared as well. Because every State has equal rights when taxing the commerce it touches, there exists the danger that such taxes can impose cumulative burdens upon interstate transactions which are not presented to local commerce.[28]

General Motors maintained extensive operations in Washington through its Chevrolet, Pontiac, and Oldsmobile sales divisions, as well as its General Motors parts division. The bulk of those sales operations were not conducted through offices in Washington, but through employees, district managers, and service representatives who regularly visited customers and who worked out of their homes in Washington. General Motors employed about 20 people in its sales divisions residing in Washington, and about 20 employees in its parts division residing in Washington who operated its Washington warehouses. The Court found that the sales and service activities performed by the resident employees of its sales divisions were responsible for generating General Motors sales in Washington: "These divisions had district managers, service representatives and other employees who were residents of the State and who performed substantial services in relation to General Motors' functions therein, particularly with relation to the establishment and maintenance of sales, upon which the tax was measured."[29]

Although General Motors' resident sales employees did not work out of a Washington sales office, the Court concluded that was irrelevant to establishing substantial nexus in Washington: "We place little weight on the fact that these divisions had no formal offices in the State, since, in actuality, the homes of these officials were used as corporate offices. Despite their label as 'homes,' they served the corporation just as effectively as 'offices.'"[30]

Employees residing in the state — who are in a position to develop close, ongoing relationships in the local market and to significantly influence the volume of sales there — are, under *General Motors*, just as effective as the maintenance of an office or other physical place of business. Referring back to *Dilworth*, if the salesmen there

[26] *Norton v. Illinois Department of Revenue*, 340 U.S. 534, 537 (1951).

[27] 377 U.S. 436 (1964).

[28] *Id*. at 440.

[29] *Id*. at 447.

[30] *Id*.

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had been domiciled in Arkansas, as the Court alluded, the case would have likely come out differently under the *Dilworth* Court's reasoning — certainly after *General Motors*.

The risk of double taxation under a gross receipts tax was no less present in *General Motors* than in its predecessor, *J.D. Adams*. The nexus requirement is thus a commerce clause issue rather than an issue of due process. Nevertheless, the Court seems to use due process and commerce clause concepts interchangeably in *General Motors*. The Court cleared up this confusion in *Quill v. North Dakota*,[31] acknowledging that it had often blurred the distinction between the commerce and due process clauses in prior cases: "Thus, although we have not always been precise in distinguishing between the two, the Due Process Clause and the Commerce Clause are analytically distinct." The *Quill* Court squarely placed the substantial nexus requirement and the issue of "multiple taxation" under the commerce clause.[32]

For gross receipts tax purposes, substantial nexus is determined less by the size of a taxpayer's physical place of business in the taxing jurisdiction than by its contribution to generating the taxpayer's sales in that jurisdiction. In *Standard Pressed Steel v. Department of Revenue*,[33] the taxpayer, which sold aerospace fasteners, had one employee in Washington: Martinson, an engineer who worked out of his Washington home. Martinson advised Boeing, the taxpayer's major Washington customer, on its anticipated requirements for the taxpayer's aerospace fasteners and helped troubleshoot problems with orders. Martinson, however, did not solicit orders for the fasteners, all of which were forwarded directly by the customer to the taxpayer's out-of-state sales office. The taxpayer maintained no office or any other physical place of business in Washington besides Martinson.[34]

The taxpayer argued that the presence of a single employee was too thin to create nexus in Washington. The Court responded: "We think the question in the context of the present case verges on the frivolous. For appellant's employee, Martinson, with a full-time job within the State, made possible the realization and continuance of valuable contractual relations between appellant and Boeing."[35]

Similar to *General Motors*, in *Standard Pressed Steel* an employee residing in Washington was deemed the equivalent of an office — creating a substantial nexus between the taxpayer's sales and Washington so long as the employee's efforts and ongoing relationship with the customer significantly contributed to establishing a market for the goods in Washington. From those cases we learn that for an interstate seller of goods to have substantial nexus under a gross receipts tax, there must be a physical place of business in the taxing state through which the seller (through its employees) engages in substantial in-state market-generating activities.

In *Tyler Pipe v. Washington*,[36] the Supreme Court applied this nexus standard for imposing a gross receipts tax on an interstate sale of goods. Tyler sold a large volume of its products in Washington, but manufactured and shipped them outside the state. "Tyler maintains no office, owns no property, and has no employees residing in the State of Washington. Its solicitation of business in Washington is directed by executives who maintain their offices out-of-state *and by an independent contractor located in Seattle*."[37] The Court found that the independent contractor sales representatives, who resided in Washington, "engaged in substantial activities that helped Tyler to establish and maintain its market in Washington"; those activities included forming valuable long-term relationships with customers as well as improving name recognition, market share, and goodwill.[38] The sales representatives also provided Tyler with

[31] 504 U.S. 298, 305 (1992).

[32] *Id.* at 309 and 312.

[33] 419 U.S. 560 (1975).

[34] *Id.* at 561.

[35] *Id.* at 562.

[36] 483 U.S. 232 (1987).

[37] *Id.* at 249 (emphasis added).

[38] *Id.* at 249-250: "The sales representatives acted daily on behalf of Tyler Pipe in calling on its customers and soliciting orders. They have long-established and valuable relationships with Tyler Pipe's customers. Through sales contacts, the representatives maintain and improve the name recognition, market share, goodwill, and individual customer relations of Tyler Pipe."

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valuable local market information that enabled Tyler to compete in that competitive market.[39] Citing *Scripto v. Carson*,[40] the Court found it irrelevant that those valuable market-generating activities were conducted by independent contractors rather than employees or agents.[41] The Court held that "the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales."[42]

Tyler Pipe, like *General Motors* and *Standard Pressed Steel*, satisfied the two-part test for nexus under a gross receipts tax on the sale of goods: It maintained a physical place of business in Washington through its resident sales representatives — through which it engaged in substantial sales-generating activities. It cannot be overemphasized that *Tyler Pipe* preceded the due process ruling in *Quill* by five years and, like *Standard Pressed Steel*, blurred the distinction between due process and the commerce clause when describing the requirements for substantial nexus.[43] The line of cases beginning with *J.D. Adams*, however, were uniformly concerned with the risk of multiple taxation. Where two states — that is, the place of shipment and the place of delivery — have equal jurisdiction to tax an interstate sale of goods for due process purposes, a substantial nexus to the sale reduces or eliminates the risk of taxation by both states. When the seller maintains a physical place of business in the destination state, *J.D. Adams* holds that the commerce clause prevents the state of origin of the goods from taxing the interstate sale.

An economic nexus standard under a gross receipts tax, therefore, violates the dormant commerce clause. The "fair notice" concerns of the due process clause, establishing jurisdiction to tax, are not sufficient to prevent multiple taxation. As *Dilworth* demonstrates, for a state to impose a gross receipts tax on an interstate sale of goods, it must establish that the seller has more than the *Quill* physical presence standard.[44] Gross receipts taxes require a physical place of business in the taxing state and, unlike use taxes, the activities conducted by the seller at the physical place of business must be related to the in-state sales.[45]

Crutchfield Misapplies Case Law

The Ohio Supreme Court's *Crutchfield Corporation v. Testa*[46] decision misapplies the case law applicable to gross receipts taxes. The taxpayer in *Crutchfield* shipped electronic products into Ohio from outside the state. It "employs no personnel in Ohio, and maintains no facilities in Ohio. The business Crutchfield does [in Ohio] consists solely of shipping goods from outside the state to its customers in Ohio using the United States Postal Service or common-carried delivery services."[47] Crutchfield solicited Ohio customers entirely through the internet and telephone sales orders, and had in excess of $500,000 in Ohio sales annually. The supreme court held that those facts were sufficient to establish that Crutchfield had economic nexus, which in turn was sufficient for Ohio to impose the CAT (a business gross receipts tax) on Crutchfield's interstate sales.

In concluding that economic nexus is sufficient to create substantial nexus to an interstate sale, the state supreme court discounted the precedential effect of *Dilworth*, *Norton*, *General Motors*, and *Standard Pressed Steel* as "case law that embodies the since-discarded theory of interstate-commerce immunity from state taxation."[48] Thus, the court effectively overruled all of those cases

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[39] *Id.*

[40] 362 U.S. 207 (1960).

[41] *Tyler Pipe*, 483 U.S. at 250.

[42] *Id.*

[43] As *Quill* explained, a state may have jurisdiction to tax an interstate sale, but the commerce clause may prevent it from taxing the sale because of its burden on commerce. *Quill*, 504 U.S. at 305.

[44] *Quill*, 504 U.S. at 317-318.

[45] *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 560-562 (1977) (distinguishing gross receipts taxes and holding that, for a state to impose a use tax collection duty on a remote seller, a state need not show that the seller's physical presence in the state is related to the interstate sales).

[46] Slip op. 2016-Ohio-7760 (Ohio 2016).

[47] *Crutchfield*, at 1.

[48] *Id.* at 12.

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and their progeny, even though they continue to be cited as authority by the U.S. Supreme Court.[49] In *National Geographic Society v. California*, a post-*Complete Auto* case, the Court underscored the risk of double taxation in cases like *Dilworth* that is not present in the use tax collection cases.[50]

More importantly, those cases and their progeny rest squarely on commerce clause concerns of the risk of multiple taxation, even though they may use the now outdated commerce clause language that preceded *Complete Auto*. *General Motors*, in fact, begins with a statement disavowing any immunity for interstate commerce and stating that even interstate commerce must pay its own way: "It was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. [citing] *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 303 U. S. 254 (1938). Even interstate business must pay its way." Therefore, the substantial nexus standard in *General Motors* was based on modern commerce clause standards, not — as the Ohio Supreme Court stated — on any immunity for interstate commerce.

Most of those cases involved a taxpayer claiming immunity from taxation on grounds that it lacked substantial nexus, a requirement of *Complete Auto*. As noted, all of the cases dating back to *J.D. Adams* concern the risk of multiple taxation, not immunizing interstate commerce. For the market state to tax an interstate sale, those cases require a showing that the taxpayer maintains a physical place of business in the jurisdiction in which it engages in substantial market-generating activities. Otherwise, the state of origin of the goods has nexus to tax the sale through the taxpayer's physical place of business and activities conducted there.

Conclusion

The economic nexus standard under the Ohio CAT, grounded entirely in due process, fails to satisfy commerce clause requirements and creates an unreasonable risk of double taxation. In sustaining the CAT, the Ohio Supreme Court's decision was contrary to a long line of precedent imposing a stricter nexus requirement on gross receipts taxes imposed on the interstate sale of goods. ■

[49] *See, e.g.*, *Oklahoma v. Greyhound Lines*, 514 U.S. 175, 184, 186-187 and 189 (1995) (*citing Berwind-White*, *Dilworth*, and *Norton*); and *National Geographic*, 430 U.S. 551, 557-558 (*citing Standard Pressed Steel*, *General Motors*, *Norton*, and *Dilworth*).

[50] *National Geographic*, 430 U.S. at 558 (noting that for the use tax, "the out-of-state seller runs no risk of double taxation").

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