INTERSTATE & FOREIGN COMMERCE

Due to the intricacies and complexity of the subject matter, there will be multiple articles posted on a monthly basis. Multiple components of interstate and foreign commerce will be discussed. These include a multiplicity of different kinds of transactions. These include: a) supplies & materials used in interstate & foreign commerce; b) repairs made in international waters; c) supplies & materials first used in international waters; d) shipping charges; e) non-taxable services; f) extraterritorial fabrication of rigs; and g) off-shore leases. In addition, at the end there will be a general discussion as to how the commerce clause directly impacts the petroleum and aviation industry. Hopefully, this will bring better understanding of how transactions should be structured, so as to minimize tax liability.

There are two aspects to the commerce clause. The first aspect involves commerce by and between the individual fifty states within the United States. The second aspect involves foreign commerce between the United States and foreign nations.

A. INTERSTATE COMMERCE

1. The Interstate Commerce Exemption with regard to Vessels

Louisiana Revised Statute 47:305(E) provide in pertinent part:

"It is not the intention of this Chapter to levy a tax upon articles of tangible personal property imported into this State, or produced or manufactured in this State for export; nor is it the intention of this Chapter to levy a tax on bona fide Interstate Commerce. It is, however the intention…to levy a tax on…tangible personal property after it has come to rest in this State and has become a part of the mass of property in this State." [Emphasis supplied]

Contrary to the initial regulations of the Department of Revenue, the Louisiana Supreme Court has held in Express Boat Company, infra, that the Interstate and Foreign Coastwise Commerce includes travel from points in Louisiana to points offshore beyond Louisiana's three (3)-mile territorial limits. A Taxpayer should therefore, contend that any assessment of sales and use taxes on its purchases of materials, supplies and equipment for vessels which operate in "continuous Interstate Commerce" throughout Louisiana and the United States is improper. The primary basis for Taxpayer's opposition to this tax is a Federal Prohibition against any State tax that would unduly burden Interstate Commerce. This Federal prohibition is found in Article 1, Section A, Clause 3 of the Commerce Clause of the United States Constitution. As such, under either the United States Constitution, or under State Constitutional or statutory law, a Taxpayer's purchases of supplies, materials and equipment utilized on its vessels while engaged in continuous Interstate or Foreign Coastwise Commerce should be free from sales or use taxes imposed by the State of Louisiana, or any other state.

This is the only correct interpretation that can be adopted. First, under the Supremacy Clause of the United States Constitution, it has been uniformly held by the Courts of the United States that

certain Federal laws preempt conflicting State laws in regard to the regulation of certain national matters of concern, which have been expressly delegated to the Congress by the original Founding Fathers. Interstate Commerce has long been recognized as such an area. Limitations concerning Interstate Commerce have always been imposed upon the States' otherwise broad ability to tax. Accordingly, the Taxpayer should be exempt from sales taxes since the Federal government, by and through its regulation of Interstate Commerce, has already preempted this area from conflicting State tax legislative initiatives. In the alternative, the Louisiana State Constitution and LSA R.S. 47:305 precludes the imposition of such a tax on the purchases of supplies, materials and equipment for Taxpayer's vessels because these vessels are "instrumentalities" of Interstate Commerce. Vessels operating in both Intrastate and Interstate Commerce does not deprive the Taxpayer of the benefit of the exemption provided under LSA R.S. 47:305.1. *Compass Ofshore, Inc. vs McNamara, 526 So.2d 425 (La. App. 4th Cir. 1988)*. It being the Taxpayer's historical position that any attempt to impose a sales tax under such circumstance would expressly violate State Constitutional and Statutory Law. See *Tigator, Inc. vs West Baton Rouge Parish, 657 So.2d221 (La. App. 1st Cir. 1995);* writ denied*, 663 So.2d 712 (La. 1995)*.

2. Background on Federal Jurisprudence Regarding the Interstate Commerce Clause

The most important recent jurisprudential decision issued by the United States Supreme Court concerning the Interstate Commerce Clause can be found in *Complete Auto Transit Company, Inc. vs Brady, 430 U.S. 274 (1977).* In that case, the Supreme Court of the United States held that it was not automatically unconstitutional to impose a direct tax on Interstate Commerce if it was a tax imposed solely for the "privilege of doing business," there were still significant restraints on State legislation that might otherwise unduly burden such business activities. As long as some kind of non-crippling imposition of tax is imposed equally for in-state, and out-of-state taxpayers; such a tax was not, per se, a violation of the Commerce Clause.

However, a close review of this case will show that the operative facts are distinguishable from those that currently exist in most cases. The taxpayer in *Complete Auto Transit* was taxed on the basis of five percent (5%) of the gross income earned from transporting certain property between points exclusively within the state. In that case, a corporation was engaged in the business of transporting vehicles by truck from Jackson, Mississippi to various auto dealers exclusively with that state. The taxpayer was paid on a contract basis for the transportation from a particular point in Jackson, Mississippi to various Mississippi dealers. In *Complete Auto Transit Company, Inc.*. it is imperative that the reader realize that the Taxpayer in *Complete Auto Transit* expressly involved a tax which was imposed only on Intrastate activities within the State of Mississippi. In that case, there was no continuous movement of vehicles across state lines. In addition, the sales tax in that case was imposed on the service of transporting these vehicles to various locations within the state of Mississippi. This was not a situation where a tax was being imposed on the "instrumentalities of the Interstate Commerce".

It should also be noted that the statutory exclusion found in LSR R.S. 47:30 was enacted before the opinion in _Complete Auto Transit_ was released by the United States Supreme Court. At the time that Section 305 Exclusion was passed into law by the Louisiana legislature, the Supreme Court had already held that a Louisiana sales and use tax could only be imposed upon property that had "come to rest" with the State, and had become a part of the common mass of property located within Louisiana. Indirect taxation of Interstate Commerce by taxing the instrumentality is strictly prohibited. _Henneford_ *vs* _Silas Mason Company_, *300 U.S. 577 (1937);* _Southern Pacific Company_ *vs* _Gallagher_,*306 U.S. 167 (1939);* _Halson and Randolph_ *vs* _Kentucky_, *279 U.S. 245 (1929).*

Although the Supreme Court may have expanded the power of any given State to impose a reasoned and limited tax on Interstate Commerce, it cannot be said that the Louisiana legislature intended to change the existing exclusion, which already existed by State Statute at the time of the _Complete Auto Transit_ decision. In other words, the legislature must be presumed to have known the limitations on such taxation, and Section 305 must be interrupted in light of the law in effect at the time. The Exclusion found in Section 305 was enacted into law in 1948. See Acts 1948, No. 9, § 5. Attempts have been made to change this statutory provision. All such attempts have failed. Accordingly, in order to impose a tax on a Taxpayer's vessels and its supplies and materials, the law would require that these vessels be deemed to have "come to rest" in Louisiana, and had become a part of the common mass of property located with the State. Otherwise, no valid sales and use tax can be imposed. In most instances, a Taxpayer's vessels never "came to rest" in Louisiana, as that term has been interpreted by State and Federal Courts.

It also should be noted that under existing law, the DOR does not have the general authority to apportion the sales and use tax proportionately to local activities. Under _Complete Auto Transit,_ supra, the criteria to be utilized for purposes of determining whether a particular tax is volitive of the Commerce Clause requires that the tax must be fairly apportioned to local activities. Since the DOR does not have the authority to make such an apportionment, the property involved in Interstate Commerce can _not_ be taxed. In _Mississippi Chemical Express, Inc._ *vs* _Glover_, *467 So.2d 1261 (La. App. 2nd Cir. 1985)*, the Louisiana Second Circuit Court of Appeals expressly held that the DOR did not have the authority to fairly apportion a tax to local activities. Without this authority, such a tax would be unconstitutional.

TO BE CONTINUED. . .

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