CHAPTER 8

DIRECT TAXATION? – OR INDIRECT TAXATION?

Once again we shall find here that while the terms of our respective Constitutions may shape the methods of judicial reasoning, they do not necessarily dictate the solutions reached; where the economic requirements of a federal system indicate a common solution of a common problem, the courts of each of the systems studied here can generally arrive at broadly the same answer, despite their variable starting points, by grouping the factual elements of the problem situation before them into appropriate categories which may then be interpreted so as to lead to the result desired.

As regards taxation this process has been unusually complex because of the difficulty of establishing any satisfactory middle ground between the definitions of the lawyer and the definitions of the economist as to the meanings of the terms employed in this field. Accordingly, the label which is attached to a particular tax is very often of considerable importance, not as having any precise content of meaning, but as a characterisation device in the process of judicial interpretation towards a desired result.

Reference has already been made \(^1\) to the confusion which surrounds definition of the term “excise,” and this must now be explored further.

The prohibition of Section 90 of the Australian Constitution against the levying by the States of taxes deemed to be “excises,” has meant that the definition of what is to be included under this head is of the greatest importance to the States in setting the limits of their powers of internal taxation. The requirement of Articles I:2:3 and I:9:4 of the United States Constitution that federal “direct” taxes be apportioned among the States in proportion to their respective populations as determined by the census, was modified by the Sixteenth Amendment to the effect that taxes on income from whatever source derived, do

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\(^1\) Supra, Chapter 7, page 92.
not require to be apportioned. This Amendment was held\(^2\) by the Supreme Court to transform income tax, which our other systems would categorise as a "direct" tax, into an "excise" and therefore an "indirect" tax. The problem remains, of course, to define what is meant by "income"! The Canadian Constitution, by Section 92(2), gives the Provinces the power to levy "Direct taxation within the Province in order to the raising of a revenue for Provincial purposes," therefore impliedly excluding them from levying "indirect" taxes, and raising the question as to which kinds of "excises" are to be regarded as "indirect" taxes. In relation to the taxation of interstate commerce there must also be taken into account, in Australia, the provision of Section 92 of the Constitution that trade, commerce and intercourse shall be "absolutely free," and in the United States, the "freedom" of interstate commerce to be implied from the federal commerce clause power of Article I:8:3 of the Constitution. There is no such express provision in the Canadian Constitution but Section 92(2) thereof, mentioned above, amounts to the same thing in effect as regards Provincial taxation. Regarding this Section it has been said in the United States that, "For us the constitutional problem is posed by the total or qualified immunity of interstate sales from state gross receipts taxation implied from the commerce clause ... The purpose of the Canadian provisions was evidently similar to our own implied prohibition, namely, the protection of interstate commerce from the ramifying effects of local taxes that would be reflected in prices ... ’’,\(^3\) to which we may add Mr. Justice Frankfurter’s statement for the United States Supreme Court in *Freeman v. Hewit*\(^4\) that, "An exaction by a State from interstate commerce falls not because of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce.’’

That is the ground to which Chief Justice Marshall might fruitfully have confined his judgment in *Brown v. Maryland*\(^5\) in invalidating a State statute requiring importers to take out a licence and to pay a fee therefor. The true vice of this statute was that it was discriminatory, only importers being required to take out a licence, and thereby impeded a free flow of imported goods. Marshall, although conceding


\(^5\) 12 Wheat. 419 (1827).