'Cause I'm the Taxman

By CHARLES D. RAY

It's fair to say that George Harrison, the lyricist of "Taxman," was no fan of Great Britain's tax system. We have some recent litigants who likely share his level of disdain when it comes to Connecticut's system. Our plaintiff, Alico, LLC, is a landscape construction company that operates in several states and has offices in Ludlow, Massachusetts and Somers, Connecticut. Alico's sole member and his wife both work for the company. Alico owns two vehicles that the owner and his wife use daily in their work and garage at night at their home in Somers. Until 2021, the vehicles were registered in Massachusetts and taxes on them were paid to that state.

In 2018, the Somers tax assessor got wind of things and retroactively placed Alico's two vehicles on the tax rolls for 2017 and 2018, under the authority of Section 12-71(f) of the General Statutes. The assessor also assessed taxes and a 25 percent penalty against Alico's sole owner, despite the fact that the two vehicles were owned by Alico. The Somers Board of Assessment appeals altered the 2017 and 2018 grand lists to reflect Alico as the owner of the two vehicles, but otherwise left the assessment in place.

Alico and its owner appealed to the Superior Court, arguing that Somers' assessment on the 2017, 2018 and 2019 grand lists amounted to double taxation and violated the dormant commerce clause of the United States Constitution, because the vehicles were used in interstate commerce and subject to taxation in Massachusetts. The Superior Court rejected that argument, concluding: 1) the tax imposed was fairly related to the benefits provided by the Town and was fairly apportioned because it was directly tied to activities of the vehicle within the town; 2) Section 12-71(f) was qualitatively different that the tax imposed in Massachusetts, which was an excise tax levied on the privilege of registering a motor vehicle in that state; and 3) that Alico had the choice of registering the two vehicles in Connecticut, such that any double taxation was the result of Alico's choice as to registration and not the result of a discriminatory tax scheme. The Court thus ruled that the vehicles had properly been added to Somers' grand lists, but gave Alico a small victory by reducing the assessed value of the vehicles and eliminating the 25 percent penalty.

The Supreme Court transferred Alico's appeal from the Appellate Court to its own docket. In an opinion penned by Justice Alexander, the Court affirmed, unanimously, the trial court's judgment. To refresh, the commerce clause has two functions—one that's awake and one that's asleep. The clause itself provides that Congress has the power to "regulate Commerce with foreign Nations, and among the Several States, and with the Indian Tribes . . . ." The dormant commerce clause prohibits states from taxing a transaction more heavily if it crosses state lines and from discriminating against interstate commerce by providing a direct advantage to local business or by subjecting interstate commerce to the burden of multiple taxation. *See Comptroller of the Treasury v. Wynne*, 575 U.S. 542, 549-50 (2015).

When evaluating a dormant commerce clause claim, a court will first look to see whether a tax facially discriminates against interstate commerce or is facially neutral. If facially neutral, a tax can still run afoul of the commerce clause if it has the "practical effect of imposing a burden on interstate commerce that is disproportionate to the legitimate benefits." *MERSCOPR Holdings, Inc. v. Malloy,* 320 Conn. 448, 474, cert. *denied*, 580 U.S. 959 (2016). If facially neutral, a tax claimed to be unconstitutional is evaluated by way of the four-part test laid out in *Chase Manhattan Bank v. Gavin*, 249 Conn. 172, 210, *cert. denied*, 528 U.S. 965 (1999): 1) is the tax applied to an activity with a substantial nexus with the taxing state; 2) is the tax fairly apportioned; 3) does the tax discriminate against interstate commerce; and 4) is the tax fairly related to services provided by the state. *See Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977).

Alico made no claim that Section 12-71(f) was not facially neutral and conceded that the tax satisfied the first and fourth prongs of the *Complete Auto* test. Ultimately, the Court's analysis boiled down to whether the tax imposed on *Alico* was fairly apportioned (second prong). In that analysis, a court will look to whether a tax is fairly attributable to an activity carried on in the taxing state. In doing so, a court should first ask whether a tax is "internally consistent" and, if so, whether it is "externally consistent" as well. In *Alico*, the plaintiffs claimed that Section 12-71(f) was internally inconsistent "because, if a vehicle leaves from and returns each day to state A but is registered and owned by a company in state B, the company would owe taxes to state A pursuant to § 12-71(f)(4), and it would also owe taxes to state B pursuant to § 12-71(f)(3)(A)." *Alico*, 348 Conn. at 358.

The problem for Alico, as pointed out by the Court, is that both subsections of § 12-71 base taxation on where, in the normal course of operation, a vehicle "most frequently leaves from and returns to." And if a vehicle most frequently leaves from and returns to more than one town, that vehicle is to be added to the tax list of the town in which it is located for three or more months preceding the assessment date. Under this scheme, as Justice Alexander notes, a vehicle cannot be taxed by more than one state because a vehicle cannot, in the normal course, most frequently leave from and return to more than one state. Well, that's fine says Alico, but the statute is still internally inconsistent because it does not require Connecticut to provide a credit for the taxes that Alico pays on its vehicles to Massachusetts. Not a problem according to the Court, because the saving grace of tax credits comes into play only if the tax is internally inconsistent and needs to be saved.

At this point, the apt reader might be sensing a Catch-22 situation, given that Alico paid taxes to Massachusetts based on its registration of the two vehicles there and must now pay taxes, retroactively, in Connecticut based on where the owner and his wife live. But double taxation is not unconstitutional if the taxes result from different and nondiscriminatory tax schemes. And here, "Alico pays multiple taxes on its vehicles…because of the combined effect of Connecticut's and Massachusetts' different and nondiscriminatory tax schemes—one of which taxes vehicles on the basis of their physical location and the amount of time that they are in the state, and the other that taxes vehicles on the basis of their registration in the state." *Alico*, 348 Conn. at 363. The fact that both taxes are calculated by way of the value of the vehicle did not sway the Court away from its conclusion that the two taxes were different and non-discriminatory. The Court's reluctance to do so was based in large part on its conclusion that Alico could have avoided the double taxation problem by registering its vehicles in Connecticut rather than Massachusetts. How it was supposed to do so on a retroactive basis was left unexplained.

In the end, the Court's analysis is hard to fault. The fairness of the result is bound to be disputed by Alico. ■

■ Any views expressed herein are the personal views of the author.

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