

MAINE STATE LEGISLATURE

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STATE OF MAINE

Inter-Departmental Memorandum Date March 9, 1962

To Ernest N. Johnson, State Tax Assessor

Dept. Bureau of Taxation

From John W. Bennett, Asst. Atty. General

Dept. " " "

Subject Examination of Records of Nonresident Taxpayers

The Questions:

Has the State Tax Assessor a right to insist upon the examination of records of nonresidents of Maine who have incurred sales or use tax liability in this state and what recourse has the Assessor in the event such nonresident refuses access to his records?

THE OPINION

Books located out of state:

The usual manner of securing books of another is by order of court. Such an order has for its enforcement the subsequent fine or imprisonment arising from contempt of the court order through refusal to produce the books requested. A court order is good only within the jurisdiction which gives it effect. Thus, a court order to produce in Maine, books located in New Hampshire, is without effect.

We do not here have the necessary facts upon which the court may predicate jurisdiction for the purpose of enforcing the order as were present in Consolidated Rendering Co. v. Vermont, 80 Vt. 55, 66 A 790, 207 U.S. 541, where the defendant was ordered to produce books of the company which were, at the time, in another state. The defendant, in that case, refused and was ultimately fined for contempt. Defendant objected that due process was denied it because the statute authorized infliction of a fine by the court for failure to perform an act outside the state. The court said:

"There can surely be no illegality in providing that a corporation doing business in the state and protected by its powers may be compelled to produce before a tribunal of the state material evidence in the shape of books or papers kept by it in the state, and which are in the custody and

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control, although for the moment outside the limits of the state, and the enforcement of the decree offered no difficulties as the defendant was within the jurisdiction and did business therein." (Underlining mine.)

An attempt to reach books of account located in a sister state, will prove fruitless where our court lacks the authority to enforce its order. The order will call for the performance of acts in another state. Supervision will be lacking. Direct acquisition of a nonresident seller's books of account appears at best a difficult procedure without hope of success.

"A foreign judgment that the defendant do or refrain from doing an act other than the payment of money will not be enforced by an action on the judgment."
Am. Jur., Judgments, sec. 938.

Books located in Maine:

If a nonresident seller's agent has in his possession books of account of the principal and such books are being maintained by the agent in Maine for the purpose of recording sales transacted here, such records may be reached by legal action. Jurisdiction is had of the subject matter. The person having custody of the books is within the state and amenable to process. Calling for production of records located in Maine for the purpose of determining the amount of tax liability owing to the state arising from the doing of business seems proper. The court has the ability to supervise ordered events.

An Indirect Approach--The Arbitrary Assessment:

The use of the arbitrary assessment may bring the nonresident's books and records into the state when such books and records are otherwise unobtainable. Presentation of records would likely be made at a reconsideration hearing. If no such hearing is requested by the nonresident there is the possibility that the state will fail to realize the full amount of liability due it from the taxable events. However, the arbitrary amount assessed

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based upon similar types of businesses within the same general business area would likely result in an assessment fair to both the taxpayer and the state. The use of the arbitrary assessment has further merit:

"The assessment establishes the tax liability and provides the necessary basis for enabling the jurisdiction to collect the tax. The taxing jurisdiction should not be required to divert auditors or field representatives to following up delinquents when the law provides for a less costly and equally expeditious means of securing payment of delinquent taxes."
Administration of Local Sales and Use Taxes, Meak and Cowan, (1961) page 196.

Same--The Injunction:

The sales and use tax law, section 34, authorized the filing of a complaint, applying for an injunction from doing business in this state against any person required by section 6 of said law to register as a seller where such person fails to so register. The breach of law is the failure to register after request. Jurisdiction exists over the nonresident through submission to jurisdiction by the regular solicitation of business or the making of retail sales. Persons doing business within the jurisdiction are, under some statutes, deemed residents for the purpose of being sued. See: *Routenberg v. Schweitzer*, 165 N.Y. 175, 58 N.E. 880 and *Kaye-Martin v. Brooks* (Ill.) 267 F. 2d 394. In *Kaye-Martin v. Brooks* the question was whether the attendance in Chicago at a meeting by a non-resident corporate officer was sufficient contact to give the state jurisdiction over such nonresident corporation. The statute asserted by Illinois is substantially identical to the following Maine provision:

**"Service on Nonresidents
Sec. 21. Service of Process.--**

1. Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts herein after enumerated in this section, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

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A. The transaction of any business within this state;

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II. Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the summons upon the defendant outside this state, with the same force and effect as though summons had been personally served within this state.

III. Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section.

IV. Nothing contained in this section limits or affects the right to serve any process in any other manner now or hereafter provided by law."
Chapter 112, R.S. 1954, amended.

In holding that there was no jurisdiction the court said:

"As prerequisite to personal jurisdiction of state court over nonresident, there must be some act by which defendant purposefully avails himself of privilege of conducting activities within the forum state, thus invoking benefits and protection of its laws, and he must have certain minimal contacts with the forum state such that the maintenance of suit does not offend traditional notions of fair play and substantial justice."
Kaye-Martin v. Brooks, supra.

Apparently each case will be decided on its own facts re acts which fulfill the requirement of transaction of any business within the state:

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"Although the phrase 'transaction of any business within this State' is as broad as constitutional authority will permit it poses a problem of statutory construction within the constitutional framework and its application to the factual background of each individual case." *Kaye-Martin v. Brooks, supra.*

"The court may acquire jurisdiction over the nonresident if there are some minimal contacts by the nonresident with the state so as to make it reasonable that he should be amenable to suit within the state." *Nerlund v. Schiavone, 250 Minn. 160, 84 N.W. 2d 61.*

A Utah case, 3 Utah 2d 34, 277 P. 2d 969, the court cites the Western Gas Appliance case, 257 P. 2d 930 and language there given:

"In Western Gas Appliance, . . . Mr. Justice Crockett pointed out a number of other activities authoritatively determined as 'not doing business' for process purposes; (1) mere presence of an office in the forum, (2) a factory sale to a local distributor, (3) instruction to retailers in aid of distributors' aid promotion, (4) warranting and shipping parts to an independent dealer and (5) isolated cases of equipment installation."

The case immediately above cited, 3 Utah 2d 34, 277 P. 2d 969 about sums up the status of nonresident service of process statutes:

"At present we are committed to a not too specific proposition that to be subject to the process of the local forum, where distribution of commodities is concerned, the outsider must do something else than

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merely solicit their sale or distribution, and the 'something else' should be such as would inspire in a reasonable person's mind the conviction that such outsider, as a practical matter, is present in the state personally or by authorized representation, to further his business interests with local inhabitants through real and identifiable contracts representing a continuity of dealing and activity not too dissimilar from that indulged by local business people attending to their own business pursuits."

It seems now generally recognized that even though a defendant is not physically present within a state, by engaging in certain activities therein he may be deemed to be present and subject to the jurisdiction of its courts. The leading case upholding this principle is *International Shoe Co. v. Washington*, 326 U.S. 310. That case contains language applicable to nonresident individuals and indicates that this type of jurisdiction may now be grounded on the defendant's minimum contacts within the state, rather than on a finding of actual "doing business"; but present decisions indicate that "minimum contacts" jurisdiction will be limited to causes of action arising from those contacts.

I conclude that sales made in Maine by nonresident sellers are transactions of business within the meaning of the statute allowing for service of injunctive process upon nonresidents.

A cause of action has been defined as those facts sufficient to justify a court in rendering a judgment; or a breach of duty.

It is to be noted that the injunctive section of the sales and use tax law, section 34, does not provide for injunctive relief where any retailer refuses the assessor access to his books. The section gives relief for the failure to register; or for the failure to file reports; or for the failure to pay liability. Suppose the nonresident does register when informed that his failure may result in injunction against him, but that he refuses to allow examination of his books. Section 23 of the sales and use tax law authorizes the examination of the books, records, etc. of any retailer. The nonresident, through registration, has become a retailer and subject to the duty of exhibiting his records to the Assessor's agents on request. Still he may refuse.

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Failure to produce books in keeping with section 25 constitutes as much a breach of the law as those omissions set forth in section 34. It seems repugnant to permit injunctive relief for the breach of a rule or regulation without allowing such relief for a greater breach, i.e., the breach of law.

See also section 127, Chapter 53, service of process on foreign corporations.

CONCLUSION

There exists no body of law upon the question posed. A probable reason is the utilization of other methods such as the arbitrary assessment. Only over the last few years have states turned to the problems presented by the nonresident seller. Prior to that time there were more than enough immediate problems at home requiring attention.

Presently there exists the indirect approach through the already mentioned arbitrary assessment. The injunction procedure herein mentioned as another approach is based only upon the opinion of this writer.

This paper is being submitted with the understanding that further and continuous examination of the authorities and of the law will be here conducted for the purpose of properly meeting the various problems presented by the nonresident seller.

JWB:epd

STATE OF MAINE

Inter-Departmental Memorandum Date November 3, 1961

To John W. Benoit, Assistant Attorney General Dept. Bureau of Taxation
From Ernest M. Johnson, State Tax Assessor Dept. Bureau of Taxation
Subject Examination of records of nonresident taxpayers

Will you please advise what rights this office has to insist upon the examination of records of nonresidents of Maine who have incurred sales or use tax liability in this State; and what recourse in the event such nonresident taxpayer refuses access to his records.

EMJ:j