IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DIAL CORPORATION,	:	
	:	
Petitioner,	:	
	:	
v.	:	C.A. No. 06C-05-014 (CHT)
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DIRECTOR OF REVENUE,	:	
	:	
Respondent.	:	
	:	
	:	

OPINION AND ORDER

On Appeal from the Decision of the Tax Appeal Board

Submitted: July 27, 2007
Decided: January 29, 2008
Amended: January 30, 2008 (Page 26)

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TOLIVER, JUDGE

Before the Court is an appeal by the Petitioner, the Dial Corporation, of the January 13, 2006 decision of the Director of Revenue denying Dial's claim of entitlement to a refund of the wholesaler gross receipt tax paid pursuant to 30 Del. C. § 2902.[1] On October 17, 2006, Dial moved for summary judgment. On November 17, 2006, the Director of Revenue filed a similar motion. The matter having been briefed and oral argument completed, that which follows is the Court's resolution of the issues which the parties have so put before the Court.

PROCEDURAL POSTURE

This case has been put before the Court during the course of the Court's review of a similar challenge to § 2902 in *Ford Motor Co. v. Director of Revenue.*[2] Dial filed an *amicus curiae* brief in the *Ford* case and moved to have its case removed to this Court on an expedited

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[1] This provision of the Code as well as all subsections thereof shall hereinafter be referred to by section only.

[2] *Ford Motor Co. v. Director of Revenue*, C.A. No. 04C-02-155 (Del. Super.)(filed February 12, 2004).

basis so that the cases could be considered simultaneously.[3] That motion was granted on January 9, 2006.

STATEMENT OF FACTS

There is very little dispute of fact underlying this controversy.[4] Dial is a manufacturer of consumer goods such as soap and other personal hygiene products. Although Dial's corporate offices are located in Scottsdale, Arizona, Dial is incorporated under the laws of the State of Delaware. Accordingly, Dial pays the Delaware corporate franchise tax pursuant to 8 Del. C. §503 but is exempted from paying the Delaware income tax pursuant to 30 Del. C. §1902.

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[3] The facts of each case present unique issues and the while the parties seek the same result, they do not make the same arguments. Therefore, they are most appropriately addressed individually.

[4] As evidence of the absence of any significant dispute in this regard and to assist the Court in its review of the matters, the parties have entered into an extensive stipulation concerning the factual circumstances upon which this litigation is premised. Stipulation of Facts, *Dial Corporation v. Director of Revenue*, C.A. No. 06C-05-014 (Del. Super.)(filed September 12, 2006) (Docket No. 6).

Dial is considered a "wholesaler" of goods for purposes of § 2902. Any entity engaged in the business of "wholesaling" must pay a licensing fee for each such facility located in this State as well as a tax on the gross receipts from all wholesales which take place within its borders.[5] Because Dial fell within the definition of a wholesaler, from January 2004 until September 2005, Dial paid a gross receipt tax imposed via § 2902 of $41,380. On November 20, 2005, Dial filed a Claim for Revision with the Delaware Department of Finance seeking a refund of that amount.

Dial manufactures its products at facilities located in Illinois, California, Missouri, Iowa and Pennsylvania. Dial also contracts with so called "co-packers", concerns which manufacture and package Dial products as directed by Dial. After a product is manufactured and packaged, it is shipped to a distribution center. Dial maintains distribution centers in Illinois, Georgia, Texas and Pennsylvania. None of Dial's manufacturing or distribution facilities are located within Delaware.

[5] *See* § 2902(b) & (c)(1).

Likewise, none of the co-packer facilities are located within Delaware.

Unless a customer picks up the products from a manufacturing or distribution center by means of transportation owned and/or operated by the customer, Dial ships its products to its customers from its distribution centers via independent common carriers "F.O.B." place of shipment.[6] The destination is identified by the customer but the arrangements for a carrier are often made by Dial as a part of the standard agreement between Dial and its customers. The parties agree that title to the products so shipped as well as any associated risk of loss, passes to the customer upon Dial's delivery of the goods to the carrier at either Dial's distribution or manufacturing centers or a co-packer facility.

Dial's usual practice is to bill the customer upon delivery of the goods to the carrier. The invoices are

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[6] As stated in Article Two of the Delaware Uniform Commercial Code, the term "F.O.B." stands for "free on board", meaning that the seller has the obligation of delivering the goods to the specified place and/or means of transportation. *See* 6 Del. C. § 2-319.

sent from Dial's headquarters in Arizona upon confirmation of that event and the customer usually responds with payment by wire transfer, or if not, by check to a postal address or facility in Arizona, Illinois or Georgia. Where Dial makes the transportation arrangements with the carrier, Dial often pays the costs of transportation. If the customer is to be responsible for those costs, Dial credits the customer with a "pickup allowance".

Dial assigns sales teams to manage its accounts with its major customers, which includes Wal-Mart. Each such team is located near that customer's corporate headquarters.[7] The relationship between Dial and Wal-Mart is no different and is managed by Dial from a sales office located near Wal-Mart's corporate headquarters in Bentonville, Arkansas. Orders are placed and the goods are shipped from a distribution center by an independent

[7] Dial has sales offices located in Arkansas, Michigan, Minnesota, Massachusetts, North Carolina and Arizona. Dial's Massachusetts sales office handles any non-major retail sales in Delaware. Dial's sales shipped to locations in Delaware to non-major retailers comprise less than five percent (5%) of the sales at issue. Dial does not maintain any sales offices or presence of any kind in Delaware.

common carrier to the location specified by Wal-Mart. Alternatively, that transportation is provided by Wal-Mart or a Wal-Mart affiliated concern.

Consistent with the practice outlined above, payment by Wal-Mart for all purchases of Dial products is made by electronic transfer from Wal-Mart's corporate headquarters in Arkansas to Dial at its corporate headquarters in Arizona upon delivery to the carrier. Similarly, unless Wal-Mart or one of its affiliates picks up the goods from the designated distribution center,[8] Dial makes the arrangements with and pays any independent carrier so retained.

Between January 2004 and September 2005, Dial shipped $10,776,042.00 worth of products to locations within Delaware from distribution centers outside of the state. The bulk of these products was shipped to the Wal-Mart distribution center located in Smyrna, Delaware which serves a total of seventy-six Wal-Mart stores in

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[8] Where there are no independent carriers involved and Wal-Mart picks up the goods using its own carrier or one owned by an affiliate, no gross receipts tax is imposed on the sale. Those transactions are not at issue in this litigation.

Delaware, Maryland, New Jersey and Pennsylvania.

Dial does not provide any direct advertising of its products in Delaware. It only advertises nationally and spends 49 million dollars on that effort. Less than two hundred thousand dollars is attributed by Dial to its sales in this state. That figure is based upon the proportion the Delaware sales constitute of Dial's total sales and multiplying the total spent advertising its products by that figure.

Dial contends that the issue presented to this Court is whether the Delaware Wholesaler Gross Receipt Tax as applied to Dial violates the Article I, § 8 of the United States Constitution, also known as the "Commerce Clause".[9]

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[9] It reads in relevant part:

> Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . but all Duties, Imposts and Excises shall be uniform throughout the United States;
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> . . .
>
> To regulate Commerce with foreign Nations, and among the several States . . . . [sic]

Neither side disputes that the relationship between Dial and Wal-Mart in general, or that the sales upon which the tax was imposed, constituted interstate commerce for purposes of Article I, § 8.

Dial argues that the tax is unconstitutional because it is applied to the sale of products which does not take place in the State of Delaware given the undisputed fact that ownership of the goods sold was transferred to Wal-Mart before the goods were shipped to Delaware. Therefore, because a state can only tax its share of an interstate transaction, Delaware has unconstitutionally imposed a tax upon commerce between the states which does not take place within its borders. In order to pass constitutional muster, Dial argues that tax must satisfy the four prong analysis prescribed by the United States Supreme Court in *Complete Auto Transit, Inc. v. Brady,*[10] as construed by this Court in *Franklin Fibre v. Director of Revenue,*[11] which it does not.

The Director does not dispute Dial's statement of the law relative to the taxation by a state of its share of commerce occurring within the borders of that state. The

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[10] *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

[11] *Franklin Fibre-Lamitex Corp. v. Director of Revenue*, 505 A.2d 1296 (Del. Super. 1985), *aff'd* 511 A.2d 385 (Del. 1986).

dispute lies in the application of the facts to that law. To be specific, the Director contends that under the facts of this case, the activity being taxed is wholly local, i.e., the goods were delivered to Wal-Mart in Delaware. Consequently, the entire activity is subject to taxation and there is no violation of any authority, constitutional or statutory, state or federal.

DISCUSSION

Scope of Review

The scope of review of the decision of the Tax Appeal Board upholding the decision of the Director of Revenue is limited.[12] The appeal to this Court does not involve a trial de novo; it is confined to a review of the proceedings below.[13] The decision, if supported by the record, will be sustained in the absence of an abuse of

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[12] *State Tax Commissioner v. Wilmington Trust Co.,* 266 A. 2d 419 (Del. Super. 1968).

[13] *Id.* at 421.

discretion or an error law.[14] Here, as noted, an error of law in the form of an alleged violation of the Commerce Clause of the U. S. Constitution, is alleged. It is that federal authority which must be discussed first in order to put this litigation in its proper perspective.

The Commerce Clause

The Commerce Clause of the United States Constitution gives Congress the power to regulate commerce among the several states.[15] The framers of the Constitution intended, at least in part, to create an area of free trade among the several states; assure the unrestricted flow of commerce throughout the states; to protect commercial intercourse from invidious restraints and to prevent interference through conflicting or hostile state laws. It is also intended to prohibit one state from exacting more than its just share from interstate commerce than would be commensurate with the burden

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[14] *Id.*

[15] U. S. CONST. Art. I, § 8.

imposed by that activity.[16]

Prior to the decision in *Complete Auto*, the federal courts swung from one extreme prohibiting any taxation of interstate commerce by the states,[17] to the other end allowing the state to so act depending upon the language of the particular statute.[18] It was in *Complete Auto* that the U. S. Supreme Court imposed a more pragmatic approach.

Complete Auto involved an action by a carrier which transported automobiles manufactured outside the State of Mississippi to dealers in that state seeking a refund of a sales tax imposed by Mississippi on those deliveries. At the outset, the Court noted that the purpose of the Commerce Clause was not to relieve those engaged in interstate commerce of their just share of the state tax

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[16] 15A AM. JUR. 2D *Commerce* § 2 (2007). *See Oregon Waste Systems Inc. v. Department of Environmental Quality of State of Oregon*, 511 U.S. 93 (1994).

[17] *See Leloup v. Port of Mobile*, 127 U.S. 640, 648 (1888); *See Freeman v. Hewit*, 329 U.S. 249 (1946); and *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951).

[18] *See New Jersey Bell Telephone Co. v. State Board of Taxes and Assessments of New Jersey,* 280 U.S. 338 (1930).

burden.[19] It then upheld the Mississippi tax employing what has since been referred to as the *Complete Auto* four prong test.

The test was designed to be employed to determine whether a state tax violates the Commerce Clause, and it overruled the previously more formal and ritualistic view. Instead, the Court referencing the more pragmatic approach, noted with approval:

> . . . These decisions have considered not the formal language of the tax statute, but rather its practical effect, and have sustained a tax against Commerce Clause challenge when the tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.[20]

Since the carrier had raised no such claims, the challenge was rejected.[21]

The existence and application of the *Complete Auto* four part test was reaffirmed in *Oklahoma Tax Comm'n v.*

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[19] *Complete Auto Transit*, 430 U.S. at 278.

[20] *Id. at* 279.

[21] *Id.* at 289.

Jefferson Lines, Inc.,[22] when the U. S. Supreme Court upheld the Oklahoma tax sales tax as applied to the sale of interstate bus tickets in Oklahoma. At the same time the Court again discussed the relationship between a state's authority to tax interstate commerce and the Commerce Clause.

As to the first, third and fourth prongs of the *Complete Auto* test, the analysis was uncomplicated. There was no doubt that there was a sufficient nexus between the activity being taxed, i.e., the sale of the tickets in Oklahoma and the State of Oklahoma (first prong).[23] Nor was there much difficulty understanding that discrimination against interstate commerce is prohibited (third prong) and that the tax must be fairly related to the benefits conferred upon the taxpayer by the taxing jurisdiction (fourth prong).[24] The second

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[22] *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 183 (1995).

[23] *Complete Auto Transit*, 430 U.S. at 279.

[24] The Commerce Clause does not require that there be a direct dollar for dollar relationship between the taxing state and the taxpayer. Rather, interstate commerce must be made to pay its fair share of state expenses including those from which it receives no direct benefit. *Jefferson Lines Inc.*, 514 U.S. at 189.

prong, fair apportionment, was however, the subject of extended discussion.

More specifically, the Court noted that the purpose of fair apportionment is to prevent each state from taxing more than its fair share of the interstate commerce involved. To meet this requirement, the tax must be internally and externally consistent. To be internally consistent, a tax must not impose a burden upon interstate commerce that intrastate commerce would not have to bear under the same circumstances. External consistency, on the other hand, measures whether the tax on the interstate commerce "reaches beyond that portion of value that is fairly attributable to economic activity within the taxing state." Put another way, the Court stated that the inquiry was limited to inquiring that the tax "be reasonably related to the taxpayer's presence or activities in the [taxing] state."[25]

This Court had occasion to review a previous draft of § 2902 given the tenants of *Complete Auto,* in *Franklin*

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[25] *Id.* at 200 (citations omitted).

Fibre. That case involved an appeal of a decision by the Director of Revenue to assess a gross receipts tax on the sales by the wholesaler to out of state buyers.[26] Deliveries of the products sold to out of state buyers were made "an F.O.B." shipping point to a common carrier located in Delaware.[27] Title and possession, the parties agreed, transferred within the geographical boundaries of Delaware. Section 2902 as it then existed applied a tax (0.4%) on the gross receipts of all goods sold by a wholesaler in Delaware. The wholesaler challenged the assessment claiming that the imposition of the tax violated the Commerce Clause.

This Court initially determined that the sales were made within this State based upon the passage of title to the buyer as well as risk of loss and possession of the goods. As a consequence, it was determined that the

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[26] A gross receipts tax is a tax imposed upon a wholesaler of goods based upon its sale of goods to retailers within the taxing jurisdiction. It is to be distinguished from a sales tax which is a tax imposed upon the buyers of the goods at the ostensible end of the transaction. *Id.* at 179. For present purposes, the distinction is put forth only for purposes of clarification of the terms being used. It does not have any impact upon the legal analysis involved.

[27] *Franklin Fibre-Lamitex Corp*, 505 A.2d at 1297-98

sales fell within the ambit of § 2902. The Court then went on to review the propriety of the tax given the guidelines enunciated in *Complete Auto.*

There was no dispute as to the first and fourth prongs of the *Complete Auto* test. The tax had been applied to an activity with a substantial nexus to Delaware given the fact that the sales were consummated here and were fairly related to services provided by the State. And since the activity that was taxed, although a part of interstate commerce, was wholly local, there was no risk of multiple taxation and the tax was determined to have been fairly apportioned. Accordingly, prongs two and three of *Complete Auto* were also satisfied. The imposition of the tax was therefore consistent with the dictates of the Commerce Clause.

In the cases referenced above, the courts have been, at least in part, concerned with the existence of a nexus between the taxing state and the activity being taxed. Their focus has included as well a review of whether the tax of the activity or presence in question is reasonably related to the extent of that activity or presence in the taxing jurisdiction. What has not been the subject of extensive review is how that nexus or activity is quantified for Commerce Clause purposes in circumstances such as here where the tax is imposed based solely upon the destination of the goods shipped to Delaware. It is in this context that Dial's entitlement to a refund of the tax imposed via § 2902 upon the sale of goods by Dial to Wal-Mart must be resolved.

Imposition of the Gross Receipts Tax

For purposes of § 2902, a wholesaler is defined as any person or entity engaged as an owner or agent in the sale of goods to another for consideration where the second party intends to resell the same to others. In addition to a $75 licensing fee, § 2902(c)(1) requires that:

> . . . every wholesaler shall also pay a license fee at the rate of 0.384% of the aggregate gross receipts attributable to sales of tangible personal property physically delivered within this State. . . .

"Gross receipts" is defined in § 2901(4) as the "total consideration received from sales of tangible personal property physically delivered within this State to the purchaser or the purchaser's agent."

Had the goods in question been delivered to Wal-Mart prior to the amendment of § 2902 in 1984,[28] the issue would be easily decided based upon the holding in *Franklin Fibre*. The tax would not have been imposed given the fact that the sale did not take place within the State of Delaware as a matter of statutory construction.[29] In addition, to impose the gross receipts tax under such circumstances would have clearly resulted in a constitutional confrontation via the Commerce Clause given the fact that title to the goods passed, and as a consequence the sales took place, beyond the confines of this state. Stated differently, the imposition of the

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[28] The amendment changed the definition of "gross receipts" applicable to *wholesalers* to provide for a "destination" test, rather than the then existing "passage of title" test for purposes of determining the applicability of § 2902. House Bill 686, 132nd General Assembly, Synopsis, p. 2 (signed into law July 17, 1984 as 64 Del. Laws, c. 374).

[29] At that point, the imposition of the tax was keyed to the transfer of title to the goods as opposed to the delivery of the goods to their destination. *Franklin Fibre-Lamitex Corp*, 505 A.2d at 1298.

gross receipts tax under the previous version of § 2902 would have violated the apportionment prong of the *Complete Auto* test.[30]

Unfortunately from an analytical point of view, since the amendment of § 2902 changing the tax initiating event from the transfer of title to the goods to their physical delivery within Delaware, *Franklin Fibre* is of little use beyond anecdotal. The question to be addressed remains whether the tax as imposed on the gross receipts of the sale of goods tendered and to which title passed outside of Delaware, places an unconstitutional burden upon interstate commerce.

***Complete Auto* Analysis**

It is readily apparent that the tax Dial paid pursuant to § 2902 does not discriminate against

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[30] Neither Dial or the Director of Revenue argue that whether § 2902 has been constitutionally applied here depends upon whether the tax is imposed via an "apportionment by percentages" methodology. Rather, both contend that the determination as to whether the tax is fairly apportioned must be reviewed under the "wholly local" approach. *See* Dial's Reply Brief at 2. As a result, the former approach is not a factor in this case and will not be discussed further.

intrastate commerce and is fairly related to services provided by the state. Equally obvious is the fact that the tax is applied to an activity (goods delivered in Delaware) with a substantial nexus to this State. Any goods delivered by a wholesaler in Delaware, regardless of where they originated, in or out of state, has the requisite nexus to the state as well as the services provided. There is no issue as a result relative to the first, third and fourth prongs of the *Complete Auto* test. However, whether the tax is fairly apportioned, i.e., based upon and reasonably related to Dial's presence in Delaware in this regard, is a different story.

Simply put, the imposition of the gross receipts tax in the present circumstances can not be accomplished without offending the Commerce Clause. It is undisputed that the sales constituted interstate commerce and were legally consummated outside the geographical boundaries of the State. There is similar accord between the parties that the goods became the property of Wal-Mart and other retailers at that point in time. Wal-Mart can be taxed on gross receipts from the sale of those goods to consumers once delivered to Delaware, but Dial surrendered what title to or interest therein before they were "physically delivered" in this State. Dial has done nothing in Delaware relative to the wholesales at issue to subject itself to taxation.

Again, a tax must be both internally and externally consistent. The failure to meet both criteria will necessarily mean that the tax is not fairly apportioned.[31] In this case, while the tax is internally consistent, it is not consistent externally. The tax imposed pursuant to § 2902 meets the former in that if each state in the Union enacted similar legislation, Dial would not be subject to multiple taxation. The wholesaler could only deliver the goods on one occasion and accordingly each state could only tax deliveries in that location.

Section 2902, on the other hand, is not externally consistent given the fact that the sales activity took place entirely outside of Delaware. What the Director of Revenue seeks to do is to tax interstate commerce where no part of that commerce took place in this State and for

[31] *Complete Auto Transit*, 430 U.S. at 288.

which it bears no burden, simply because Wal-Mart directed that the goods be delivered to its distribution facility in Delaware. That effort violates Article I, § 8 of the U. S. Constitution.

The essence of the position taken by the Director of Revenue is that gross receipts taxes have been approved by the U. S. Supreme Court as consistent with the dictates of the Commerce Clause. Although that is a correct statement of law, it ignores a critical fact relative to exactly how the taxpayer's presence in the taxing jurisdiction is defined. The Director apparently believes that the Commerce Clause allows the imposition of a tax on an activity as long as Dial once owned goods presently owned by Wal-Mart and designated by Wal-Mart for delivery in Delaware. That argument can not prevail.

First, it conveniently ignores the absence of sufficient contact with the State to sustain jurisdiction over Dial in so far as these activities are concerned once title to and the risk of loss of the goods passed to

Wal-Mart.[32] That deficiency can not be cured in light of the agreed upon facts. Second, the Director of Revenue has failed to cite any authority for the proposition that once a taxpayer relinquishes ownership of property, it may be subject to taxation based solely upon the destination of the property. Indeed, the cases cited, both federal[33] and state,[34] are legally and/or factually inapposite. Third, to the extent that the Director of

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[32] *See International Shoe Co. v. State of Washington Office of Unemployment Compensation and Placement et. al.*, 326 U.S. 310, 318 (1945); *Shaffer v. Heitner*, 433 U.S. 186, 216-17 (1977); *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298-99 (1980); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); and *Ashai Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 116 (1987).

[33] *See Trinova Corp. v. Michigan Dep't of Revenue*, 498 U.S. 358 (1991)(The statute involved a "value added tax without any discussion as where sale component of the tax occurred.); *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue,* 483 U.S. 232 (1987) as well as *Standard Pressed Seel Co. v. Washington Dep't of Revenue,* 419 U.S. 560 (1975)(Attacks on a statute on apportionment grounds and the taxing event was a sale which was defined as the passage of title); and *Moorman Mfg. Co. v. Bair,* 437 U.S. 267 (1978)(A challenge to an income tax on apportionment grounds based on sale of goods in Iowa to citizens of that state.).

[34] *See Saudi Refining, Inc. v. Dir. of Revenue,* 715 A.2d 89 (Del. Super. 1998)(Title to the petroleum products was tendered in Delaware at the refinery outlet); *In re Tax Appeal of Baker & Taylor, Inc. v. Kawafuchi,* 82 P.3d 804 (Haw. 2004)(A challenge to a general excise tax on jurisdictional grounds and with the tax was fairly apportioned)*; and General Motors Corp. v. City of Seattle*, 2001 WL 479909 (Wash. App. 2001)(A challenge to a municipal tax statute based upon activities which took place in and out of the city).

Revenue contends that the physical delivery of the goods was a wholly local event and subject to taxation consistent with the Commerce Clause, that contention continues to avoid acknowledging who should be taxed and where the sale took place.

The Court further notes that the Director of Revenue does not tax the wholesale of goods from Dial to Wal-Mart where Wal-Mart picks up the goods by means of transportation owned by Wal-Mart or one of its affiliates/subsidiaries. Exactly how that exchange can be distinguished from the wholesales at issue here is, at the very least, unknown. In each case, title and risk of loss transfers from Dial to Wal-Mart outside of Delaware. Wal-Mart designates where the goods are to be delivered, not Dial, and pays, directly or indirectly, for the delivery.[35]

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[35] The costs of transportation, as noted above, is apparently built into the price of the goods given the fact that Wal-Mart is allowed a credit when it or an affiliate/subsidiary takes physical possession of the goods prior to their transportation to Wal-Mart in Delaware. No such credit is allowed where the goods are delivered F.O.B. place of shipment to a common carrier under the same circumstances. *See supra* note 6 at 5. As a consequence, the ownership and/or identity of the carrier delivering the goods is of no real significance for purposes of this dispute.

In sum, title to and ownership of the Dial goods is determinative. At the risk of being repetitive, the ownership of those products sold destined for delivery in Delaware was transferred from Dial before the goods entered the State of Delaware. It was Wal-Mart which then designated that the goods were to be physically delivered in this State and where, not Dial. There was local activity which is taxable and a taxpayer upon which the tax might be imposed. However, it is not pursuant to § 2902 nor is Dial the proper party. Delaware can not tax what does not take place within its borders. To conclude otherwise would be to allow an undue burden upon interstate commerce thereby violating the Commerce Clause.

CONCLUSION

Title to and delivery of the goods sold by Dial to Wal-Mart constituted interstate commerce. However, that activity did not take place within the geographical confines of the State of Delaware. For the reasons stated above, the efforts on behalf of the State to tax those sales violated Article I, § 8 of the U. S. Constitution. The Director of Revenue erred as a matter of law and Dial is entitled to the entry of judgment in its favor in that regard as well as a refund of the gross receipts taxes paid from January 2004 to September 2005. Accordingly, Dial's motion for summary judgment is **granted** and the cross motion for summary judgment filed on behalf of the Director of Revenue is **denied.**

IT IS SO ORDERED.

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TOLIVER, JUDGE