Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue

460 U.S. 575
Supreme Court of the United States
March 29, 1983

MINNEAPOLIS STAR & TRIBUNE CO. v. MINNESOTA COMMISSIONER OF REVENUE. No. 81-1839. Argued January 12, 1983. Decided March 29, 1983. APPEAL FROM THE SUPREME COURT OF MINNESOTA. Lawrence C. Brown argued the cause for appellant. With him on the briefs were John D. French, John P. Borger, and Norton L. Armour. Paul R. Kempainen, Special Assistant Attorney General of Minnesota, argued the cause for appellee. With him on the brief was Warren Spannaus, Attorney General. Briefs of amici curiae urging reversal were filed by Peter W. Schroth and Charles S. Sims for the American Civil Liberties Union et al.; and by Philip A. Lacovara. Terry Maguire, and Pamela J. Riley for Knight-Ridder Newspapers, Inc., et al. JUSTICE BLACKMUN joined the opinion of the Court except for a footnote not reproduced in this abridgement. The opinion of JUSTICE WHITE, concurring in part and dissenting in part, is omitted.

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the question of a State's power to impose a special tax on the press and, by enacting exemptions, to limit its effect to only a few newspapers.

I

Since 1967, Minnesota has imposed a sales tax on most sales of goods for a price in excess of a nominal sum.[7] Act of June 1, 1967, ch. 32, Art. XIII, § 2, 1967 Minn. Laws 2143, 2179, codified at Minn. Stat. § 297A.02 (1982). In general, the tax applies only to retail sales. An exemption for industrial and agricultural users shields from the tax sales of components to be used in the production of goods that will themselves be sold at retail. As part of this general system of taxation and in support of the sales tax, Minnesota also enacted a tax on the "privilege of using, storing or consuming in Minnesota tangible personal property." This use tax applies to any nonexempt tangible personal property unless the sales tax was paid on the sales price. Like the classic use tax, this use tax protects the State's sales tax by eliminating the residents' incentive to travel to States with lower sales taxes to buy goods rather than buying them in Minnesota.

The appellant, Minneapolis Star & Tribune Co., "Star Tribune," is the publisher of a morning newspaper and an evening newspaper (until 1982) in Minneapolis. From 1967 until 1971, it enjoyed an exemption from the sales and

[7] Currently, the tax applies to sales of items for more than 9¢. Minn. Stat. § 297A.03(2) (1982). When first enacted, the threshold amount was 16¢. Act of June 1, 1967, ch. 32, Art. XIII, § 3(2), 1967 Minn. Laws 2143, 2180.

use tax provided by Minnesota for periodic publications.^ In 1971, however, while leaving the exemption from the sales tax in place, the legislature amended the scheme to impose a "use tax" on the cost of paper and ink products consumed in the production of a publication.^ Ink and paper used in publications became the only items subject to the use tax that were components of goods to be sold at retail. In 1974, the legislature again amended the statute, this time to exempt the first $100,000 worth of ink and paper consumed by a publication in any calendar year, in effect giving each publication an annual tax credit of $4,000.~ Publications remained exempt from the sales tax^.

After the enactment of the $100,000 exemption, 11 publishers, producing 14 of the 388 paid circulation newspapers in the State, incurred a tax liability in 1974. Star Tribune was one of the 11, and, of the $893,355 collected, it paid $608,634, or roughly two-thirds of the total revenue raised by the tax.^ In 1975, 13 publishers, producing 16 out of 374 paid circulation papers, paid a tax. That year, Star Tribune again bore roughly two-thirds of the total receipts from the use tax on ink and paper.^

Star Tribune instituted this action to seek a refund of the use taxes it paid from January 1, 1974, to May 31, 1975. It challenged the imposition of the use tax on ink and paper used in publications as a violation of the guarantees of freedom of the press and equal protection in the First and Fourteenth Amendments. The Minnesota Supreme Court upheld the tax against the federal constitutional challenge.^ We~ now reverse.

II

Star Tribune argues that we must strike this tax on the authority of *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936). Although there are similarities between the two cases, we agree with the State that *Grosjean* is not controlling.

In *Grosjean,* the State of Louisiana imposed a license tax of 2% of the gross receipts from the sale of advertising on all newspapers with a weekly circulation above 20,000. Out of at least 124 publishers in the State, only 13 were subject to the tax. After noting that the tax was "single in kind" and that keying the tax to circulation curtailed the flow of information, *id.,* at 250-251, this Court held the tax invalid as an abridgment of the freedom of the press.~

We think that the result in *Grosjean* may have been attributable in part to the perception on the part of the Court that the State imposed the tax with an intent to penalize a selected group of newspapers. In the case currently before us, however, there is no legislative history.~ and no indication, apart from the structure of the tax itself, of any impermissible or censorial motive on the part of the legislature. We cannot resolve the case by simple citation to *Grosjean.* Instead, we must analyze the problem anew under the general principles of the First Amendment.

III

Clearly, the First Amendment does not prohibit all regulation of the press. It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating

constitutional problems. See, *e. g., Citizen Publishing Co.* v. *United States,* 394 U.S. 131, 139 (1969) (antitrust laws); *Lorain Journal Co.* v. *United States,* 342 U.S. 143, 155-156 (1951) (same); *Breard* v. *Alexandria,* 341 U.S. 622 (1951) (prohibition of door-to-door solicitation); *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 192-193 (1946) (Fair Labor Standards Act); *Mabee* v. *White Plains Publishing Co.,* 327 U.S. 178 (1946) (same); *Associated Press* v. *United States,* 326 U.S. 1, 6-7, 19-20 (1945) (antitrust laws); *Associated Press* v. *NLRB,* 301 U.S. 103, 132-133 (1937) (National Labor Relations Act); see also *Branzburg* v. *Hayes,* 408 U.S. 665 (1972) (enforcement of subpoenas). Minnesota, however, has not chosen to apply its general sales and use tax to newspapers. Instead, it has created a special tax that applies only to certain publications protected by the First Amendment. Although the State argues now that the tax on paper and ink is part of the general scheme of taxation, the use tax provision^ is facially discriminatory, singling out publications for treatment that is, to our knowledge, unique in Minnesota tax law.

Minnesota's treatment of publications differs from that of other enterprises in at least two important respects:~ it imposes a use tax that does not serve the function of protecting the sales tax, and it taxes an intermediate transaction rather than the ultimate retail sale. A use tax ordinarily serves to complement the sales tax by eliminating the incentive to make major purchases in States with lower sales taxes; it requires the resident who shops out-of-state to pay a use tax equal to the sales tax savings^. Minnesota designed its overall use tax scheme to serve this function. As the regulations state, "[t]he 'use tax' is a compensating or complementary tax."^. Thus, in general, items exempt from the sales tax are not subject to the use tax, for, in the event of a sales tax exemption, there is no "complementary function" for a use tax to serve.^ But the use tax on ink and paper serves no such complementary function; it applies to all uses, whether or not the taxpayer purchased the ink and paper instate, and it applies to items exempt from the sales tax.

Further, the ordinary rule in Minnesota, as discussed above, is to tax only the ultimate, or retail, sale rather than the use of components like ink and paper. "The statutory scheme is to devise a unitary tax which exempts intermediate transactions and imposes it only on sales when the finished product is purchased by the ultimate user." *Standard Packaging Corp.* v. *Commissioner of Revenue,* 288 N.W. 2d 234, 239 (Minn. 1979). Publishers, however, are taxed on their purchase of components, even though they will eventually sell their publications at retail.

By creating this special use tax, which, to our knowledge, is without parallel in the State's tax scheme, Minnesota has singled out the press for special treatment. We then must determine whether the First Amendment permits such special taxation. A tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest. See, *e. g., United States* v. *Lee,* 455 U.S. 252 (1982). Any tax that the press must pay, of course, imposes some "burden." But, as we have observed, see *supra,* at 581, this Court has long upheld economic regulation of the press. The cases approving such economic regulation, however, emphasized the general applicability of the challenged regulation to all business~, suggesting that a regulation that singled out the press might place a heavier burden of

justification on the State, and we now conclude that the special problems created by differential treatment do indeed impose such a burden.

There is substantial evidence that differential taxation of the press would have troubled the Framers of the First Amendment.~ The role of the press in mobilizing sentiment in favor of independence was critical to the Revolution. When the Constitution was proposed without an explicit guarantee of freedom of the press, the Antifederalists objected. Proponents of the Constitution, relying on the principle of enumerated powers, responded that such a guarantee was unnecessary because the Constitution granted Congress no power to control the press. The remarks of Richard Henry Lee are typical of the rejoinders of the Antifederalists:

> "I confess I do not see in what cases the congress can, with any pretence of right, make a law to suppress the freedom of the press; though I am not clear, that congress is restrained from laying any duties whatever on printing, and from laying duties particularly heavy on certain pieces printed . . . ." R. Lee, Observation Leading to a Fair Examination of the System of Government, Letter IV, reprinted in 1 B. Schwartz, The Bill of Rights: A Documentary History 466, 474 (1971).

^The concerns voiced by the Antifederalists led to the adoption of the Bill of Rights.^

The fears of the Antifederalists were well founded. A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. See *Railway Express Agency, Inc.* v. *New York,* 336 U.S. 106, 112-113 (1949) (Jackson, J., concurring). When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government. See generally Stewart, "Or of the Press," 26 HASTINGS L. J. 631, 634 (1975). "[A]n untrammeled press [is] a vital source of public information," *Grosjean,* 297 U.S., at 250, and an informed public is the essence of working democracy.

Further, differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional. See, *e. g., Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 95-96 (1972); cf. *Brown* v. *Hartlage,* 456 U.S. 45 (1982) (First Amendment has its "fullest and most urgent" application in the case of regulation of the content of political speech). Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.~

IV

The main interest asserted by Minnesota in this case is the raising of revenue. Of course that interest is critical to any government. Standing alone, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally,˜ avoiding the censorial threat implicit in a tax that singles out the press.˜

{T}he possibility of error inherent in the proposed rule poses too great a threat to concerns at the heart of the First Amendment, and we cannot tolerate that possibility.˜ Minnesota, therefore, has offered no adequate justification for the special treatment of newspapers.˜

V

Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers. The effect of the $100,000 exemption enacted in 1974 is that only a handful of publishers pay any tax at all, and even fewer pay any significant amount of tax.˜ The State explains this exemption as part of a policy favoring an "equitable" tax system, although there are no comparable exemptions for small enterprises outside the press. Again, there is no legislative history supporting the State's view of the purpose of the amendment. Whatever the motive of the legislature in this case, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme. It has asserted no interest other than its desire to have an "equitable" tax system. The current system, it explains, promotes equity because it places the burden on large publications that impose more social costs than do smaller publications and that are more likely to be able to bear the burden of the tax. Even if we were willing to accept the premise that large businesses are more profitable and therefore better able to bear the burden of the tax, the State's commitment to this "equity" is questionable, for the concern has not led the State to grant benefits to small businesses in general.˜ And when the exemption selects such a narrowly defined group to bear the full burden of the tax, the tax begins to resemble more a penalty for a few of the largest newspapers than an attempt to favor struggling smaller enterprises.

VI

We need not and do not impugn the motives of the Minnesota Legislature in passing the ink and paper tax. Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment.^ We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.^ A tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action. Since Minnesota has offered no

satisfactory justification for its tax on the use of ink and paper, the tax violates the First Amendment,˜ and the judgment below is

Reversed.

JUSTICE REHNQUIST, dissenting.

Today we learn from the Court that a State runs afoul of the First Amendment proscription of laws "abridging the freedom of speech, or of the press" where the State structures its taxing system to the advantage of newspapers. This seems very much akin to protecting something so overzealously that in the end it is smothered. While the Court purports to rely on the intent of the "Framers of the First Amendment," I believe it safe to assume that in 1791 "abridge" meant the same thing it means today: to diminish or curtail. Not until the Court's decision in this case, nearly two centuries after adoption of the First Amendment, has it been read to prohibit activities which in no way diminish or curtail the freedoms it protects.˜

To collect from newspapers their fair share of taxes under the sales and use tax scheme and at the same time avoid abridging the freedoms of speech and press, the Court holds today that Minnesota must subject newspapers to millions of additional dollars in sales tax liability. Certainly this is a hollow victory for the newspapers, and I seriously doubt the Court's conclusion that this result would have been intended by the "Framers of the First Amendment."

For the reasons set forth above, I would affirm the judgment of the Minnesota Supreme Court.