SUPREME COURT OF THE UNITED STATES

No. 93–1677

OKLAHOMA TAX COMMISSION, PETITIONER *v.* JEFFERSON LINES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[April 3, 1995]

JUSTICE BREYER, with whom JUSTICE O'CONNOR joins, dissenting.

Despite the Court's lucid and thorough discussion of the relevant law, I am unable to join its conclusion for one simple reason. Like the judges of the Court of Appeals, I believe the tax at issue here and the tax that this Court held unconstitutional in *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U. S. 653 (1948), are, for all relevant purposes, identical. Both cases involve taxes imposed upon interstate bus transportation. In neither case did the State apportion the tax to avoid taxing that portion of the interstate activity performed in other States. And, I find no other distinguishing features. Hence, I would hold that the tax before us violates the Constitution for the reasons this Court set forth in *Central Greyhound*.

Central Greyhound considered a tax imposed by the State of New York on utilities doing business in New York—a tax called "`[e]mergency tax on the furnishing of utility services.'" *Id*., at 664 (Murphy, J., dissenting) (quoting New York Tax Law §186–a). That tax was equal to "two per centum" of "gross income," defined to include "receipts received . . . by reason of any sale . . . made" in New York. 334 U. S., at 664. The New York taxing authorities had applied the tax to gross receipts from sales (in New York) of bus transportation between New York City and cities in upstate New York over routes that cut across New Jersey and Pennsylvania. *Id*., at 654. The out-of-state

portion of the trips accounted for just over 40 percent of total mileage. *Id*., at 660.

Justice Frankfurter wrote for the *Central Greyhound* Court that "it is interstate commerce which the State is seeking to reach," *id*., at 661; that the "real question [is] whether what the State is exacting is a constitutionally fair demand . . . for that aspect of the interstate commerce to which the State bears a special relation," *ibid.;* and that by "its very nature an unapportioned gross receipts tax makes interstate transportation bear more than `a fair share of the cost of the local government whose protection it enjoys,'" *id*., at 663 (quoting *Freeman* v. *Hewit*, 329 U. S. 249, 253 (1946)). The Court noted that

> "[i]f New Jersey and Pennsylvania could claim their right to make appropriately apportioned claims against that substantial part of the business of appellant to which they afford protection, we do not see how on principle and in precedent such a claim could be denied. This being so, to allow New York to impose a tax on the gross receipts for the entire mileage—on the 57.47% within New York as well as the 42.53% without—would subject interstate commerce to the unfair burden of being taxed as to portions of its revenue by States which give protection to those portions, as well as to a State which does not." 334 U. S., at 662.

The Court essentially held that the tax lacked what it would later describe as "external consistency." *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U. S. 159, 169 (1983). That is to say, the New York law violated the Commerce Clause because it tried to tax significantly more than "that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg* v. *Sweet*, 488 U. S. 252, 262 (1989).

The tax before us bears an uncanny resemblance to the New York tax. The Oklahoma statute (as applied to "[t]ransportation . . . by common carriers")

imposes an "excise tax" of 4% on "the *gross receipts* or gross proceeds *of each sale*" made in Oklahoma. Okla. Stat., Tit. 68, §1354(1)(C) (Supp. 1988) (emphasis added). The New York statute imposed a 2% tax on the "*receipts* received . . . by reason *of any sale* . . . made" in New York. See *supra*, at 1 (emphasis added). Oklahoma imposes its tax on the total value of trips of which a large portion may take place in other States. New York imposed its tax on the total value of trips of which a large portion took place in other States. New York made no effort to apportion the tax to reflect the comparative cost or value of the in-state and out-of-state portions of the trips. Neither does Oklahoma. Where, then, can one find a critical difference?

Not in the language of the two statutes, which differs only slightly. Oklahoma calls its statute an "excise tax" and "levie[s]" the tax "upon all sales" of transportation. New York called its tax an "[e]mergency tax on . . . services" and levied the tax on "`gross income,'" defined to include "`receipts . . . of any sale.'" This linguistic difference, however, is not significant. As the majority properly recognizes, purely formal differences in terminology should not make a constitutional difference. *Ante*, at 7–8. In both instances, the State imposes the tax on gross receipts as measured by sales. Both taxes, then, would seem to have the same practical effect on the, inherently interstate, bus transportation activity. If the *Central Greyhound* Court was willing to look through New York's formal labels ("[e]mergency tax on . . . services"; "gross income" tax) to the substance (a tax on gross receipts from sales), why should this Court not do the same?

The majority sees a number of reasons why the result here should be different from that in *Central Greyhound*, but I do not think any is persuasive. First, the majority points out that the New York law required a seller, the bus company, to pay the tax, whereas

the Oklahoma law says that the "tax . . . shall be paid by the consumer or user to the vendor." Okla. Stat., Tit. 68, §1361(A) (Supp. 1988). This difference leads the majority to characterize the former as a "gross receipts" tax and the latter as a constitutionally distinguishable "sales tax." This difference, however, seems more a formal, than a practical difference. The Oklahoma law makes the bus company ("the vendor") and "each principal officer . . . personally liable" for the tax, whether or not they collect it from the customer. *Ibid*. Oklahoma (as far as I can tell) has never tried to collect the tax directly from a customer. And, in any event, the statute tells the customer to pay the tax, not to the State, but "to the vendor." *Ibid*. The upshot is that, as a practical matter, in respect to both taxes, the State will calculate the tax bill by multiplying the rate times gross receipts from sales; the bus company will pay the tax bill; and, the company will pass the tax along to the customer.

Second, the majority believes that this case presents a significantly smaller likelihood than did *Central Greyhound* that the out-of-state portions of a bus trip will be taxed both "by States which give protection to those portions, as well as [by] . . . a State which does not." *Central Greyhound*, 334 U. S., at 662. There is at least a hint in the Court's opinion that this is so because the "taxable event" to which the Oklahoma tax attaches is not the interstate transportation of passengers but the sale of a bus ticket (combined, perhaps, with transportation to the state line). See *ante*, at 15 ("The taxable event comprises agreement, payment, and delivery of some of the services in the taxing State . . . ."). Thus, the majority suggests that a tax on transportation (as opposed to the sale of a bus ticket) by a different State might be "successive," *ante*, at 16, but is not "double taxation" in a constitutionally relevant way, *ibid.;* see *ante*, at 15 ("no other State can claim to be

the site of the same combination"). I concede that Oklahoma could have a tax of the kind envisioned, namely one that would tax the bus company for the privilege of selling tickets. But, whether or not such a tax would pass constitutional muster should depend upon its practical effects. To suggest that the tax here is constitutional simply because it lends itself to recharacterizing the taxable event as a "sale" is to ignore economic reality. Because the sales tax is framed as a percentage of the ticket price, it seems clear that the activity Oklahoma intends to tax is the transportation of passengers—not some other kind of conduct (like selling tickets).

In any event, the majority itself does not seem to believe that Oklahoma is taxing something other than bus transportation; it seems to acknowledge the risk of multiple taxation. The Court creates an ingenious set of constitutionally-based taxing rules in footnote 6—designed to show that any other State that imposes, say, a gross receipts tax on its share of bus ticket sales would likely have to grant a credit for the Oklahoma sales tax (unless it forced its own citizens to pay both a sales tax and a gross receipts tax). But, one might have said the same in *Central Greyhound*. Instead of enforcing its apportionment requirement, the Court could have simply said that once one State, like New York, imposes a gross receipts tax on "receipts received . . . by reason of any sale . . . made" in that State, any other State, trying to tax the gross receipts of its share of bus ticket sales, might have to give some kind of credit. The difficulties with this approach lie in its complexity and our own inability to foresee all the ways in which other States might effectively tax their own portion of the journey now (also) taxed by Oklahoma. Under the Court's footnote rules, is not a traveler who buys a ticket in Oklahoma still threatened with a duplicative tax by a State that does *not* impose a sales tax on transportation (and thus, would not have to offer a credit for the

sales tax paid in Oklahoma)? Even if that were not so, the constitutional problem would remain, namely that Oklahoma is imposing an unapportioned tax on the portion of travel outside the State, just as did New York.

Finally, the majority finds support in *Goldberg* v. *Sweet*, 488 U. S. 252 (1989), a case in which this Court permitted Illinois to tax interstate telephone calls that originated, or terminated, in that State. However, the *Goldberg* Court was careful to distinguish "cases [dealing] with the movement of large physical objects over identifiable routes, where it was practicable to keep track of the distance actually traveled within the taxing State," *id*., at 264, and listed *Central Greyhound* as one of those cases, 488 U. S., at 264. Telephone service, the *Goldberg* Court said, differed from movement of the kind at issue in *Central Greyhound*, in that, at least arguably, the service itself is consumed wholly within one State, or possibly two—those in which the call is charged to a service address or paid by an addressee. 488 U. S., at 263. Regardless of whether telephones and buses are more alike than different, the *Goldberg* Court did not purport to modify *Central Greyhound*, nor does the majority. In any event, the *Goldberg* Court said, the tax at issue credited taxpayers for similar taxes assessed by other States. 488 U. S., at 264.

Ultimately, I may differ with the majority simply because I assess differently the comparative force of two competing analogies. The majority finds determinative this Court's case law concerning sales taxes applied to the sale of goods, which cases, for example, permit one State to impose a severance tax and another a sales tax on the same physical item (say, coal). In my view, however, the analogy to sales taxes is not as strong as the analogy to the tax at issue in *Central Greyhound*. After all, the tax before us is not a tax imposed upon a product that

was made in a different State or was consumed in a different State or is made up of ingredients that come from a different State or has itself moved in interstate commerce. Rather, it is a tax imposed upon interstate travel itself—the very essence of interstate commerce. And, it is a fairly obvious effort to tax more than "that portion" of the "interstate activity['s]" revenue "which reasonably reflects the in-state component." *Goldberg* v. *Sweet*, *supra*, at 262. I would reaffirm the *Central Greyhound* principle, even if doing so requires different treatment for the inherently interstate service of interstate transportation, and denies the possibility of having a single, formal constitutional rule for all self-described "sales taxes." The Court of Appeals wrote that this "is a classic instance of an unapportioned tax" upon interstate commerce. *In re Jefferson Lines, Inc.*, 15 F. 3d 90, 93 (CA8 1994). In my view, that is right. I respectfully dissent.