

**SUPREME COURT OF LOUISIANA**

**No. 2004-C-0814**

**CYNTHIA BRIDGES, SECRETARY, DEPARTMENT OF REVENUE,  
STATE OF LOUISIANA**

**VERSUS**

**AUTOZONE PROPERTIES, INC.**

**CALOGERO, C. J., CONCURS IN DENIAL OF REHEARING:**

I concur in the denial of the application for rehearing filed by defendant, Autozone Properties, Inc. ("Properties"), because the application was untimely, and the judgment is therefore final. However, I take the opportunity in response to this application to present the reasons why I concurred initially, the reasons I concur now, and my appreciation of the law governing this legal issue, especially since, while the judgment is now final in Louisiana, this matter concerns a serious federal constitutional issue, which, as between the litigants, is not yet finally resolved. I concurred in the opinion because the corporate restructuring undertaken by the various Autozone entities in 1995 seemed to me essentially to be a "scheme" designed to deprive the State of Louisiana of corporate income and franchise taxes it would otherwise have been entitled to receive. After reviewing the application for rehearing and reassessing the appellate briefs, it has become apparent to me that this case involves a more serious constitutional issue than I had earlier perceived, one that might have been decided incorrectly by us on original hearing.

As the application for rehearing points out, because Properties responded to the State's suit with an exception to personal jurisdiction, the appeal in this case relates only to that issue—personal jurisdiction. Further, applicable federal jurisprudence and/or rational legal analysis supports the possibility that the court of appeal might

have correctly found that Louisiana courts do not have personal jurisdiction over this nonresident corporate shareholder whose only contact with Louisiana is its out-of-state receipt of dividends from a nonresident corporation of Louisiana that was doing business in Louisiana. It seems, at least, that the defendant may well lack sufficient minimum contacts with the State to support such jurisdiction. My clearest problem with the opinion is the court's statement, without qualification, that "Louisiana has personal jurisdiction over a nonresident shareholder when Louisiana has provided benefits, opportunities, and protections which helped to create the income." *Bridges v. Autozone Properties, Inc.*, 04-0814, p. 1 (La. 3/24/05), \_\_\_ So. 2d \_\_\_, \_\_\_. That conclusion, and its underlying analysis, I submit, potentially expose untold numbers of out-of-state corporate shareholders to suits in Louisiana, regardless of whether those shareholders possess sufficient minimum contacts to support personal jurisdiction, contrary to a long line of state and federal jurisprudential authority.

In my view, the court's decision improperly conflates two issues that should be treated separately. The first of those issues focuses on whether a state has jurisdiction or authority to impose a given tax ("authority to tax"), while the second focuses on whether the prospective taxpayer has sufficient contacts with the state to allow that state's courts to exercise personal jurisdiction over that taxpayer in the state's suit to collect the tax ("personal jurisdiction").<sup>1</sup> Because the word "jurisdiction" is often used in the case law to describe a state's authority to tax, these two separate, discrete issues are easily confused. However, I now believe that treating those two issues separately is essential to reaching a correct decision on the important constitutional issue presented in this case.

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<sup>1</sup> See Walter Hellerstein, "Jurisdiction to Tax Income and Consumption in the New Economy: A Theoretical and Comparative Perspective," 38 Ga. L. Rev. 1, 3-4 (Fall 2003).

In the court's opinion in this case, the relevant issue was framed as follows:

whether Louisiana has *taxing jurisdiction* over the dividend income of a nonresident beneficiary, Autozone Properties, based on its investment in Autozone Development which receives the benefits, opportunities, and protections that come from doing business in Louisiana.

(Emphasis added.) In finding that Louisiana does have “taxing jurisdiction” over Properties, the court relies primarily on the following cases: *International Harvester Co. v. Wisconsin Dept. of Taxation*, 322 U.S. 435 (1944); *Quill v. North Dakota*, 504 U.S. 298 (1992), and *Geoffrey, Inc. v. South Carolina Tax Commission*, 313 S. C. 15, 437 S.E. 13 (1993). All three of these cases focus on a state's authority to impose taxes, as opposed to a state court's personal jurisdiction over a nonresident defendant. The courts had personal jurisdiction in both *International Harvester* and *Quill* because the “minimum contacts” test was satisfied by the fact that the defendants in the suits were nonresident corporations doing business within the state. In *Geoffrey*, personal jurisdiction was not an issue because the nonresident corporation had itself filed the suit, thereby submitting itself to the jurisdiction of the courts of South Carolina. Reduced to fundamentals, this court's decision in this case may be summarized as follows: If a state has authority to tax income derived from a corporation that has enjoyed benefits, opportunities, and protections provided by that state, the state's courts automatically have personal jurisdiction over nonresident shareholders who receive that income, even if those shareholders have no minimum contacts with the state. I do not believe that conclusion is consistent with the longstanding jurisprudential authority that requires minimum contacts to support a state court's personal jurisdiction over nonresident defendants.

Significantly, the analysis section of this court's decision does not cite any of the leading United States Supreme Court cases on personal jurisdiction, such as *International Shoe v. State of Washington*, 326 U.S. 310 (1945), despite its

acknowledgment that both of the lower courts relied on that case to support their findings that Louisiana courts do not have personal jurisdiction over Properties. *International Shoe* is instructive in a number of ways, not least of which is the fact that it is one of the seminal United States Supreme Court cases on personal jurisdiction. Further, it seems to me that consideration of the principles established by *International Shoe* is mandatory in this case because of the factual similarities. Like this case, *International Shoe* involves a state's effort to impose a tax on a nonresident corporation by filing a suit to which the nonresident corporation has responded by filing an exception to personal jurisdiction. Further, *International Shoe* was decided by the United States Supreme Court just one year after it decided the *International Harvester* case setting forth the analysis for determining whether a state has authority to tax. These facts, taken together, raise the obvious question: If the *International Harvester* analysis relative to authority to tax is sufficient to decide the personal jurisdiction question in this case, as this court's opinion suggests, why did the United States Supreme Court employ the "minimum contacts" analysis to decide the personal jurisdiction issue in *International Shoe*?

Ultimately, I believe that *International Shoe* stands for the proposition that authority to tax and personal jurisdiction are discrete questions, both of which must be answered before a state can pursue collection of a tax against a nonresident prospective taxpayer by filing a suit in that state's courts. The separate nature of the two issues is clear in the introduction to *International Shoe*, in which the United States Supreme Court set forth two different "questions for decision" as follows:

- (1) whether, within the limitations of the due process clause of the Fourteenth Amendment, appellant, a Delaware corporation, has by its activities in the State of Washington rendered itself amenable to proceedings in the courts of that state to recover unpaid contributions to the state unemployment fund exacted by state statutes, . . . and (2)

whether the state can exact those contributions consistently with the due process clause of the Fourteenth Amendment.

*Id.* at 311. Stated another way, question number one is the personal jurisdiction question, while question number two is the authority to tax question.<sup>2</sup> The *International Shoe* court concluded that the State of Washington had both “constitutional power to lay the tax [i.e., authority to tax] **and** to subject appellant to suit to recover it [i.e., personal jurisdiction].” *Id.* at 321.

Further, the *dicta* in *International Shoe* and *Quill* to the effect that the question of a state’s authority to impose a tax and the question of the state court’s personal jurisdiction over the prospective nonresident taxpayer are sometimes decided on the basis of the same factual considerations, does not, in my view, give this court license to simply ignore the minimum contacts analysis when considering the personal jurisdiction question in tax cases. It seems logical to me that, whenever a nonresident prospective taxpayer has minimum contacts with a state, and these minimum contacts are related to its receipt of income from activities in the state, and these minimum contacts are sufficient to allow the state’s courts to exercise personal jurisdiction over that taxpayer, the state probably also has authority to tax that income. In that case, some of the same factors that support the state court’s personal jurisdiction would logically support the state’s authority to tax. On the other hand, the converse is not necessarily true. The fact that a state has authority to tax income because it has provided benefits, opportunities, and protections that contributed to the profitability of the enterprise providing that income, does not necessarily mean that the nonresident prospective taxpayer, who receives dividend income derived from a

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<sup>2</sup>As this quote demonstrates, due process concerns impact both the personal jurisdiction issue and the authority to tax issue.

corporation doing business in that state, has minimum contacts with the state sufficient to support personal jurisdiction over that taxpayer.

This conclusion is supported by the fact that, to my knowledge, no court has ever before held that a nonresident shareholder's simple receipt of dividends from a corporation doing business in the state constitutes sufficient minimum contacts to allow that state's courts to exercise personal jurisdiction over that nonresident shareholder, in the absence of any other contacts with the state. Although the *International Harvester v. Wisconsin Dept. of Taxation* case contains an extensive discussion of Wisconsin's authority to tax dividend income received by nonresident shareholders with no other contacts in Wisconsin, the critical difference between that case and this case is the fact that, in *International Harvester*, the nonresident shareholders were not named as defendants in the state's suit to collect the tax. 32 U.S. 435. Rather, the defendant in the *International Harvester* suit was the corporation issuing the dividends to the nonresident shareholders. The defendant corporation was doing business in Wisconsin and therefore had minimum contacts with Wisconsin. *Id.* In the case here under consideration, the State's suit named the nonresident shareholder as a defendant, in fact the only defendant.

Nevertheless, it does seem offensive that the State of Louisiana might be deprived of the taxes it might otherwise be entitled to collect on Autozone Development's rental income, if that income were not distributed as dividends to Properties. The solution to that problem is not to allow Louisiana courts to exercise personal jurisdiction over nonresident shareholders who may have no minimum contacts with Louisiana. The court of appeal properly observed in this case that "the Department [of Revenue]'s remedy appears to lie with the legislature." *Bridges v. Autozone Properties, Inc.*, 2003-0492 (La. App. 1 Cir. 1/5/04), 873 So. 2d 25, 32.

Indeed, many states have adopted creative and thoughtful legislation to combat the problem of avoidance of state taxation through various corporate structuring schemes,<sup>3</sup> including the formation of Real Estate Investment Trusts (“REITs”), such as Autozone Development from which Properties receives the dividends the State wishes to tax in this case. Notably, Mississippi has adopted legislation specifically dealing with the problem of tax avoidance through formation of REITs. *See* Miss. Code Ann. § 27-7-17(n) of 1986. Texas and New Jersey have proposed somewhat similar provisions.<sup>4</sup>

Further, Louisiana has itself has adopted legislation to deal with the problem of taxing partnerships that do business in Louisiana and have nonresident partners. Louisiana specifically requires partnerships doing business in Louisiana to file returns and make payments on behalf of nonresident partners who do not agree to file returns in Louisiana and pay taxes on their Louisiana income. La. R.S. 47:201.1. Just as Louisiana has legislatively handled the problem of taxation of nonresident partners in a Louisiana partnership, a legislative solution would seem to be warranted to combat the problem of taxation of nonresident shareholders in REITs doing business in Louisiana. One legislative solution to this problem would be the adoption of legislation disallowing the dividends-paid deduction taken by the REIT in this case, thereby allowing Louisiana to tax the dividend income while it is in the hands of the REIT that clearly has minimum contacts with Louisiana through its ownership of property and receipt of rents from the retail Autozone stores operating within the State.

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<sup>3</sup> For a general overview of this legislation, see Ann L. Kamasky & Michael A. Guariglia, *The States Strike Back—New Legislation and Rules Limit Common State Income Tax Planning Strategies*, 2003 WL 2202135, Georgetown University Law Center Continuing Legal Education.

<sup>4</sup> *See, id.*

I concur in the denial of this untimely application for rehearing in order to express my belief that, had it been timely filed, the rehearing application should have been granted so as to allow the parties to brief and argue the issue of whether Properties had sufficient contacts with the State of Louisiana to allow Louisiana courts to exercise personal jurisdiction over that nonresident corporation in this suit by the State of Louisiana seeking payment of taxes. That issue is not resolved, in my view, by this court's finding that Louisiana has authority to levy the taxes against Properties because of its receipt of dividends from a separate company that enjoyed the benefits, opportunities, and protections that contributed to the profitability of that separate company. I believe that the applicable United States Supreme Court jurisprudence on this issue clearly reveals that the personal jurisdiction question is a separate question from the issue of whether the State of Louisiana has authority to tax the income of the corporation from which Properties receives dividends, and that the traditional minimum contacts test applies to resolution of the personal jurisdiction question. Further, assuming that the court of appeal correctly found that Autozone Properties does not have requisite minimum contacts with the State of Louisiana to allow Louisiana courts to exercise personal jurisdiction over that nonresident dividend recipient corporation, the taxes cannot be collected by resort to the method chosen by the State in this case—i.e., the filing of suit against the nonresident shareholder corporation.

In my view, the State, by enacting curative legislation, could collect the corporate taxes on the revenues from the in-state stores while avoiding the necessity of suing nonresident shareholders to collect the tax, if it were to pass legislation like Mississippi has whereby the taxes could be collected before the dividends from REITs leave the State.