IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

FORD MOTOR COMPANY,	:	
	:	
Petitioner,	:	
	:	
v.	:	C.A. No. 04C-02-155 (CHT)
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DIRECTOR OF REVENUE,	:	
	:	
Respondent.	:	
	:	
	:	

OPINION AND ORDER

On Appeal from the Decision of the Director of Revenue

Submitted: July 27, 2007
Decided: April 25, 2008

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TOLIVER, JUDGE

PROCEDURAL POSTURE

Before the Court is an appeal by the Petitioner, the Ford Motor Company, of the decision of the Director of Revenue denying Ford's claims of entitlement to a refund of the wholesaler gross receipt tax paid pursuant to 30 *Del. C.* § 2902[1] in the amount of $3,629,376. The Director of Revenue denied the claim on May 6, 2003. Ford sought a review of that decision by the Delaware Tax Appeal Board. Following the response of the Director of Revenue, Ford removed the matter to this Court on February 11, 2004 pursuant to 30 *Del. C.* § 333.

A one day non-jury trial on the matter was held on June 28, 2005, followed by post trial briefing. On January 13, 2006, while this matter was pending, the Director of Revenue denied a similar claim by the Dial

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[1] This provision of the Code as well as all subsections thereof and related provisions of Chapter 29 shall hereinafter be referred to by section only.

Corporation for a refund of the gross receipts tax paid by Dial pursuant to § 2902. Dial appealed and moved to have its case removed to this Court on an expedited basis to allow both to be addressed simultaneously.[2] That motion was granted on January 9, 2006. The briefing in the Dial appeal was completed and oral argument held on both cases on July 27, 2007.

While Ford and Dial essentially seek the same result and the legal issues are substantially the same, there are significant differences in the facts and legal arguments made. The Court has therefore addressed them individually and rendered a decision in the appeal by Dial on January 29, 2008.[3] That which follows is the Court's resolution of the issues so presented in the

[2] *Dial Corporation v. Director of Revenue*, C. A. No. 06C-05-014, at 2 (Del. Super. January 29, 2008).

[3] *Id.* at 1. As the record reflects, the Court rejected the assessment made by the Director of Revenue on the goods sold by Dial to Wal-Mart for the reasons stated therein.

appeal by Ford.

STATEMENT OF FACTS

There is very little dispute of fact underlying this controversy.[4] The Ford Motor Company is principally engaged in the development, manufacture, assembly, marketing and sale of motor vehicles as well as motor vehicle parts. Although Ford is incorporated in the State of Delaware and pays the Delaware corporate franchise tax pursuant to 8 *Del. C.* § 503, its principal place of business is in Dearborn, Michigan.

Ford does not sell its products directly to consumers but to independent Ford dealerships. It is considered a

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[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, *Ford Motor Co. v. Director of Revenue*, C.A. No. 04C-02-155 (Del. Super.) (filed June 28, 2005) (Docket No. 17).

"wholesaler of goods" for purposes of § 2902. That statutory provision also mandates that any entity falling within that definition and engaged in the business of "wholesaling" must pay a licensing fee for each such facility located in Delaware as well as a tax on the gross receipts from all wholesale sales which take place within its borders.

From January 1999 until October 2002, Ford sold vehicles to automotive dealers in Delaware with a wholesale value of $727,440,438. Based upon that activity, Ford was assessed and paid gross receipt taxes imposed via § 2902 in the amount of $3,629,376. In December 2002, Ford filed a "Claim for Revision" with the Delaware Department of Finance seeking a refund of that amount.

Ford does not have a direct presence in this State, i.e., it does not maintain any offices, manufacturing/assembly plants or facilities of any kind in Delaware. Nor are any of its employees located or stationed here. The research, development, engineering and design activities associated with developing new and improved vehicles, takes place outside of Delaware. The nexus between Ford and Delaware lies in Ford's relationship with the eleven Ford and Lincoln Mercury dealerships located in Delaware which purchase Ford vehicles as well as related products and services. That relationship is governed generally by the Sales and Service Agreement which provides the basic framework through which the parties operate.

The delivery of a vehicle to a dealership in Delaware is the beginning of the end of a complex and detailed scheme. As noted above, no part of the Ford vehicles, beginning with the research, development, engineering or design associated with their production and/or assembly, takes place in Delaware. Notwithstanding that fact, the entire process must be described at least in basic terms in order to address whether § 2902 can be applied to the sale and delivery of the vehicles in question without offending any applicable legal principles.

The process leading up to the actual physical delivery of a Ford vehicle consists of several arguably separate activities. They are nominated as: (1) program forecasting, (2) allocation, (3) wholesaling, (4) scheduling, (5) segmenting, (6) sequencing/blending, (7) vehicle building and (8) logistics. The first seven activities are relatively uncomplicated while the eighth, logistics, is more involved for present purposes.

Program forecasting along with the allocation process essentially involves a determination, based upon a dealer's past sales history and related information, of the number of vehicles to be distributed to that dealer for the upcoming year. This results in an "Earned Allocation Report" for each dealership which specifies the total number and type of vehicles for each dealership. The Ford employees involved in this function are located in Michigan.

During the wholesale process, Ford employees physically visit each Ford dealership in Delaware.[5] Those employees secure what is nominated as a "Dealer Commitment Form" signed by a representative of the dealership which obligates them to purchase a certain number of cars, at wholesale prices, from Ford.[6] The signed form is transmitted to Ford corporate headquarters in Michigan to be accepted by Ford. Ford then creates a

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[5] During the period at issue, Ford's employees made 58 visits per year to dealerships in Delaware for the purpose of securing wholesale sales.

[6] The Dealer Commitment Form is often modified in the two weeks after it is signed because not all dealerships commit to their full allocation and other dealers require more cars than their allocation.

"Suggested Retail Order" for the total number of vehicles committed to by the individual dealership which includes the specific information about each vehicle such as the make, model, color and options. Any orders subsequently drawn against that commitment are transmitted directly from Delaware to Michigan.

Once the orders are received, the remainder of the process prior to the logistics phase begins. This involves the assignment of orders to assembly plants based upon capacity, delivery costs and the time necessary to manufacture the vehicles involved after the component materials needed are gathered. The process is administered from Michigan although Ford proprietary software allows a dealer to track the manufacturing process until it is concluded. Once that point is reached, the vehicle is taken to a "drop zone" which is usually adjacent to the manufacturing facility where the vehicle was assembled.

The logistics phase begins once the vehicles are in the drop zone, and the employees of the assigned rail or motor carrier inspect and drive the vehicles through what is referred to as the “gate” or “gate release”. It is at this point the parties have agreed that title to the vehicles, along with any associated risk of loss, passes from Ford to the dealers to which they are to be delivered.[7] In addition, it is at “gate-release” that revenue from the sale or sales in question is attributed to Ford based upon generally accepted accounting principles.[8]

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[7] The parties do not reference any evidence in the record upon which that agreement is based. But for their agreement in this regard, the Court, given the instant facts, might have reached a difference result. In any event, for the reasons discussed *infra*, that agreement is not determinative of the legal viability of the gross receipts taxes assessed herein.

[8] In spite of this accounting maneuver, according to the Sales and Service Agreement, until payment from the dealer is actually received, Ford maintains a security interest in each individual vehicle.

Vehicles bound for Delaware are then transported to what is referred to as a "mixing center" in Fostoria, Ohio. From there, they are sent to a "destination ramp" in either Jessup, Maryland or Twin Oaks, Pennsylvania before being delivered to the designated dealers in Delaware. The costs of shipping the vehicles, which includes both transportation and insurance, is borne by Ford. Ford also makes and controls the arrangements made with the carriers for shipping. The dealer apparently has no input or authority to make its own arrangements.

Upon arrival at the dealerships in Delaware, the vehicles are inspected by the dealer. If there is any damage to the vehicle that occurred during transport from the manufacturing facility to the dealership, Ford, not the dealer, pays the cost of the repair.[9] Before March

[9] If the damage is greater than $500, the car cannot be sold as new. If that happens, Ford has two choices. It will either repair the vehicle and prepare it to be sold as used, or it can destroy the vehicle.

21, 2001, Ford would pay the cost of the repair directly. After March 21, 2001, insurance policies purchased by Ford insured all risk of loss not otherwise covered by the common carrier.[10] Ford is the loss payee of those policies.[11]

The relationship between Ford and the dealerships does not end once the vehicles arrive in Delaware. As opposed to that described in the Dial appeal, there are ongoing obligations flowing in both directions.

In so far as the dealers are concerned, each must provide daily reports of all vehicles sold to the public, along with monthly and annual financial reports, to Ford in Michigan. The dealers must honor/perform all

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[10] The policies were issued by the American Road Insurance Company and the Gentle Winds Reinsurance, LTD. American Road is a subsidiary of Ford Motor Company and while Ford does not have a similar affiliation with Gentle Winds, Ford pays an annual premium for that policy of six million dollars.

[11] Each policy specifically covers the period of the vehicles transit from the manufacturing plant until it is accepted by the dealer.

warranty, recall and service work as well as meet the standards prescribed by Ford when engaging in any such activity. Training to perform that work is provided by Ford customer service representatives at the dealerships. Any unresolved customer complaints must also be reported to Ford.

Ford's continuing commitment is just as substantial. The company directs national advertising to Delaware. Although the actual activities for advertising and marketing occur in Michigan, Ford contributes money directly into an advertising fund maintained by or on behalf of Ford dealerships in Delaware. Ford develops and initiates rebates and sales incentive programs implemented in Delaware designed to increase vehicle sales. Lastly, dealers must install and maintain signage identifying the dealer as being authorized to sell, lease and service new and used Ford vehicles. It is Ford which establishes standards for and must approve that signage.

Ford contends that the issue presented to this Court is whether imposing the Delaware Wholesaler Gross Receipt Tax on one hundred percent of Ford's gross receipts violates Article I, § 8 of the United States Constitution, also known as the "Commerce Clause"[12] as well as the "Due Process Clause" of the Fourteenth Amendment to that document.[13] Ford argues that the tax is unconstitutional because it is applied to the sale of products which do not take place in the State of Delaware

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[12] 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]

[13] It reads in relevant part:

> No State shall deprive any person of life, liberty, or property without due process of law.

and places an undue burden upon interstate commerce.[14] As a consequence, the application of § 2902 has transgressed the limitations set forth in the Commerce Clause according to the United States Supreme Court in *Complete Auto Transit, Inc. v. Brady*,[15] thereby constituting legal error.

Ford further argues that it should be completely exempt from taxation via § 2902 because it does not physically deliver tangible personal property within the geographical boundaries of the State of Delaware. Because Ford did not do so, its sales to Ford dealerships in Delaware do not fall within the ambit of the aforementioned statute. By reaching a contrary result

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[14] Ford further contends that a tax imposed under the statute might survive constitutional scrutiny if it were based upon some measure of its alleged presence in Delaware other than one hundred percent of Ford's wholesales of vehicles to Delaware dealers. It has suggested three alternate methods of calculating any gross receipts that might be due. Petitioner's Op. Br. at 10-11.

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

given the existing circumstances, the Director of Revenue also erred as a matter of law.

The Director of Revenue urges the Court to affirm his decision. He argues that imposing the gross receipts tax via § 2902 generally and/or specifically in so far as Ford's vehicular sales activities in Delaware are concerned, does not violate any provision of the federal constitution as claimed by Ford.[16] The Director of Revenue goes on to contend that Ford does in fact deliver goods in this State within the meaning of § 2902. The Court, should, as a consequence, deny Ford's appeal and sustain the imposition of the taxes.

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[16] In response to Ford's argument that there are alternative methods of assessing the tax, the Director of Revenue disagrees stating that the amount of the tax can not be assessed other than as set forth in the terms of the statute. Respondent's Post-Trial Ans. Br. at 33.

DISCUSSION

Scope of Review

As stated in *Dial*, the applicable standard of review is not complicated.

> ____The scope of review of the decision of the Tax Appeal Board upholding the decision of the Director of Revenue is limited. The appeal to this Court does not involve a trial de novo; it is confined to a review of the proceedings below. The decision, if supported by the record, will be sustained in the absence of an abuse of discretion or an error law.[17]

The Commerce Clause

The purpose and history of the Commerce Clause is also set forth in *Dial*. At the risk of being repetitive, this Court acknowledged:

> The Commerce Clause of the United States Constitution gives Congress the

[17] *Dial*, C.A. No. 06C-05-014 at 9 (footnotes omitted).

> power to regulate commerce among the several states. 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 imposed by that activity . . . .[18]

Complete Auto concerned a tax on automobiles delivered to dealers in the State of Mississippi. The vehicles were manufactured and/or assembled outside of that state. The tax was imposed for the privilege of doing business there. The amount of the tax was determined by application of the rates designated by statute to the gross proceeds of the sales or gross income received.

The Unites States Supreme Court determined that the

[18] *Id.* at 10 (footnote omitted).

tax in question did not impose an undue burden on interstate commerce and upheld the imposition of the tax. That analysis has since become known as the *Complete Auto* four prong test. When applied, the test will result in the rejection of a challenge to a tax levied by a state or local government where 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.[19]

In 1995, the Supreme Court reaffirmed the *Complete Auto* analysis in *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*[20] In that case, the interstate carrier did not collect Oklahoma sales tax on tickets for interstate travel originating in Oklahoma. The Oklahoma Tax Commission filed a claim with the United States

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

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

Bankruptcy Court after the carrier went bankrupt. The Bankruptcy Court found the tax inconsistent with the Commerce Clause in that it placed an undue burden on interstate commerce and presented a danger of multiple taxation of the same activities. The Supreme Court disagreed based upon its analysis of the situation in light of the holding in *Complete Auto*.

There was no real dispute between the parties in *Jefferson Lines* as to prongs one, three and four of the *Complete Auto* test. However, it was a different story relative to the fair apportionment prong. The tax had to be both internally and externally consistent.

> . . . Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. . . . The test . . . looks to the structure of the tax at issue to see whether its identical application by every State . . . would place interstate commerce at a disadvantage as compared with commerce

> intrastate. . . .
>
> External consistency, on the other hand, looks not to the logical consequences of cloning, but the economic justification for the State’s claim upon the value taxed, to discover whether a State’s tax reaches beyond that portion of value that is fairly attributable to economic activity withing the taxing State.[21]

The Supreme Court made a number of additional comments which, while not critical to its decision, are particularly relevant to the instant controversy. It stated:

> . . . [W]e found a sufficient safeguard against the risk of impermissible multiple taxation of a sale in the fact that it was consummated in only one State. . . . As we put it [previously], a necessary condition for imposing the tax was the occurrence of ‘a local activity, delivery of goods within the State upon their purchase for consumption’. . . . Conversely, we held that a sales tax could not validly be imposed if the purchaser already had obtained title to the goods as they were shipped from outside the taxing State into the taxing State by common carrier. The out-of-state seller in that case

[21] *Id.* at 185.

> 'was through selling' outside the taxing State. . . .[22]

The Court further noted that while some of the activities taking place before or after a sale or rendition of services might cross state lines, multiple taxation of the same goods and/or services was not prohibited by the Commerce Clause.[23] Lastly, it recognized that case law supported the proposition that:

> . . . [S]ales with at least partial performance in the taxing State justify that State's taxation of the transaction's entire gross receipts in the hands of the seller.[24]

The decision and underlying rationales of *Complete Auto* and *Jefferson Lines* have been the subject of much discussion since issued generally and in particular here. Several consistent conclusions regarding the taxation of

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[22] *Id* at 187.

[23] *Id.* at 188-189. *See also City of Modesto v. National Med. Inc*., 27 Cal. Rptr.3d 215. (Cal. App. 2005).

[24] *Jefferson Lines, Inc.*, 514 U.S. at 189.

interstate commerce have resulted. They are as follows:

> 1. Taxing interstate commerce is not prohibited by the Commerce Clause and interstate commerce must bear its fair share of the state and local tax burdens to which it contributes.[25]
>
> 2. Gross receipts taxes are a means of distributing the costs of government and not a measure of the benefits actually conferred by state and/or local governments.[26]
>
> 3. Any taxes so imposed must be reasonably related to the extent of the contact with or presence within the taxing jurisdiction since this is the primary justification for such taxes.[27]
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> 4. Manufacturing and wholesaling are different activities for purposes of determining whether a state or local tax places an impermissible burden interstate commerce thereby violating the Commerce Clause.[28]

It is within this framework that the dispute between Ford and Director of Revenue must be addressed. The

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[25] *Id.*

[26] *Exxon Corp. v. Wisconsin Dept. of Revenue*, 447 U.S. 207 (1980).

[27] *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981).

[28] *Tyler Pipe Industries v. Washington State Dept. of Revenue*, 483 U.S. 232 (1987).

Court will turn first to the issue of whether Ford's wholesaling efforts are subject to § 2902. If the answer is in the affirmative, the focus must shift to an examination of whether § 2902 was applied in a fashion consistent with the Commerce Clause.

Ford's Activities Fall Within The Ambit of § 2902

The instant controversy centers, as noted above, around whether Ford was engaged in "wholesaling" during the course of the activities in question. The answer requires a further review of the relevant statutory provisions of Chapter 29.

Section 2901(10)(a)(1) defines a "wholesaler" as follows:

> Every person engaged, as owner or agent, in the business of selling to or exchanging with another person goods for cash or barter or any consideration for purpose of resale by the person

> acquiring the goods sold or exchanged, and includes without limitation goods sold or exchanged through outlets, warehouses and distribution depots of persons whose principal place of business is located inside or outside this State and also includes the sale of machinery, supplies or materials which are to be directly consumed or used by the purchaser in the conduct of any business or activity is subject to the tax imposed by this part . . . .

The parties agree that Ford falls within this definition and that the statute requires any entity falling within that definition to pay a fee or a tax at the statutorily mandated rate applied to the "aggregate gross receipts attributable to sales of tangible personal property physically delivered within this State . . . ."[29] Section 2902(4)b defines "Gross receipts" where a wholesaler is concerned as the "total consideration received from sales of tangible personal property physically delivered within this State to the purchaser

[29] Section 2902(b) & (c)(1).

or the purchaser's agent" with certain exceptions not pertinent to this discussion. Lastly, "physically delivered" in this context includes:

> [D]elivery to the United States mail or to a common or contract carrier for shipment to a place within this State irrespective of F.O.B. or other terms of payment for delivery.[30]

As noted above, Ford contends that since title to the vehicles is transferred to the dealerships before the vehicles enter Delaware, the activities in question do not fall within the scope of Chapter 29 and should not be taxed. This argument is not persuasive.

Simply put, Ford does maintain a continuous course of contact with and control over the delivery and wholesale sale of Ford vehicles and related products/services to dealerships located in the State of Delaware. Moreover, the wholesaling process begins with and is superimposed

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[30] Section 2901(7).

upon activity taking place in Delaware. As a result, the Court must conclude that said activity is governed by § 2902. That conclusion is warranted for at least three reasons.

First, the record clearly indicates that Ford has an ongoing relationship with the eleven Ford and Lincoln/Mercury dealerships located in Delaware which preexisted the assessment of the taxes in question. That relationship, as evidenced by the Sales and Service Agreements, defines how, when and where Ford vehicles and related services are acquired as well as disposed. The initial forecast of the number of vehicles to be sold along with the agreement to purchase the same involved physical visits to and contacts with the Delaware dealerships by Ford employees from other states and the execution of a dealer commitment form in Delaware. It involves as well the transmission of orders placed pursuant to those agreements by dealership personnel in Delaware to Ford headquarters in Michigan.

Second, Ford determines and controls the manner as well as the timing of the delivery of vehicles, other Ford products and related services to the dealerships.[31] Although the parties have agreed that title and risk of loss pass to the dealerships outside Delaware, it is apparent that Ford’s contact with, control over and interest in the vehicles does not end at that point.

Ford schedules and directs delivery to Delaware by carrier which is critical to the wholesaling process, at least according to Ford’s expert, Douglas Kevorkian.[32] Ford retains an ownership interest in the vehicles in the form of a lien until the price of each vehicle is

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[31] This is to be contrasted with the situation in *Dial* where Wal-Mart told Dial where and when to deliver the goods Wal-Mart purchased from Dial.

[32] *See* Stipulated Ex. N. 7, Douglas Kevorkian, *Wholesale Practices of Ford Motor Company and the US Auto Industry*, at 47 (January 25, 2005).

actually remitted to Ford which is most likely after the vehicle is sold.[33] The Court further notes that vehicles sustaining more than $500 in damage during transit are returned to Ford for disposition by Ford, including, but not limited to resale.

Third, Ford controls the manner in which dealerships dispose of or maintain vehicles delivered to them by carrier. Ford mandated the terms and circumstances by which the dealerships advertise and/or display Ford products.[34] Similarly, Ford sets the standards for service, repair and warranty work on vehicles acquired by Delaware dealerships from Ford and sends Ford employees to Delaware to train dealership personnel in those regards. That oversight continues up to and including

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[33] While "title transfer" may allow dealerships to dispose of the vehicles, any vehicles so shipped, like a mortgaged home, remain encumbered unless and until the lien is released by Ford.

[34] The record further reflects that Ford provides incentives which affect the price and/or terms of the sale of the vehicles by the dealerships to consumers post delivery.

that point in time that the vehicles are sold in the reports that the dealerships must make to Ford concerning sales of vehicles and products along with the performance of related services.

To reach any other result would be to ignore the complex relationship between Ford and its Delaware dealerships. That relationship as well as the activities generated are not capable of simplistic division as Ford would argue but are inextricably intertwined constituting one continuous course of conduct. The activity assessed was intended by Ford to culminate in the delivery of vehicles in Delaware, which did take place. As a consequence, Ford's wholesaling activities are within the scope of § 2902 and subject to the fees assessed thereby. If Ford's challenge is to be successful, it must be based upon the applicable provisions of the United States Constitution.

Constitutionality of § 2902

The constitutionality of gross receipts taxes when viewed in light of the Commerce Clause has long been settled.[35] Again, the Commerce Clause does not prevent taxation of interstate commerce by state or local governments as long as the governmental effort in that regard imposes no undue burden upon that commerce. Moreover, there is no challenge via the Due Process Clause of the Fourteenth Amendment where there is a substantial nexus for Commerce Clause purposes between the activity being taxed and the taxing jurisdiction.[36]

Section 2902 is not constitutionally suspect on either ground. First, Ford does not dispute the fact

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[35] *Complete Auto Transit, Inc.,* 430 U.S. at 274; *Jefferson Lines, Inc.,* 514 U.S. at 175; *Franklin Fibre-Lamitex Corp. v. Director of Revenue*, 505 A.2d 1296, 1299 (Del. Super. 1985), *aff'd* 511 A.2d 385 (Del. 1986). As to *Franklin Fibre*, the Court must note, as it did in *Dial*, that the case is of no additional utility here given the amendment of § 2902 in 1984. *See Dial,* at 19.

[36] *Complete Auto Transit, Inc.,* 430 U.S. at 274.

that there is a substantial nexus between its wholesaling activities and Delaware. Its due process claim does not, as a consequence, merit further consideration.[37] Second, Ford's challenge lies in the application and/or assessment of the tax on the sales between Ford and its Delaware dealerships. It contends that said assessments place a constitutionally impermissible burden upon interstate commerce based upon the dictates of *Complete Auto* and its progeny. To be specific, Ford contends that the taxes imposed via § 2902 are not fairly apportioned, are not fairly related to services provided and that the taxes discriminate against interstate commerce, thereby failing three of the four prongs of the *Complete Auto* test.[38] The constitutionality of the assessments made by

[37] Indeed, Ford has devoted a total of two paragraphs in its opening brief and nothing after that.

[38] As noted above, Ford does not argue that there is no substantial nexus between the activity being taxed and the taxing jurisdiction and does not therefore suggest that the instant assessments violate the first prong of *Complete Auto.*

the Director of Revenue will be so judged as a result.

Complete Auto **Analysis**

Ford contends that the assessments violate the third prong of the *Complete Auto* test in that they discriminate against interstate commerce in favor of intrastate commerce. That argument has no merit. The statute treats any wholesaler engaged in wholesaling in Delaware the same. All must pay a tax on the gross receipts of the wholesaling activity without regard to where or how the goods were manufactured or assembled. It is the extent of the wholesaling activity which is measured by the receipts from the sales of the goods delivered in Delaware which is taxed.

Ford's argument is apparently premised upon defining wholesaling to include the manufacturing of the goods.[39] The Court does not adopt that definition as the activities comprise two distinct events which may be taxed separately as the goods transit the stream of commerce.[40] Ford's expert testimony does not negate the legal viability of that conclusion and is not persuasive given the facts and circumstances of this litigation.

Ford next contends the taxes imposed run afoul of the fourth prong of the *Complete Auto* test in that they are not fairly related to benefits conferred upon the taxpayer by the taxing jurisdiction. To adopt Ford's argument in this regard, the Court would have to accept

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[39] The examples provided by Ford in support of its argument are not helpful. Every wholesaler, regardless of where they manufacture or assemble the goods being wholesaled, is taxed at the same rate. General Motors and Chrysler, both of which have assembly facilities in Delaware, would pay the same rate as Ford or Toyota on vehicles delivered to dealerships in Delaware. Consequently, the location of efforts to create the finished product leading up to their delivery, is of no consequence when the gross receipts tax is assessed pursuant to § 2902. Petitioner's Op. Br. at 19.

[40] *Complete Auto Transit, Inc.*, 430 U.S. at 274; *Tyler Pipe Industries, Inc.*, 483 U.S. at 243.

the proposition that Ford's activity is limited to averaging fifty-eight visits to Delaware per year by four of its employees. That is simply incorrect and represents an extremely myopic view of Ford's wholesaling activity in Delaware.

As previously described, Ford's presence and/or wholesaling activity in Delaware is substantial. It involves extensive and ongoing contact with the dealerships, the execution of contracts and orders for motor vehicles along with advertising and continued financial interests in those goods post delivery to Delaware. Ford sends employees to Delaware to train dealership staff in a continuing effort to sell, service and/or repair vehicles after the vehicles had been delivered here. Most significantly, Ford directs, schedules and otherwise controls the delivery of vehicles to its dealerships in Delaware.

In order to satisfy the fourth prong of the *Complete Auto* test, there need not be a dollar for dollar relationship between the amount of tax imposed by the jurisdiction and the value of the benefits conferred to the taxpayer.[41] Nor does there have to be a direct benefit conferred upon the taxpayer before the taxpayer is made to pay it share of the expenses of government.[42] All that is required is that the taxpayer bear its fair share of state expenses and that the measure of those expenses must be reasonably related to the level of its activity in the taxing jurisdiction.[43]

During the period of time under scrutiny, Ford received in excess of $700,000,000 from the sale of vehicles delivered to dealerships in Delaware. Based

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[41] *Commonwealth Edison Co.*, 453 U.S. at 628-629.

[42] *Goldberg v. Sweet*, 488 U.S. 252 (1989); *Jefferson Lines, Inc.*, 514 U.S. at 175.

[43] *Commonwealth Edison Co.*, 453 U.S. at 626; *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938).

upon that activity, it paid approximately $3,700,000 in gross receipts taxes via § 2902. Given the level of activity involved along with the amount of revenue so generated, Ford cannot enjoy the privilege of doing business in this State without paying its fair share of the costs of government associated therewith. Stated differently, the Court is not persuaded by Ford's argument in this regard and must conclude that the tax is fairly related to the benefits conferred by and in this State.

The major thrust of Ford's challenge is that the gross receipts tax assessed violates the second or fair apportionment prong of the *Complete Auto* test. Ford claims that since "less that one quarter of one percent of Ford's costs associated with its gross receipts from Delaware dealers are from activities conducted in

Delaware",[44] taxing one hundred percent of the gross receipts from the sale of vehicles delivered to dealerships in Delaware contravenes the aforementioned measure of constitutionality. It again relies upon the view that Ford's only activities in Delaware are the visits by its New Jersey and Virginia sales managers. The Director of Revenue, Ford argues, has erroneously taxed substantial wholesaling, development, manufacturing assembly and marketing activities that took place beyond the borders of Delaware.

Neither side disagrees with the proposition that the tax imposed must be internally and externally consistent. Nor have the parties advanced any argument suggesting that the tax is inconsistent internally. Ford's argument is that the challenged assessments are externally inconsistent, i.e., the taxes reach activities beyond

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[44] Petitioner's Op. Br. at 18.

Delaware. This argument, however and again, requires the Court to adopt a view of the definition of wholesaling put forth by Ford. It also requires the Court to ignore: (1) the full scope and nature of Ford's activities associated with the sale and delivery of its products in Delaware; and (2) the fact that each of those activities is inextricably intertwined with the other activities and done to benefit Ford's wholesaling efforts in Delaware. This Court, at the risk of being repetitive, cannot adopt such an approach.

First, the Court must conclude that the tax was assessed based on the delivery of vehicles in Delaware and therefore, on activities which took place in Delaware. As a result, there is no risk of multiple taxation by other jurisdictions on goods so delivered. The Director of Revenue has not attempted to tax more than Delaware's fair share of this interstate commerce and the tax is reasonably related to Ford's presence in this State.

Second, with respect to Ford's argument that wholesaling includes other activities leading up to the completion of the finished product which took place prior to delivery to Delaware, this Court repeats the response made relative to the fourth prong.[45] In sum, wholesaling is a separate and distinct activity which took place locally. In addition, it is clear that goods may be taxed at more than one point in the stream of commerce for different reasons.[46]

Third, the tax imposed via § 2902 is a tax based upon the privilege of doing business in this State and the level of activity in that regard. Even if one were to view the wholesaling process to include the other

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[45] *See* p. 33-36 *supra*.

[46] *See* cases cited at foot note 23 *supra.*

activities initiated before the vehicles arrived in Delaware, those efforts are so intertwined with those which took place after that event, that they are incapable of segregation. Moreover, Ford's efforts were intentionally designed and carried out for purposes of engaging in wholesaling in Delaware. As a consequence, it was appropriate for the Director of Revenue to view that activity as having taken place entirely in this State here as a measure of that business activity. This view is consistent with the dictates expressed in *Jefferson Lines.*[47]

Ford cites a number of cases meant to bolster its position that the gross receipts tax as applied by Delaware is unconstitutional because the tax is not fairly apportioned.[48] However, the cases so referenced

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[47] *Id.*

[48] *See* Petitioner's Op. Br. At 15-20.

are either factually inapposite or legally irrelevant.[49] For example, neither *Northwood Construction Co. v. Township of Upper Moreland; City of Winchester v. American Woodmark Corp.;* nor *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia,* upon which Ford places significant reliance, present fact patterns which are even remotely analogous to the facts presented here. The taxation challenged in those cases as violative of the Commerce Clause attempted to include activities without any connection to the taxing jurisdiction. That is clearly not the case here.

As noted in *Dial,* it is the application of the *Complete Auto* test to the specific facts of each case

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[49] *See generally Northwood Construction Co. v. Township of Upper Moreland*, 856 A.2d 789 (Pa. 2004), *cert. denied*, 125 S. Ct. 1736 (2005); *City of Winchester v. American Woodmark Corp.*, 464 S.E.2d 148 (Va. 1996); *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia*, 823 A.2d 108 (Pa. 2003); *General Motors Corp. v. City of Los Angeles*, 486 P.2d 163 (Cal. 1971); *General Motors Corp. v. City of Kansas City*, 1994 WL 49620 (Mo. App. W.D. Feb. 22, 1994). *M & Assocs. v. City of Irondale*, 723 So.2d 592 (Ala. 1998); *Southern Pacific Transportation Co. v. Arizona Department of Revenue*, 44 P.3d 1006 (Ariz. Ct. App. 2002).

which determines whether the application of the taxing authority, or the authority itself, is constitutional. Ford is correct to the extent that it argues that there are cases where gross receipts taxes have been deemed unconstitutional because they do not conform to the standard outlined by the *Complete Auto* test. However, the mere existence of this line of jurisprudence, without more, is not persuasive.[50]

Given this view of Ford's activities, the Court must conclude that the imposition of the gross receipts tax is externally consistent as well as internally consistent. Section 2902 does not reach activities or efforts beyond the borders of Delaware and is fairly apportioned under

[50] More on point are *General Motors Corp. v. City of Seattle*, 25 P.3d 1022 (Wash Ct. App. 2001), *cert. denied*, 535 U.S. 1056 (2002) and *Volkswagen Pac., Inc. V. City of Los Angeles*, 496 P.2d 1237 (Cal. 1972) where the gross receipts taxes imposed on wholesaling in each case are deemed to have been fairly apportioned given the separate and distinct nature of manufacturing versus wholesaling as differentiated by the U. S. Supreme Court in *Tyler Pipe Industries*, 483 U.S. at 234.

the instant circumstances as a result. Nothing more in this regard is required by the Commerce Clause.

In sum, the imposition of the gross receipts tax pursuant to § 2902 meets all four prongs of the *Complete Auto* test. This view is consistent with the holdings not only in *Complete Auto* but in *Jefferson Lines, Tyler Pipe* and other cases reviewing the interaction between state/local tax statutes and the Commerce Clause. Accordingly, the Court must find that the Director of Revenue did not run afoul of the Commerce Clause. The fact that some of the activities contributing to production of the goods upon which the assessment was based took place in other states is of no legal consequence and does not require the Director of Revenue to exclude any part of the value of the goods sold at wholesale by Ford in Delaware.[51]

This is not the first occasion that Ford has attempted to persuade a court that the Commerce Clause insulates Ford's wholesaling activities from taxation by a state or local jurisdiction. In *Ford Motor Co. v. City of Seattle, Executive Servs. Dep't*,[52] Ford advanced the same arguments supported by the same line of authority that it has championed here. The issue arose following imposition of a "business and occupation tax" by the Cities of Seattle and Tacoma, Washington on wholesale sales by Ford to automotive dealers in those cities.

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[51] The conclusion that the taxes imposed via § 2902 does not violate the Commerce Clause is also consistent with the result reached by the Court in *Dial.* As that decision reveals, all aspects of the relationship between Dial and Wal-Mart from beginning to end took place prior to the delivery of the goods in Delaware. Dial had completed the sale and had no further connection or contact with the goods. Passage of title and transfer of the risk of loss occurred outside of this State and was critical to determining whether the tax was assessed in a manner that did not constitute an undue burden upon interstate commerce. In the instant litigation, there was extensive and continued contact with Delaware with the clear purpose of facilitating wholesaling activity notwithstanding when and where legal ownership was to have passed.

[52] 156 P.3d 185 (Wash. 2007).

Ford was registered to do business in the State of Washington, and while it maintained an office in Bellevue, Washington, Ford did not manufacture or assemble motor vehicles in that state. Nor did Ford sell automotive products directly to consumers. However, as the Supreme Court of Washington noted, Ford did sell vehicles and parts to dealers who in turn sold them to consumers. Ford also engaged in a wide variety of activities within the two cities for the purpose of selling its products to dealers and assisting the dealers in selling Ford products/services directly to consumers. That effort included advertising, marketing, meeting with dealership personnel about new products and services, selling automotive warranties on Ford automobiles as well as addressing customer concerns.

After referencing the federal authorities discussed above, the Washington Supreme Court went on to conclude that the tax in question was fairly apportioned, did not discriminate against interstate commerce and was fairly related to the services provided by the taxing jurisdiction. Therefore, the tax did not violate the constraints imposed by the Commerce Clause.[53]

That court also made several comments about the challenges raised by Ford. First, it noted that Ford's fair apportionment argument had been previously decided adversely to Ford and there was no basis to alter that result. Second, wholesale sales constituted an activity separate from manufacturing, design and related activities and must be considered as having been conducted totally within the locale where the goods

[53] Ford did not challenge the existence of the first or substantial nexus prong of the *Complete Auto* test. In addition, there were challenges not relevant to this litigation raised by Ford based on state law which were also rejected by the Washington Supreme Court.

ultimately came to rest.[54] Lastly, the court dismissed Ford's assertion that the *Complete Auto* analysis required it to "compare the actual value of the services provided by the [taxing jurisdiction] with the income taxed."[55] Rather, the court stated that the fourth prong of the *Complete Auto* test did not concern the rate or amount of the tax but required only that the tax be "tied to the earnings which the state made possible."[56]

The holding and comments made in *Ford v. City of Seattle* referenced above to the instant litigation are consistent with the approach taken by this Court. Ford has engaged in wholesaling of goods in Delaware just as it did in the State of Washington. The responses to Ford's arguments, given the facts of this case, are of

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[54] *City of Seattle, Executive Service Department*, 156 P.3d at 195.

[55] *Id.*

[56] *Id.*

equal strength if not stronger. Ford cannot argue otherwise.

Lastly, given the view of § 2902 adopted here, it is not necessary to reach Ford's argument that the Director of Revenue could constitutionally assess a gross receipts tax on Ford's wholesaling activity in Delaware by utilizing any of the alternative methods proposed by Ford.

CONCLUSION

Based upon the foregoing, The decision of the Director of Revenue must be, and hereby is, **affirmed.** There is substantial evidence to support the conclusion that Ford engaged in activities during the relevant periods of time which were subject to the gross receipts tax imposed pursuant to 30 *Del. C.* § 2902. Nor was any legal error committed by the Director of Revenue in reaching that result. Lastly, neither the aforementioned statute or the manner in which it was imposed, run afoul of Article I, § 8 of the United States Constitution or the Fourteenth Amendment to that authority.

TOLIVER, JUDGE