No Double Taxation Risk for CAT: *Crutchfield* Got It Right

by Richard L. Cram

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In this report, Cram discusses a recent article by Robert Firestone in which he asserted that the Ohio Supreme Court misapplied dormant commerce clause jurisprudence in *Crutchfield Corp. v. Testa*. Cram argues that the Ohio Supreme Court got it right, and that Firestone's concerns about the potential for double taxation are misplaced.

In a recent article,[1] New York City Tax Appeals Tribunal Commissioner Robert Firestone argues that the Ohio Supreme Court in *Crutchfield Corp. v. Testa*[2] misapplied case law that construed the dormant commerce clause in the context of a state gross receipts tax. *Crutchfield* upheld Ohio's economic nexus standard for its commercial activities tax (CAT), a gross receipts tax.

Firestone claims that to establish substantial nexus, the state must show that the out-of-state seller has a physical place of business "through which it is engaged in substantial sales-generating activities" in the state because of the purported heightened risk of multiple taxation with gross receipts taxes.[3] The taxpayer did not raise the risk of multiple taxation in *Crutchfield*.[4] This suggests that no such issue existed. The court instead focused on substantial nexus, upholding the CAT "factor presence" nexus[5] threshold of $500,000 in Ohio sales[6] applied to an out-of-state retailer with no physical presence in the state.[7]

For support, Firestone relies on *J.D. Adams Manufacturing Co. v. Storen*,[8] *McGoldrick v. Berwind-White Coal Mining Co.*,[9] *McLeod v. Dilworth*,[10] and three Washington business and occupation (B&O) tax cases: *General Motors Corp. v. Washington*,[11] *Standard Pressed Steel v. Department of Revenue*,[12] and *Tyler Pipe Industries Inc. v. Washington*.[13] Firestone cannot rely on these decisions, however. To the extent they remain good law, these decisions support the argument that the CAT presents no serious risk of multiple taxation. Five of the cases — *J.D. Adams*, *Berwind-White*, *Dilworth*, *General Motors Corp.*, and *Standard Pressed Steel* — were decided in an era when a majority of the justices on the U.S. Supreme Court

[1] Robert J. Firestone, "Does the Ohio CAT Violate the Commerce Clause?" *State Tax Notes*, May 1, 2017, p. 491.

[2] 2016-Ohio-7760, slip op. (Ohio 2016).

[3] Firestone, *supra* note 1.

[4] *Crutchfield*, slip op. at para. 29.

[5] Charles E. McLure Jr. first proposed the factor presence nexus concept in his December 2000 *National Tax Journal* article "Implementing State Corporate Income Taxes in the Digital Age." The Multistate Tax Commission expanded on McLure's concept, approving a uniformity proposal in 2002 titled "Factor Presence Nexus Standard for Business Activity Taxes."

[6] Ohio Rev. Code section 5751.01(I)(3).

[7] *Crutchfield*, slip op. at paras. 42, 56. For analysis and support of the court's substantial nexus rationale, *see* John A. Swain, "The Zombie Precedent: *Norton Co. v. Department of Revenue*," *State Tax Notes*, Apr. 17, 2017, p. 301; and Cram, "Dissociation — A Valid Transactional Nexus Argument?" *State Tax Notes*, June 19, 2017, p. 1177.

[8] 304 U.S. 307 (1938).

[9] 309 U.S. 33 (1940).

[10] 322 U.S. 327 (1944).

[11] 377 U.S. 436 (1964).

[12] 419 U.S. 560 (1975).

[13] 483 U.S. 232 (1987).

subscribed to the now-debunked interstate commerce tax immunity theory expressed in *Freeman v. Hewit*[14] and *Spector Motor Service Inc. v. O'Connor*.[15] Under that obsolete theory, the Court held that the commerce clause prohibited states from taxing sales in interstate commerce. If the out-of-state seller had sufficient local incidents, that is, the interstate commerce became localized, then the tax could be upheld as a local tax.[16] The local incident requirement satisfied due process and reduced the risk of multiple taxation.[17]

But the Court discarded the interstate commerce tax immunity theory in *Complete Auto Transit Inc. v. Brady*.[18] Thus, the five pre-*Complete Auto* cases that Firestone relies on are of questionable authority to the extent they rest on that rejected theory. Those cases generally have continuing relevance only regarding their risk of multiple taxation analysis. And none supports the proposition that the CAT presents a risk of multiple taxation (again, an argument that Crutchfield did not raise). The only post-*Complete Auto* decision Firestone relies on is *Tyler Pipe*, in which the Supreme Court found there was no risk of multiple taxation created by Washington's B&O tax. The B&O tax is a gross receipts tax, similar to the CAT, imposed on an out-of-state seller's interstate sales into Washington.

Complete Auto replaced the interstate commerce tax immunity theory with a four-part test. A state can tax interstate commerce if 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] As the *Crutchfield* court correctly observed, the local incident requirement under the rejected interstate commerce tax immunity theory is not the same as the substantial nexus requirement under the *Complete Auto* four-part test.[20]

Firestone confuses the substantial nexus and fair apportionment requirements of the *Complete Auto* test. Substantial nexus — in addition to fulfilling the due process nexus requirement for "some minimum connection, between a state and the person, property or transaction it seeks to tax"[21] — seeks to limit "state burdens on interstate commerce."[22] But consideration of the risk of multiple taxation specifically applies under the fair apportionment requirement,[23] which involves application of the internal consistency and external consistency tests.[24] Under the internal consistency test, the court hypothesizes that other states have passed an identical taxing statute to that of the taxing state, to determine if a risk of multiple taxation exists.[25] External consistency looks to

> 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 within the taxing State.[26]

Neither the internal nor external consistency test considers whether the out-of-state seller has physical presence in the taxing state.

Apportionment is not an exact science. As stated in *Moorman Mfg. Co. v. Bair*,[27] "some risk of duplicative taxation exists whenever the states in which a corporation does business do not follow identical rules for the division of income." In

[14] 329 U.S. 249 (1946) (overruled in *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 288-89 (1977), as recognized in *Oklahoma Tax Commission v. Jefferson Lines Inc*., 514 U.S. 175, 183 (1995)).

[15] 340 U.S. 602 (1951) (overruled in *Complete Auto*, 430 U.S. at 288-289).

[16] *See Freeman,* 329 U.S. at 267–268 (Rutledge, J., concurring).

[17] *Id*. at 270–71.

[18] 430 U.S. 274, 288–289 (1977), overruling *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951).

[19] *Id*. at 279.

[20] *Crutchfield*, slip op. at para. 34.

[21] *Quill Corp. v. North Dakota*, 504 U.S. 298, 313 (1992) (quoting *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 344–345 (1954)).

[22] *Id*. at 313.

[23] *See Goldberg v. Sweet*, 488 U.S. 252, 260-261 (1989) ("We are mindful that the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction").

[24] *Id*. ("We determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent").

[25] *Id*.

[26] *Jefferson Lines Inc*., 514 U.S. at 185.

[27] 437 U.S. 267, 278 (1978) (upholding Iowa's single-sales-factor apportionment method for its corporate income tax, when challenged by an Illinois manufacturer claiming that the method violated the commerce clause, as applied to its income from sales into Iowa, because Illinois used a three-factor apportionment formula).

Moorman, the Supreme Court upheld against a commerce clause challenge Iowa's single-sales-factor apportionment method — despite a speculative risk of multiple taxation. That same principle should apply to consideration of whether a gross receipts tax satisfies the fair apportionment requirement.[28]

The cases Firestone relies on are distinguished below, followed by a review of *Crutchfield* and an analysis of the CAT under the internal and external consistency tests. This analysis proves that the CAT presents no risk of multiple taxation.

J.D. Adams (1938)

Firestone contends that *J.D. Adams* is the "seminal case defining the nexus standard for business gross receipts taxes on the sale of goods."[29] However, nexus was not an issue in that case. The taxpayer, a manufacturer located in Indiana, challenged imposition of the Indiana gross receipts tax on its *outbound* interstate sales. The tax applied to "gross income of every resident of the State and the gross income of every nonresident derived from sources within the State."[30] The taxpayer manufactured the goods in, accepted the orders in, shipped the goods from, and received payment in the taxing state. In the context of modern commerce clause jurisprudence, the risk of multiple taxation analysis in *J.D. Adams* fits neatly under the fair apportionment requirement of the four-part *Complete Auto* test.

The Indiana gross receipts tax applied both to inbound interstate sales by nonresidents (destination-sourced) and outbound interstate sales by residents (origin-sourced). The Court viewed the tax as applying to gross receipts from interstate commerce without apportionment between the local activities, which were deemed taxable by the state, and the interstate activities, which were deemed not taxable.[31] Thus, the tax violated the commerce clause under the interstate commerce tax immunity theory[32] and created a risk of double taxation by both the state of manufacture and the state in which the goods were sold.[33]

Under *J.D. Adams*, a gross receipts tax that applied to both destination-sourced and origin-sourced interstate sales was struck down because of the risk of double taxation by both the origin and destination states. In contrast, the CAT sources sales of tangible personal property to Ohio "if the property is received in this state by the purchaser."[34] Thus, the CAT applies only to intrastate sales and inbound interstate sales. It does not apply to outbound interstate sales. As a destination-sourced tax on interstate sales, the CAT does not present the risk of multiple taxation illustrated in *J.D. Adams*.

Berwind-White (1940)

In *Berwind-White*, the Supreme Court upheld against a commerce clause challenge the New York City sales tax applied to sales of coal delivered by the Pennsylvania seller to customers in the city. The seller also had a sales office in New York City, where orders were taken. The seller shipped the coal from Pennsylvania, delivering it to customers in the city. The Court determined that the sales were consummated in New York City, where delivery took place to the customer, and there was no risk of double taxation. Also, under the interstate commerce tax immunity theory, the Court determined that the delivery of the coal to the customer by the seller in the city made the coal sales local, not interstate, and therefore taxable.[35] Nexus was not at issue.

Firestone argues that *J.D. Adams* and *Berwind-White* support the proposition that the out-of-state seller must have a sales office in the taxing state

[28] See *Comptroller of Treasury of Maryland v. Wynne*, __ U.S. __, 135 S. Ct. 1787, 1795 (2015), in which the Court saw "no reason why the distinction between gross receipts and net income should matter" for purposes of the fair apportionment requirement.

[29] Firestone, *supra* note 1.

[30] *J.D. Adams*, 304 U.S. at 308 (quoting Indiana Acts 1933, c. 50, Ind. Stat. Ann. section 64-2601 et.seq.).

[31] 304 U.S. at 311.

[32] *Id*. The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids.

[33] *Id*.

[34] Ohio Rev. Code Ann. section 5751.033.

[35] 309 U.S. at 58.

for nexus to exist.[36] However, *Berwind-White* turned on the Court's determination of whether the tax at issue was a local tax (rather than a tax on interstate commerce) and therefore taxable by New York City and by no other jurisdiction under the old interstate commerce tax immunity theory. Although the tax in *Berwind-White* was a sales tax and not a gross receipts tax, the case supports the conclusion that a destination-sourced tax such as the CAT — as opposed to a tax that would apply to both destination- and origin-sourced interstate sales, such as in *J.D. Adams* — eliminates the risk of multiple taxation.

Dilworth (1944)

Dilworth illustrates the difficulty with the interstate commerce tax immunity theory and why it was eventually abandoned.[37] That case involved a challenge by Tennessee sellers to imposition of Arkansas's sales tax on their interstate sales made to Arkansas customers, with delivery by common carrier. The Tennessee sellers arguably had no physical presence in Arkansas, except for salesmen traveling in state to solicit sales. The *Dilworth* Court, in a split decision, considered the interstate transactions to be off- limits to state taxation.[38] If the out-of-state seller's only activity in the taxing state was solicitation by traveling salesmen, the orders were accepted out of state, and the product was shipped from out of state to the customer, then the transaction was considered to be wholly in interstate commerce and immune from taxation.[39]

The *Dilworth* Court distinguished *Berwind-White* on the basis that the sales in that case were local, consummated at the delivery location, New York City, with the seller taking orders at its local sales office.[40] In contrast, the Court treated the sales as consummated in Tennessee, based on title passing to the buyer on delivery to the common carrier in Tennessee, even though the buyer would not receive possession until delivery in Arkansas.[41] In his dissent, Justice William O. Douglas did not view *Berwind-White* as distinguishable, stating that "receipt of goods within the State of the buyer is as adequate a basis for the exercise of the taxing power as use within the State."[42]

Firestone considers *Dilworth* to be a case addressing the risk of multiple taxation.[43] However, *Dilworth* contains no discussion of the risk of multiple taxation, except in Douglas's dissent. Seeing no risk of double taxation with imposing the Arkansas sales tax on the destination-sourced sales to Arkansas customers, Douglas observed that the sellers made no showing that Tennessee was taxing those same sales.[44]

Firestone further reads *Dilworth* as authority for the proposition that an out-of-state seller lacks substantial nexus unless it has a sales office, accepts orders, and delivers the merchandise to the purchaser, all in the taxing state. Although he acknowledges *Dilworth* as a pre-*Complete Auto* decision,[45] Firestone fails to consider *Dilworth*'s total dependence on the rejected theory of interstate commerce tax immunity.[46] Viewed in the post-*Complete Auto* context, *Dilworth* (other than in Douglas's dissent) sheds no light on multiple taxation analysis.

General Motors (1964)

Does a destination-sourced gross receipts tax imposed on an out-of-state seller's interstate sales into the taxing state risk multiple taxation? In *General Motors*, another pre-*Complete Auto* case, the Court considered General Motors' challenge

[36] Firestone, *supra* note 1, at 493.

[37] *See infra* note 42.

[38] 322 U.S. at 330-31.

[39] *Id.*

[40] *Id.* at 329.

[41] *Id.* at 328.

[42] *Id.* at 334 (Douglas, J., dissenting). The majority opinion acknowledged that the case might have been decided differently had Arkansas imposed a use tax. *Id.* at 330. Douglas saw the sales versus use tax distinction as irrelevant to Arkansas's power to tax. *Id.* at 332-34 (Douglas, J., dissenting). Douglas also saw transfer of possession (which occurred in Arkansas), not transfer of title (which occurred in Tennessee), as the taxable event. *Id.* at 334. The interstate commerce tax immunity theory forced the making of these awkward, narrow distinctions, in the interest of determining whether a tax was local or not — inviting inconsistencies with other decisions.

[43] Firestone, *supra* note 1, at 495.

[44] *Id.*

[45] Firestone, *supra* note 1, at 494.

[46] *See* Swain, *supra* note 7, at 301-03; and Cram, *supra* note 7, at 21-24.

to imposition of Washington's B&O tax on its interstate wholesale sales of parts and cars to Washington dealers.

In an earlier decision, *Gwin, White & Prince v. Henneford*,[47] the Court relied upon *J.D. Adams* to hold that the Washington gross receipts tax violated the commerce clause, as applied to a Washington fruit broker's gross receipts on commissions from outbound sales of fruit grown in and shipped from Washington to other states, because of the risk of multiple taxation.[48] The B&O tax in *General Motors* pertained to destination-sourced interstate wholesale sales delivered in Washington.[49] The Washington courts have not historically interpreted the B&O tax on wholesalers as applying to origin-sourced sales when delivery occurs outside of Washington.[50]

General Motors had several district managers, service representatives, and other employees located in Washington (working out of their homes), who regularly visited dealerships and conducted activities facilitating the establishment and maintenance of sales. General Motors also had a Chevrolet branch office and a parts warehouse in Washington. However, relying on *Norton Inc. v. Illinois Department of Revenue*,[51] General Motors claimed that the taxed sales were dissociated from these activities because the orders and payments were received out of state, and merchandise was shipped from out of state.[52]

Norton's rule was based on the interstate commerce tax immunity theory. An out-of-state seller's interstate sales into the taxing state were immune from tax if the seller's activities in the state were limited to sales solicitation by traveling salesmen, the orders were accepted out of state, and merchandise was shipped to the customer from out of state.[53] Under the rule of that case, the seller must have a local incident before such tax immunity is lost.[54] And if the seller could show that its in-state activity was insufficiently connected to the interstate sales sought to be taxed, then those sales remained immune from tax as dissociated from that in-state activity.[55]

The *General Motors* Court determined that the company failed to meet its burden to show dissociation under the *Norton* rule, finding sufficient connection between General Motors' in-state activities and the sales being taxed.[56] *Complete Auto*'s later rejection of the interstate commerce tax immunity theory rendered obsolete that portion of the *General Motors* rationale. Under either pre- or post-*Complete Auto* commerce clause jurisprudence, however, in-state nexus clearly existed under the *General Motors* facts. In upholding the tax, the *General Motors* Court found that the company failed to show any actual double taxation risk.[57]

Firestone views *General Motors* as a nexus case, extending nexus to include the presence in the taxing state of resident employees conducting marketing activities out of their homes (as opposed to a sales office).[58] But as previously noted, dissociation under the old *Norton* rule, not nexus, was at issue in *General Motors*. Firestone also claims that the risk of double taxation was no less present in *General Motors* than in *J.D. Adams*.[59] That statement is clearly inaccurate. The gross receipts tax at issue in *J.D. Adams* applied to both destination- and origin-sourced interstate sales, and the Court found a risk of double taxation. *General Motors* concerned only destination-sourced interstate sales, and the Court found no double taxation risk.

[47] 305 U.S. 434 (1939).

[48] 305 U.S. at 439-40.

[49] 377 U.S. at 437-38.

[50] *See Crown Zellerbach Corp. v. State*, 278 P.2d 305 (Wash. 1954); and *St. Regis Paper Co. v. State*, 388 P.2d 520 (Wash. 1964) (citing Wash. Rev. Code Ann. section 82.04.270).

[51] 340 U.S. 534 (1951). In *Norton*, another decision dependent on the interstate commerce tax immunity theory, the Court determined that an out-of-state manufacturer's interstate sales into Illinois were immune from the Illinois gross receipts tax, even though the manufacturer had a sales office and warehouse in Illinois, because the orders for the sales at issue were accepted, payment was received, and merchandise was shipped from out of state and the Illinois employees and facilities did not handle those sales.

[52] 377 U.S. at 441, 443.

[53] 340 U.S. at 537.

[54] *Id.*

[55] *Id.*

[56] 377 U.S. at 447-48.

[57] 377 U.S. at 449.

[58] Firestone, *supra* note 1, at 495.

[59] *Id.* at 496.

Standard Pressed Steel **(1975)**

In *Standard Pressed Steel*, another pre-*Complete Auto* case similar to *General Motors*, the out-of-state seller, a manufacturer selling fasteners to the Boeing Co. in Seattle, challenged imposition of the Washington B&O tax on those wholesale transactions. The seller maintained one employee in Washington, an engineer, who consulted with Boeing (along with other out-of-state employees of the seller) on its fastener needs. Boeing placed its orders directly with the seller out of state, and the product was shipped to Boeing. The in-state employee was not involved in those orders. The seller raised dissociation under the *Norton* rule.[60] The Court determined that in view of the extensive local incidents, the gross receipts from interstate sales into Washington (that is, destination-sourced interstate sales) were subject to B&O tax.[61]

The *Standard Pressed Steel* Court saw *General Motors* as "almost precisely on point," comparing the in-state activities in the two cases.[62] The Court determined that the taxpayer failed to meet its burden to show dissociation or any risk of double taxation.[63] The Court noted that the tax applied only to gross receipts from sales to local consumers, so was "apportioned exactly to the activities taxed" and did not suffer from the same unapportioned tax flaw as in *Gwin, White & Prince*.[64]

Firestone argues that under *General Motors* and *Standard Pressed Steel*, substantial nexus for a gross receipts tax requires that the out-of-state seller have a physical place of business in the taxing state.[65] But both cases turned on the Court's consideration of the outdated *Norton* rule and whether the out-of-state seller's in-state activities were dissociated from the sales being taxed. The Court in both cases also considered and found no risk of double taxation for Washington's destination-sourced gross receipts tax. Nexus clearly existed in both cases and was not a serious issue.

Tyler Pipe **(1987)**

Firestone relies on only one post-*Complete Auto* gross receipts tax decision, *Tyler Pipe*, to support his contention that nexus for a gross receipts tax requires that the out-of-state seller maintain a physical place of business in the taxing state (including through resident representatives, as opposed to employees).[66] Tyler Pipe, an out-of-state seller and manufacturer of cast iron and plastic piping, made interstate wholesale sales of those items to Washington customers. Tyler Pipe sought a refund of the Washington B&O tax paid in connection with those sales, claiming lack of nexus and that the tax was not fairly apportioned. Tyler Pipe had no physical presence in Washington but did conduct sales solicitation activity in the state through an independent contractor, which had resident employees in the state. The Court upheld the tax, determining that the in-state sales solicitation activity by the independent contractor was attributable to Tyler Pipe, so substantial nexus existed, and that the tax, as applied to Tyler Pipe, was fairly apportioned. The Court stated:

> The activity of wholesaling — whether by an in-state or an out-of-state manufacturer — must be viewed as a separate activity conducted wholly within Washington that no other State has jurisdiction to tax.[67]

Under *Tyler Pipe*, the entire gross proceeds from wholesale sales of property to Washington customers by an out-of-state seller are deemed attributable to Washington for purposes of the fair

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[60] 419 U.S. at 562.

[61] *Id*. at 564. The taxpayer in *Standard Pressed Steel* made both due process and commerce clause claims. The taxpayer argued on due process grounds that its in-state activities were inconsequential, so the tax had no reasonable relation to the benefits and protections it received from Washington. The Court held that the taxpayer's due process argument "verges on the frivolous," based on the resident engineer's activities, plus the visits from other out-of-state staff into the state. *Id*. at 562.

[62] *Id*. at 563.

[63] *Id*.

[64] *Id*. at 564 (quoting *Gwin, White & Prince*, 305 U.S. at 440). See *Moorman*, 437 U.S. at 280, in which the Court cited and quoted, *Standard Pressed Steel*, 419 U.S. at 564, and *Gwin, White & Prince*, 305 U.S. at 440, in its apportionment analysis.

[65] Firestone, *supra* note 1, at 496.

[66] *Id*. at 497.

[67] 483 U.S. at 251. In another aspect of the case involving different taxpayers, the Court found the B&O tax multiple entity exemption, which exempted certain in-state businesses, unconstitutional as discriminatory against interstate commerce, overruling *General Motors* on that issue. 483 U.S. at 248.

apportionment requirement of the *Complete Auto* test.[68] *General Motors*, *Standard Pressed Steel*, and *Tyler Pipe* all upheld destination-based gross receipts taxes against commerce clause challenges, not finding any improper risk of multiple taxation.

Crutchfield (2016)

In *Crutchfield*,[69] the Ohio Supreme Court addressed the constitutionality of the factor presence nexus standard in Ohio's CAT. The CAT applies to an out-of-state business selling products into Ohio when the business's Ohio sales exceed $500,000 per year, regardless of whether the business has any in-state physical presence.[70] After receiving a CAT assessment, Crutchfield, an out-of-state internet retail seller of mobile electronic goods, argued that it lacked substantial nexus with Ohio. Crutchfield argued that a physical presence nexus standard applied, citing *Tyler Pipe*. Crutchfield claimed that for nexus to exist, there must be at least some in-state activity by the seller or seller's representative to establish and maintain the seller's market.[71] It also contended that it had no physical presence in Ohio, either by itself or through a representative, so no nexus existed. Crutchfield did not argue that the CAT lacked fair apportionment, so that issue was not addressed.

The Ohio tax commissioner contended that the *Quill Corp. v. North Dakota*[72] physical presence nexus standard did not apply to the CAT.[73] Alternatively, Ohio argued that even if this standard did apply, physical presence nexus existed through the presence of Crutchfield's or its contractors' software and "cookies" on the computers of its Ohio customers.[74]

[68] *See* Paul J. Hartman and Charles A. Trost, *Federal Limitations on State and Local Taxation* (2003) at 233.

[69] *Crutchfield*, slip op.

[70] *See* Ohio Rev. Code section 5751.01(I)(3).

[71] *Crutchfield*, slip op. at para. 30.

[72] 504 U.S. 298 (1992).

[73] *Crutchfield*, slip op. at para. 2.

[74] *Id.*

A. Substantial Nexus

The Ohio Supreme Court upheld the assessment, determining that under *Tyler Pipe*, physical presence is a sufficient but unnecessary requirement for nexus. The court viewed Crutchfield's argument as flawed and based on the outdated theory of interstate commerce tax immunity, which was disposed of when *Complete Auto* overruled *Spector Motor Services*.[75] The court further held that the *Quill* physical presence nexus standard did not apply to the CAT, as it applies only in connection with imposing a use tax collection duty on an out-of-state seller. The court determined that $500,000 is a sufficient economic nexus threshold to establish substantial nexus under the dormant commerce clause.[76] The court did not address Ohio's physical presence nexus argument.[77] Since Crutchfield raised no fair apportionment issue, the opinion contains no risk of multiple taxation analysis.

B. Multiple Taxation Analysis in *Crutchfield*

Crutchfield's failure to raise the fair apportionment issue is a strong indication that the CAT presents no risk of multiple taxation. The CAT applies to interstate retail sales made by the out-of-state seller into Ohio. It does not apply to sales made by an in-state seller to customers located out of state.[78] Were the court to have considered the CAT under the fair apportionment requirement, it would have applied the internal and external consistency tests. Neither test considers the physical presence of the taxpayer in the state.

Under the internal consistency test, if each state adopted a gross receipts tax identical to the Ohio CAT, no multiple taxation would occur under the *Crutchfield* facts. Each state would impose its gross receipts tax on sales made by the out-of-state seller to customers in the state and would not impose tax on sales made by an in-state seller to out-of-state customers. Similar to the Washington B&O tax upheld in *General Motors*, *Standard Pressed Steel*, and *Tyler Pipe*, the

[75] *Id.* at para. 30.

[76] *Id.* at para. 3.

[77] *Id.*

[78] *See supra* note 32.

CAT applies to sales with delivery to customers in the state. This is unlike the tax held unconstitutional in *J.D. Adams*, which applied to both origin- and destination-sourced sales.[79] Applying the internal consistency test to the Ohio CAT in *Crutchfield*, only Ohio can tax the gross receipts from sales made by out-of-state sellers to customers in the state.

The external consistency test looks at whether the tax reaches beyond the value attributed to the in-state economic activity.[80] In *Crutchfield,* the in-state economic activity consisted of the delivery in Ohio of items purchased by consumers located there. The CAT, which taxes the gross receipts from those purchases, relates to the value of that economic activity. The Court's statement in *Standard Pressed Steel* that the Washington destination-sourced gross receipts tax was "'apportioned exactly to the activities taxed'"[81] would apply equally as well to the CAT. Therefore, the CAT would pass both the internal and external consistency tests.

Conclusion

Firestone argues that the economic presence nexus standard upheld in *Crutchfield* is inadequate to limit the risk of multiple taxation that a gross receipts tax purportedly presents.[82] However, Firestone offers no persuasive supporting case law or analysis. The decisions he attempts to rely on either rest on the rejected interstate commerce tax immunity theory, such as *Berwind-White* and *Dilworth*, or support the conclusion that the CAT presents no serious risk of multiple taxation, such as *J.D. Adams*, *General Motors*, *Standard Pressed Steel*, and *Tyler Pipe*. Under modern commerce clause jurisprudence, the risk of multiple taxation is considered under the fair apportionment requirement of the *Complete Auto* test. Fair apportionment was not even raised in *Crutchfield*. Had it been raised, the CAT would have passed muster under the internal and external consistency tests. The out-of-state seller's physical presence in the taxing state is irrelevant to either test. ■

[79] *See Comptroller of Treasury of Maryland v. Wynne*, __ U.S. __, 135 S. Ct. 1787, 1795 (2015), in which the Court observed that the gross receipts tax at issue in *J.D. Adams* violated the internal consistency test.

[80] 514 U.S. at 185.

[81] 419 U.S. at 564 (quoting *Gwin, White & Price*, 305 U.S. at 440).

[82] Firestone, *supra* note 1, at 491.