NOTE

Whirlpool Properties, Inc. v. Director, Division of Taxation: The Throwout Rule Should Be Thrown Out

I. Introduction

Over the past century, as businesses have evolved from serving the communities in which they were physically located to becoming national corporations, states have struggled to claim their fair share of the proceeds through corporate taxation. Historically, businesses dealt with apportioning income to individual states by maintaining separate accounting records for activity in each state.[1] However, with the increased modernization of business function, simple geographical apportionment of income became impractical.[2] As an alternative, many states have adopted statutory formulas as a method of apportioning income.[3] These formulas generally use a three-factor approach, comparing a taxpayer's in-state payroll, property, and sales receipts to those payrolls, property, and sales receipts outside the state.[4] New Jersey is a state that uses such a formula.[5] A particularly controversial element of the analysis under that formula is known as the "throwout rule."[6]

In *Whirlpool Properties, Inc. v. Director, Division of Taxation*, the New Jersey Supreme Court held that the throwout rule, when interpreted narrowly, was facially constitutional as a means of determining tax liability in New Jersey.[7] This was a modification of the appellate court's holding, which had allowed for a broad reading and application of the rule[8] that ultimately rendered it unconstitutional. The state supreme court drew a distinction between excluding receipts from states that did not have jurisdiction to tax a particular business and excluding receipts from states that opted not to impose such a tax, holding that the former action was constitutional but the latter was not.[9]

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[1] James R. Hellerstein & Walter Hellerstein, State and Local Taxation 410–11 (6th ed. 1997).

[2] *See* Trinova Corp. v. Mich. Dep't of Treasury, 498 U.S. 358, 377 (1991).

[3] *See* Margaret C. Wilson, *Apportionment Apoplexy: Throwback, Throwout, or Just Throw Up Your Hands*, 57 Tax Executive 357, 357 (2005).

[4] *Id.* at 358.

[5] N.J. Stat. Ann. § 54:10A-6 (West 2012).

[6] *See infra* Part II.A.

[7] Whirlpool Props., Inc. v. Dir., Div. of Taxation, 26 A.3d 446, 452 (N.J. 2011).

[8] Whirlpool Props., Inc. v. Dir., Div. of Taxation, 25 N.J. Tax 519, 524 (Super. Ct. App. Div. 2010).

[9] *Whirlpool*, 26 A.3d at 465.

This Note will argue that the New Jersey Supreme Court failed in its analysis of the throwout rule because neither form of excluding receipts is constitutional. Part II provides an overview of how tax liability is determined for corporations in New Jersey as well as the constitutional requirements of state taxation under the Commerce and Due Process Clauses. Part III summarizes the procedural history and the New Jersey Supreme Court's opinion in the *Whirlpool* case. Part IV.A argues that the court used the correct standard in its analysis. Part IV.B describes how the court's analysis of the throwout rule was incomplete and contends that the court should have invalidated the rule instead of narrowing it.

II. Overview of the Law

A. *Determining Corporate Income Tax in New Jersey*

Approaches to determining taxable income vary by state. In New Jersey, if a taxpayer has a sufficient relationship with the state, a three-factor apportionment formula is used to determine how much of that taxpayer's income is attributable to New Jersey.[10] This formula is based on the taxpayer's total net worth and total net income and is comprised of three fractions:[11] a payroll fraction,[12] a sales fraction (which is double-weighted), and a property fraction.[13] At issue here is the sales fraction, calculated by dividing a multistate taxpayer's New Jersey receipts by its total receipts.[14] The fraction determines what portion of a taxpayer's sales income is attributable to New Jersey by considering the taxpayer's New Jersey sales alongside its total sales throughout the country.

The throwout rule was added by amendment to the Corporate Business Tax Act via the Business Tax Reform Act of 2002[15] and specifically addressed the concern that multistate corporations were avoiding taxation in New Jersey by transferring profits to out-of-state and offshore companies.[16] The throwout rule, repealed in 2008,[17] was intended to counteract such evasion by targeting the calculation of the denominator of the sales fraction in the apportionment formula:[18] After adding together the taxpayer's total receipts, the taxpayer must "throw out" receipts from both (1) states lacking jurisdiction

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[10] *See* N.J. Stat. Ann. § 54:10A-6.

[11] *Id.*

[12] The payroll fraction is determined by dividing the taxpayer's New Jersey payroll by its total payroll. *Id.* § 54:10A-6(C).

[13] The property fraction is determined by dividing the average value of the taxpayer's property in New Jersey by the average value of the taxpayer's property everywhere. *Id.* § 54:10A-6(A).

[14] *Id.* § 54:10A-6(B).

[15] *See* Business Tax Reform Act, ch. 40, § 8, 2002 N.J. Laws 560, 584–86.

[16] *See* Whirlpool Props., Inc. v. Dir., Div. of Taxation, 26 A.3d 446, 454 (N.J. 2011).

[17] The throwout rule was repealed effective for tax years beginning on or after July 1, 2010. Act of Dec. 19, 2008, ch. 120, § 2, 2008 N.J. Laws 1120, 1125–26.

[18] *Whirlpool*, 26 A.3d at 454.

to tax the taxpayer and (2) states that have opted not to impose an income or similar business activity tax.[19] Given the resulting shrunken denominator, the throwout rule consistently resulted in an increased sales fraction—and thus increased tax liability in New Jersey—often by dramatic amounts.[20]

B. *State Tax Under the Commerce Clause*

In *Complete Auto Transit, Inc. v. Brady*,[21] the United States Supreme Court introduced a four-part test to determine facial constitutionality of a state tax under the Commerce Clause.[22] First, the tax must be applied to an activity that has a substantial nexus to the state.[23] Second, it must be fairly apportioned among the states where the activity occurs.[24] Third, it must not discriminate against interstate commerce.[25] Finally, it must be fairly related to the services provided by the state.[26]

The second requirement from *Complete Auto*, fair apportionment, has led to much debate in recent years as states struggle to find fair methods for apportioning the tax bases of multistate corporations. The U.S. Supreme Court has approved various apportionment formulas in the past[27] and held in *Container Corp. of America v. Franchise Tax Board* that apportionment methods must be both internally and externally consistent.[28] A method is internally consistent if a business taxed in every jurisdiction would not be taxed on more than 100% of its income using that apportionment technique.[29] This is thus a hypothetical test in place to guard against double taxation. A method is externally consistent if the formula reasonably reflects how the income is generated.[30] As the court in *Container Corp.* pointed out, this second requirement is arguably the more difficult to satisfy of the two.[31]

C. *State Tax Under the Due Process Clause*

In addition to being constitutional under the Commerce Clause, any state tax on interstate business must also survive the Due Process Clause.[32] Under

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[19] N.J. Stat. Ann. § 54:10A-6, *amended by* Act of Dec. 19, 2008, ch. 120, § 2, 2008 N.J. Laws 1120, 1125–26.

[20] *Whirlpool*, 26 A.3d at 452.

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

[22] *Id.* at 279.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *See generally* Walter Hellerstein, *State Taxation of Interstate Business: Perspective on Two Centuries of Constitutional Adjudication*, 41 Tax Law. 37, 59 (1987).

[28] Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169 (1983).

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] Quill Corp. v. North Dakota, 504 U.S. 298, 305 (1992).

Moorman Manufacturing Co. v. Bair,[33] the Due Process Clause requires two conditions for such a tax: (1) there must be a "minimal connection" between the activities of the interstate business and the taxing state, and (2) the income attributed to the state must be "rationally related to values connected with the taxing state."[34] Though there is overlap between analysis under the Due Process Clause and analysis under the Commerce Clause, the overlap is not completely coextensive: the Commerce Clause requires a connection that goes beyond the "purposeful direction of activities to the state" required by the Due Process Clause.[35]

III. *Whirlpool Properties, Inc. v. Director, Division of Taxation*

Part A of this section discusses the facts of *Whirlpool*, a case involving a Michigan corporation that was assessed to owe more tax in New Jersey than it had paid because of the throwout rule. Part B sets out the procedural history of the case, throughout which the rule was found to be constitutional in some form at three different judicial levels. Part C discusses the New Jersey Supreme Court's holding that a narrow interpretation of the rule made it constitutional.

A. Whirlpool *Facts*

Whirlpool Properties, Inc. (Whirlpool), a business incorporated and operating in Michigan, challenged a $24,883,399.24 deficiency assessed against it by the New Jersey Division of Taxation (the Division) for tax years 1996 through 2003.[36] A significant portion of the deficiency resulted from the application of the throwout rule in tax years 2002 and 2003.[37] Whirlpool challenged the assessment, claiming that the rule violated both the Commerce and Due Process Clauses.[38] Under these clauses, a state is forbidden from taxing "value earned outside its borders" with an income-based tax.[39]

B. *Procedural History*

The New Jersey Tax Court examined the throwout rule in *Pfizer Inc. v. Director, Division of Taxation* and ultimately disagreed with the taxpayers' contention that the throwout rule was unconstitutional.[40] The tax court found that the throwout rule operated constitutionally under the Due Process, Commerce, and Supremacy Clauses in some circumstances, and therefore

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[33] Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978).
[34] *Id.* at 273.
[35] Whirlpool Props., Inc. v. Dir., Div. of Taxation, 26 A.3d 446, 460 (N.J. 2011).
[36] *Whirlpool*, 26 A.3d at 451.
[37] *Id.*
[38] *Id.*
[39] ASARCO, Inc. v. Idaho State Tax Comm'n, 458 U.S. 307, 315 (1982).
[40] Pfizer Inc. v. Dir., Div. of Taxation, 24 N.J. Tax 116, 120 (2008). Pfizer settled prior to oral argument at the appellate court; however, the case was combined with Whirlpool's for examination on appeal.

was facially constitutional.[41] On appeal in the combined cases of *Whirlpool* and *Pfizer*, the taxpayers argued that the New Jersey Tax Court had erred in the standard it used to determine facial constitutionality.[42] Additionally, they maintained that the statute failed to comport with the Due Process, Commerce, and Supremacy Clauses and that availability of discretionary relief was insufficient to render the statute constitutional.[43]

The appellate court disagreed, affirming the state tax court's holding.[44] The state tax court had reached its holding using the standard of review from *United States v. Salerno*,[45] in which the U.S. Supreme Court held that a successful challenge to a legislative act must show there is no set of circumstances in which the act would be constitutional.[46] The state tax court had identified three sets of circumstances in which the throwout rule would be constitutional: (1) where the income being excluded is generated in whole or in part from activities in New Jersey, (2) "where the application of the Throwout Rule has no material effect on the sales fraction" because the amount included is insignificant, and (3) "where the property and payroll fractions substantially temper the impact of the sales fraction on the allocation factor."[47] The appellate court found this to be the appropriate standard, given that the U.S. Supreme Court itself had adhered to this rule.[48]

C. *The Decision of the New Jersey Supreme Court*

In the New Jersey Supreme Court's opinion, Justice LaVecchia, writing for a unanimous court, found that the appellate court correctly held that the throwout rule was facially constitutional.[49] However, the court interpreted the rule narrowly, finding it was constitutional if read to apply only to receipts from states where jurisdiction to tax was lacking.[50] Additionally, the court held that an as-applied constitutional challenge could still be mounted successfully.[51]

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[41] *Id.* at 132. Implied in this holding, and specifically mentioned in the tax court's closing remarks, is the idea that this did not foreclose the possibility of success for an "as-applied" challenge to the throwout rule. *Id.* at 139.

[42] Whirlpool Props., Inc. v. Dir., Div. of Taxation, 25 N.J. Tax 519, 527 (Super. Ct. App. Div. 2010).

[43] *Id.* at 527, 536.

[44] *Id.* at 536.

[45] United States v. Salerno, 481 U.S. 739 (1987).

[46] *Id.* at 745.

[47] Pfizer Inc. v. Dir., Div. of Taxation, 24 N.J. Tax 116, 132 (2008).

[48] *Whirlpool*, 25 N.J. Tax at 527–28.

[49] Whirlpool Props., Inc. v. Dir., Div. of Taxation, 26 A.3d 446, 468 (N.J. 2011).

[50] *Id.* at 465.

[51] *Id.* at 466, 468.

1. Salerno *Standard of Review for Facial Constitutionality*

In the supreme court, Whirlpool argued that the *Salerno* standard for facial constitutionality[52] was overruled by *City of Chicago v. Morales*,[53] where, in a footnote, Justice Stevens wrote, "To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation."[54] However, Justice Stevens continued on to say that the "viability of *Salerno*'s dictum" need not be resolved at that time because the case at hand had come from a state and not a federal court.[55] In response to Whirlpool's contention, the Director argued that *Salerno* remains good law; the Director's argument was based on *General Motors Corp. v. City of Linden*, in which the New Jersey Supreme Court adopted the standard presented in *Salerno*.[56]

The court acknowledged that "there exists a measure of uncertainty over the use of *Salerno* as the de facto standard for facial challenges to the constitutionality of a statute."[57] However, it went on to uphold the standard, reasoning that there had been "no ready or clear indication that the Supreme Court ha[d] signaled its abandonment generally, or specifically in tax statute challenges."[58] Thus the New Jersey Supreme Court affirmed the tax court's holding that multiple circumstances existed in which the throwout rule operated constitutionally and moved on to consider whether the rule met the requirements for fair apportionment.[59]

2. *Formula Apportionment Review Under* Complete Auto

Although the *Complete Auto* test has four prongs,[60] the court found only two of them to be at issue in *Whirlpool*.[61] First, the supreme court evaluated the apportionment formula under the fair apportionment and discrimination prongs.[62] The court held that the substantial nexus prong and the fair relation prong were inconsequential to its analysis because they are not implicated in applying the throwout rule.[63]

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[52] *See supra* Part III.B.

[53] City of Chicago v. Morales, 527 U.S. 41, 55 n.22 (1999).

[54] *Id.*

[55] *Id.*

[56] *See* Gen. Motors Corp. v. City of Linden, 696 A.2d 683 (N.J. 1997).

[57] Whirlpool Props., Inc. v. Dir., Div. of Taxation, 26 A.3d 446, 468 (N.J. 2011).

[58] *Id.*

[59] *Id.* at 456. The tax court held that the throwout rule operated constitutionally (1) where the income excluded from the denominator of the sales fraction is generated in whole or in part by activities in New Jersey, (2) where the application of the throwout rule has no material effect on the sales fraction because the income generated in the nontaxing state is insignificant in relation to the total income of the corporation, and (3) where the property and payroll fractions substantially temper the impact of the sales fraction on the allocation factor (even though the sales fraction is double-weighted under N.J. Stat. Ann. § 54:10A-6 (West 2012)).

[60] *See supra* Part II.B.

[61] *Whirlpool*, 26 A.3d at 462–63.

[62] *Id.* at 460–61.

[63] *Id.* at 462.

The court held that a narrow interpretation of the throwout rule met both the external consistency and internal consistency[64] requirements of fair apportionment, focusing its analysis on the more difficult external consistency requirement.[65] Answering the question of "whether the state's tax law reasonably reflects the activity within its jurisdiction,"[66] the court found that it did so with respect to states lacking jurisdiction to tax, because it was unlikely that those states had contributed significantly to the production of the income and there was therefore not enough contact with the company to tax it.[67] For example, if Company *X* in New Jersey shipped a product to Oklahoma, and that was its only contact with Oklahoma, then there would not be a sufficient connection between Oklahoma and Company *X* such that Oklahoma could impose an income tax on Company *X*. In such a situation, the court held, those receipts could be thrown out when calculating the sales factor, because Oklahoma may have contributed relatively little to the production of the economic activity compared to New Jersey.[68] The court reasoned that using the throwout rule "may more closely reflect the economic reality" of New Jersey's contributions to Company *X*'s sales.[69]

On the other hand, if Company *X* did 50% of its business in New Jersey and 50% in Maryland, and Maryland had no income tax, then throwing out the Maryland receipts would lead to a sales factor of 100% for New Jersey. This would not, the court pointed out, reasonably reflect the activity in the jurisdiction and thus would be "neither just nor fair."[70] Therefore, the court adopted a narrow interpretation of the throwout rule—one that operates only to throw out receipts from states lacking jurisdiction to tax—in lieu of the broader interpretation proffered, and previously applied, by the Director.[71] Thus, in this example, Company *X*'s sales factor in New Jersey would only be 50%: the percentage by which New Jersey participated in the production of the income.

The second part of the court's formula apportionment analysis addressed discrimination—whether the throwout rule was either facially discriminatory or had a discriminatory effect or purpose by treating out-of-state and in-state businesses unequally.[72] As an initial matter, the court pointed out that the rule is not facially discriminatory.[73] However, a law that is neutral on its

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[64] The court did not analyze the internal consistency requirement, except to point out that the throwout rule is internally consistent regardless of which type of receipt is thrown out from the denominator. This is because throwing out untaxed receipts will never lead to double taxation. *Whirlpool*, 26 A.3d at 463 n.11.

[65] *See id.* at 461.

[66] *Id.*

[67] *Id.* at 464.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.* at 465.

[72] *Id.* at 461.

[73] *Id.* at 466. Both in-state and out-of-state businesses are subject to the throwout rule.

face is still discriminatory if it has either a discriminatory purpose or effect.[74] The court noted that, unlike in a fair apportionment analysis, there is no de minimis exception for discrimination.[75] Additionally, specific factual proofs do not to have to accompany claims of discrimination; any discrimination at all will invalidate a statute under this analysis.[76]

Examining the throwout rule for a discriminatory effect, the court found that the broad interpretation of the rule would make it discriminatory with respect to the distinction between taxing and nontaxing states.[77] If, as in that broad interpretation, receipts from states that did not tax business activity were thrown out, then companies that conducted business in nontaxing states and New Jersey would be discriminated against by having increased tax liability in New Jersey.[78] On the other hand, companies that only did business in states that maintained a business income tax would not suffer from the same increased tax liability in New Jersey. Therefore, the court reemphasized its limited interpretation of the rule, calling it valid only to the extent that it operated to throw out receipts untaxed due to lack of jurisdiction.[79]

IV. Analysis

The New Jersey Supreme Court's analysis in *Whirlpool* makes progress by modifying the appellate court's decision, yet it ultimately falls short in its examination of the throwout rule. Because the appellate court's examination of Whirlpool's arguments regarding fair apportionment and discriminatory effect was not sufficiently nuanced, it arrived at the blanket conclusion that the throwout rule did not facially violate the Commerce Clause.[80] The New Jersey Supreme Court corrected this error by recognizing that a broad interpretation of the rule did, in fact, facially violate the Commerce Clause, but the court then failed to recognize that the revised understanding of the rule would violate the Commerce Clause as well.

Part A of this section explains the justification for using the *Salerno* standard of review. Part B argues that the supreme court erred in its holding because even a narrow interpretation of the throwout rule does not make the rule constitutional under the Commerce Clause.

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[74] Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 270–71 (1984).
[75] Whirlpool Props., Inc. v. Dir., Div. of Taxation, 26 A.3d 446, 461–62 (N.J. 2011).
[76] *Id.* at 461.
[77] *Id.* at 466.
[78] *Id.*
[79] *Id.*
[80] Whirlpool Props., Inc. v. Dir., Div. of Taxation, 25 N.J. Tax 519, 532 (Super. Ct. App. Div. 2010).

A. *Justifying the* Salerno *Standard of Review*

Whirlpool had a sound basis for its complaint that the *Salerno* standard of review[81] for facial constitutionality was the wrong one to apply: it is an almost impossible standard to meet. Paralleling the "rational-basis review" standard of judicial scrutiny[82] that the Supreme Court embraced decades ago to facilitate the New Deal and its accompanying multitudes of legislative acts,[83] the *Salerno* standard gives an extraordinary amount of deference to the legislative branch. The *Salerno* court awarded facial constitutionality to any law that would be constitutional in just one single set of circumstances.[84]

Though *Salerno*'s standard has been harshly criticized as "draconian"[85] and "constitutionally arbitrary,"[86] it is the correct standard to apply. The U.S. Supreme Court has been clear on the point that facial challenges to legislative acts are only appropriate in exceptional circumstances.[87] Especially in light of Article III of the Constitution, which limits the Supreme Court to hearing actual cases and controversies,[88] this is sound policy; the Supreme Court should not be a venue where months or years of legislative collaboration by elected officials is invalidated on a regular basis. Furthermore, this does not leave constitutional challengers without recourse; while facial constitutional challenges will be difficult to mount successfully, as-applied constitutional challenges can always be used for claims that a statute operates unconstitutionally under a particular set of facts.[89] As the Court has stated, "[a]s-applied challenges are the basic building blocks of constitutional adjudication."[90] The *Salerno* standard leaves room for such challenges while maintaining the historical degree of legislative deference.

If Whirlpool had argued that the throwout rule was unconstitutional specifically in its application to Whirlpool's particular circumstances, the court would have been forced to review whether the deficiency assessed was a fair reflection of the tax Whirlpool should have paid in New Jersey. Instead, the

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[81] *See supra* Part III.B.

[82] Under rational-basis review, if a legislative act is rationally related to a legitimate government interest, the court will uphold it. Kathleen M. Sullivan & Gunther Gerald, Constitutional Law 483 (Foundation Press 16th ed. 2007).

[83] *See* Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J. L. & Liberty 898, 899 (2005).

[84] United States v. Salerno, 481 U.S. 739, 745 (1987).

[85] Janklow v. Planned Parenthood, Sioux Falls Clinic, 517 U.S. 1174, 1176 (1996) (Stevens, J., respecting the denial of cert.).

[86] Marc E. Isseries, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 Am. U. L. Rev. 359, 375 (1998).

[87] *See, e.g.,* National Endowment for the Arts v. Finley, 524 U.S. 569, 580 (1998); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 223 (1990); Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973); Younger v. Harris, 401 U.S. 37, 52–53 (1971).

[88] U.S. Const., art. III, §2.

[89] Gonzales v. Carhart, 550 U.S. 124, 167 (2007).

[90] *Id.* at 168 (quoting Richard H. Fallon, *As-Applied and Facial Constitutional Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1328 (2000)).

court merely had to find that the deficiency could have been a fair reflection of that tax, because the process under which it was determined was fair. Notwithstanding this probable misstep on the part of Whirlpool, the court erred even in finding that the process was a fair one.

B. *Not Going Far Enough With Fair Apportionment*

The New Jersey Supreme Court's analysis in *Whirlpool* was partially correct. However, its attempt to comport with Dormant Commerce Clause jurisprudence by merely narrowing the scope of the throwout rule falls short. The U.S. Supreme Court has repeatedly held that no state has the right to tax 100% of any value that is not taking place 100% within its state.[91] Despite the court's conclusion that a broad interpretation of the throwout rule violates this principle, the court missed the point that permitting the taxation of income that originates in states without a corporate income tax violates the principle as well.

Extraterritorial taxation occurs when a state taxes income not properly attributed to it.[92] The internal and external consistency tests that the Supreme Court promulgated in *Complete Auto*, and on which the court's reasoning in *Whirlpool* focused in part, are directed at two separate goals.[93] While the internal consistency requirement aims to prevent multiple taxation,[94] the external consistency requirement aims to prevent extraterritorial taxation.[95] But ultimately, both focus on the same goal of allowing states to tax what is rightfully theirs and only that amount. Effectively, the prohibition against extraterritorial taxation is just another way of requiring states to have a substantial nexus with any values that they seek to tax in order to meet this goal.[96]

The court stated that "[t]he Throw-Out Rule's external consistency depends on the rationale for throwing out the receipts."[97] However, this makes the inquiry of fair apportionment a subjective one when, in fact, it should be an objective one. If the idea behind fair apportionment is that states should

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[91] *See, e.g.,* Japan Line, Ltd. v. Cnty. of Los Angeles, 441 U.S. 434, 447 (1979) ("The corollary of the apportionment principle, of course, is that no jurisdiction may tax the instrumentality [of commerce] in full."); Johnson Oil Ref. Co. v. Oklahoma *ex rel.* Mitchell, 290 U.S. 158, 162 (1933) ("When a fleet of cars is habitually employed in several States—the individual cars constantly running in and out of each State—it cannot be said that any one of the States is entitled to tax the entire number of cars regardless of their use in other States.").

[92] Butler Bros. v. McColgan, 315 U.S. 501, 507 (1942).

[93] Bradley W. Joondeph, *The Meaning of Fair Apportionment and the Prohibition on Extraterritorial State Taxation*, 71 Fordham L. Rev. 149, 157–58 (2002).

[94] Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 184 (1995) (The "principle of fair share is the lineal descendant of . . . [the] prohibition on multiple taxation.").

[95] *See* Walter Hellerstein, *Is "Internal Consistency" Foolish? Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 Mich. L. Rev. 138, 173 (1988).

[96] Joondeph, *supra note* 93, at 159 ("[F]air apportionment is essentially superfluous as a separate criterion for assessing a state's constitutionality. State taxes that are not constitutional should generally be found unconstitutional based either on their discrimination against interstate commerce or on their failure of nexus, regardless of fair apportionment concerns.").

[97] Whirlpool Props., Inc. v. Dir., Div. of Taxation, 26 A.3d 446, 463 (N.J. 2011).

only be permitted to tax what is rightfully theirs,[98] then the question of how a state chooses to determine what rightfully belongs to it is irrelevant as long as its conclusion is accurate. The court attempted to clarify the external consistency test, saying, "Stated simply, the question is whether the state's tax law reasonably reflects the activity within its jurisdiction."[99] However, this contradicts its statement, just sentences earlier, that external consistency looks to "the economic justification for the State's claim upon the value taxed."[100] While the former statement is results-oriented, the latter is concerned with reasoning. Yet, the U.S. Supreme Court has clearly stated that the purpose of the apportionment requirement is to ensure that each state only receives its "fair share" of tax—the value to which it is entitled as a result of the part it played in creating the revenue.[101] This is undoubtedly a results-oriented formulation.

Had the court proceeded with a thoroughly substantive analysis of the throwout rule, it would have recognized that because so-called "nowhere sales"[102]—sales that do not fall under the jurisdiction of any particular state and end up being assigned so that they are taxed nowhere—do not necessarily have anything at all to do with New Jersey, they should be as irrelevant to the determination of tax liability in New Jersey as whether or not another state imposes a business income tax. The court seemed to acknowledge the weakness in its analysis when it called the throwout rule "arguably externally consistent"[103]—hardly a confidence-inspiring formulation for passing a test of constitutionality. It continued, "in this situation New Jersey also *may* have contributed more to the production of a sale than the sales factor, without the Throw-Out Rule, would suggest."[104] However, to survive true fair apportionment analysis, New Jersey should have to show that it has contributed to the generation of nowhere sales in order to have them thrown out. If it does not, then the exclusion becomes arbitrary.

IV. Conclusion

The *Whirlpool* case illustrates the struggles of states to determine tax liability as accurately as possible while restraining themselves from capturing more than is their due when casting their nets. However, though the increasing nationalization and globalization of businesses makes apportioning tax liabil-

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[98] Joondeph, *supra note* 73, at 158 ("Each state . . . should be entitled to tax only that value earned within its borders, or what rightfully reflects the degree of the taxpayer's activity in that state.").

[99] *Whirlpool*, 26 A.3d at 461.

[100] *Id.* (internal quotations omitted).

[101] *See, e.g.*, Goldberg v. Sweet, 488 U.S. 252, 260–61 (1989) ("[T]he central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction."); Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169 (1983).

[102] *Whirlpool*, 26 A.3d at 465.

[103] *Id.* at 464.

[104] *Id.* (emphasis added).

ity among states more and more complex, fundamental constitutional principles still must govern these apportionments. The *Whirlpool* court failed to adhere to these principles when it upheld the throwout rule's exclusion of nowhere sales.

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