

## Justice Brandeis and State Taxation

To the Editor:

I read with interest Jasper Cummings's recent, thoughtful *Tax Notes State* article on the federal tax jurisprudence of Justice Louis Brandeis (whose namesake university is located in my hometown, Waltham, Massachusetts).<sup>1</sup> But as I read that piece, I thought it was unfortunate that it failed to mention what apparently has been Justice Brandeis's most enduring contribution to the U.S. tax field — *in the area of state taxation*. That decision celebrated its 100th birthday just two years ago.

State corporate income taxes were first enacted early in the 20th century. Challenges followed shortly thereafter. In 1920 Justice Brandeis wrote for a unanimous Supreme Court in *Underwood Typewriter Co. v. Chamberlain*,<sup>2</sup> upholding Connecticut's imposition of a corporate income tax on constitutional grounds. That decision was the Court's seminal case approving the concepts of fair apportionment and what would come to be known as the unitary business principle.<sup>3</sup>

*Underwood Typewriter* relied on Supreme Court rulings handed down in the late 19th century that applied to state property taxes imposed upon interstate railroads. Those cases allowed the states to apportion the value of the overall business enterprise rather than appraise the value of the companies' in-state track and other property.<sup>4</sup> But the Court's prior property tax cases were not necessarily controlling in the corporate income tax area. Nonetheless, Justice Brandeis recognized that in "attempting to put upon this business its

fair share of the burden of taxation [the state] was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders" — circumstances that rendered appropriate the use of apportionment.<sup>5</sup> The application of that principle has never seriously been questioned.

Justice Brandeis also recognized, as would numerous future Supreme Court decisions, that the constitutional standard to evaluate fair apportionment as applied in the corporate income context should be deferential to the states. As Justice Brandeis stated in *Underwood Typewriter*, in challenging a state's approach to such taxation, a taxpayer is generally required to show that "the method of apportionment adopted by the State was inherently arbitrary, or that its application . . . produced an unreasonable result."<sup>6</sup> This language was quoted by the Court almost 60 years later in the important case, *Moorman Manufacturing Co. v. Bair*.<sup>7</sup> *Moorman*, of course, upheld the states' use of single sales factor apportionment — the method to apportion corporate income now applied by most states. Five years after *Moorman*, the Supreme Court upheld state use of apportionment on a worldwide basis, and in so doing made repeated reference to *Underwood Typewriter*.<sup>8</sup>

In a provocative 2012 article, Professor Steven B. Lichtman argued that, while Justice Brandeis's legal philosophy remains salient in American life, his jurisprudence has been gradually disappearing from law school textbooks.<sup>9</sup> This may be true as a general matter, but is certainly

<sup>1</sup> See Jasper L. Cummings, Jr., "Louis Brandeis, Antitrust, and a Functioning Tax System," *Tax Notes State*, Apr. 11, 2022, p. 145.

<sup>2</sup> 254 U.S. 113 (1920).

<sup>3</sup> Although the Underwood Typewriter Company no longer exists, you can find some of their typewriters at the Charles River Museum of Industry & Innovation, in Waltham, Massachusetts — less than 2 miles from Brandeis University.

<sup>4</sup> See, e.g., *MeadWestvaco Corp. v. Illinois Department of Revenue*, 553 U.S. 16, 26-27 (2008); *Allied-Signal Inc. v. Director, Division of Taxation*, 504 U.S. 768, 780 (1992).

<sup>5</sup> *Underwood Typewriter*, 254 U.S. at 121.

<sup>6</sup> *Id.*

<sup>7</sup> 437 U.S. 267, 274 (1978).

<sup>8</sup> See generally *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983).

<sup>9</sup> See Lichtman, "The Disappearing Jurisprudence of Louis Brandeis," 10 *Brandeis L.J.* 9 (2012).

not so in the state tax area, where *Underwood Typewriter* and its renowned author live on.

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Note that this letter expresses the author's views and not necessarily those of the Massachusetts DOR. ■

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