Indiana Law Journal

Volume 17 | Issue 6 Article 8

8-1942

Multiple Taxation of Intangibles

TAXATION

MULTIPLE TAXATION OF INTANGIBLES

Testator died domiciled in New York. At the time of his death he owned stock of a Utah corporation represented by stock certificates in his possession in New York. Utah imposed a tax on the transfer by death. Administrators of the estate filed suit, claiming this was a violation of due process. *Held*, there is no constitutional immunity from multiple taxation. The state of incorporation has jurisdiction to tax transfer by death of shares of stock owned by a non-resident.[1]

The decisions of the present Supreme Court are based on the

---

[34] Notice and opportunity to be heard are generally required for the refusal to grant a license. Bratton v. Chandler, 260 U.S. 110 (1922). The tribunal must be impartial. Tumey v. Ohio, 273 U.S. 510 (1927). These requirements apply to administrative as well as judicial proceedings. Lloyd v. Elting, 287 U.S. 329 (1922); Note (1934) 34 COL. L. REV. 332.

[35] Note (1926) 4 WIS. L. REV. 180, 186. Likewise there must be citation before hearing and hearing or opportunity of being heard before judgment if private rights are involved.

[36] *Ex parte* Robinson, 19 Wall. 505, 513 (U.S. 1873).

[37] Lovell v. Griffin, 303 U.S. 444 (1938).

[1] Utah State Tax Comm. v. Aldrich, 62 S. Ct. 1008, 86 L. Ed. 911 (1942).

doctrine that the due process clause does not bar multiple taxation.[2] The power to tax intangibles is not to be restricted to one state, and the test of validity is the amount of protection and benefits conferred on and the power over the persons whose relationships are the source of the intangible rights.[3] The view of the present majority returns to a broader concept of "jurisdiction to tax."

The older cases were apparently decided on the theory that since intangibles were "invisible" and easy to conceal, they would escape taxation unless several states were given the opportunity to tax.[4] Nevertheless, the Supreme Court found even before the adoption of the Fourteenth Amendment that there were certain limitations on the powers of the states to tax.[5] Later, in *Union Refrigerator Transit Co. v. Kentucky*[6] the court indicated that, usually, only one state could impose a tax on tangibles.[7] *Blackstone v. Miller*,[8] decided two years before, had permitted an inheritance tax on bank deposits to be imposed by both the state of physical situs and the state of the owner's domicile. It was not until thirty years later that the court found, in a series of decisions, that the due process clause prohibited multiple taxation.[9] By using the fictional doctrine of *mobilia sequuntur personam*, intangibles were permitted to be taxed only by the state of the domicile of the creditor of a chose in action or the owner of any

---

[2] Utah State Tax Comm. v. Aldrich, 62 S. Ct. 1008, 86 L. Ed. 911 (1942); Graves v. Elliott, 307 U.S. 383 (1939); Curry v. McCanless, 307 U.S. 357 (1939).

[3] Utah State Tax Comm. v. Aldrich, 62 S. Ct. 1008, 1010, 86 L. Ed. 911, 914 (1942).

[4] *See* Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194, 205 (1905). This reason is of little consequence today as intangibles are not so easy to conceal, and do not escape taxation so often as to justify their being subject to the undue burden of multiple taxation for this reason alone. Peppin, *The Power of the States to Tax Intangibles or Their Transfer* (1930) 18 CALIF. L. REV. 638, 647.

[5] To allow every state where an object happened to be, regardless of the character of its stay, to tax that object would be an unbearable tax burden. Lowndes, *Spurious Conceptions of the Constitutional Law of Taxation* (1934) 47 HARV. L. REV. 628, 637. At first the Court found those limitations in the commerce clause, Hays v. Pacific Mail S. S. Co., 17 How. 596 (U.S. 1854); then resort was had to the contract clause, State Tax on Foreign Held Bonds, 15 Wall. 300 (U.S. 1872); and finally, about thirty five years after its adoption, the due process clause was used to invalidate a tax imposed without jurisdiction, Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U.S. 385 (1903).

[6] 199 U.S. 194 (1905).

[7] *Id.* at 211.

[8] 188 U.S. 189 (1903).

[9] Farmer's Loan and Trust Co. v. Minnesota, 280 U.S. 204 (1930) (bonds); Baldwin v. Missouri, 281 U.S. 586 (1930) (bank deposits); Beidler v. South Carolina Tax Comm., 282 U.S. 1 (1930) (choses in action); First National Bank of Boston v. Maine, 284 U.S. 312 (1932) (corporate stocks).

other form of intangible.[10] Two 1939 cases, *Curry v. McCanless*[11] and *Graves v. Elliott*,[12] presaged a return to the old idea that there was no constitutional provision against multiple taxation, and to the broader concept of jurisdiction to tax.[13] Now the Utah case has expressly overruled *First National Bank v. Maine*[14] and returned intangibles to the status they occupied before the *Farmer's Loan and Trust Co.* case.[15]

In the instant case, the Court took the position that the state of incorporation meets the "benefit, protection, and power" test and therefore has jurisdiction to impose a death transfer tax.[16] The policy of the majority in thus extending the taxing jurisdiction is questionable and the minority has taken the more practical view.[17]

---

[10] The use of the maxim was only the means to an end. The truth was that the Court had come to feel that multiple taxation of intangible property was just as objectionable from the economic standpoint as if the property were tangible. Brown, *Multiple Taxation by the States—What Is Left of It* (1935) 48 HARV. L. REV. 407, 408, 409. This was frankly admitted by Justice Sutherland in First National Bank v. Maine, 284 U.S. 312 (1932).

[11] 307 U.S. 357 (1939).

[12] 307 U.S. 383 (1939).

[13] Both cases involved a revocable trust in a state other than the domicile of the decedent. Both state of the trust and the state of the domicile of the decedent were permitted to tax.

[14] 284 U.S. 312 (1932).

[15] The instant case involved only corporate stock, but there is no reason to believe that the rule will not be applied to other forms of intangibles. See Mr. Justice Jackson, dissenting in Utah State Tax Comm. v. Aldrich, 62 S. Ct. 1008, 1021. For a recent comprehensive treatment of taxation of intangibles see Brown, *Present Status of Multiple Taxation of Intangibles* (1942) 40 MICH. L. REV. 806; *cf.*, Note (1940) 16 IND. L. J. 427 (sales tax).

[16] The Court held: (1) the corporation owes its existence to Utah and Utah law defines the nature and extent of the shareholder's interest; (2) Utah law protects these rights; (3) Utah has power over the transfer by the corporation of its shares of stock. Utah State Tax Comm. v. Aldrich, 62 S. Ct. 1008, 1011. It is generally admitted that "policy, not jurisdiction, is the nub of the matter; intangible rights have no physical location from which jurisdiction may be deduced." Pomerance, *The Situs of Stock* (1931) 17 CORN. L. Q. 43, 59.

[17] "Any conceivable 'opportunity,' 'protection,' or 'benefit' derived by the Union Pacific stockholders from Utah is negligible in proportion to the values Utah is authorized to tax." See Mr. Justice Jackson, dissenting in Utah State Tax Comm. v. Aldrich, 62 S. Ct. 1008, 1015 (1942). The mere fact that Utah created the corporation should not give it the right to tax the shares regardless of their situs or the domicile of the owner. The Union Pacific Ry. had been in existence eighteen years before Utah chartered it. Less than nine per cent of the total track is laid in Utah, and less than nine per cent of its income is derived in Utah. Its western operating offices are in Nebraska. See Mr. Justice Jackson, dissenting in Utah State Tax Comm. v. Aldrich, 62 S. Ct. 1008, 1015 (1942). The extent of protection which Utah extends to the stockholders is certainly slight. Although the majority chose to practically disregard the fact, the Uniform Stock Transfer Act, UTAH REV. STAT. ANN. (1933) §§ 18-3-1 ff., makes the stock certificate the important element in the passing of title. The transfer offices of the Union Pacific Ry. are located in New

Nevertheless, the taxpayer is again confronted with the problem of multiple taxation, an admitted evil,[18] and the solution is clearly not to come from the present Court unless there is a complete reversal of policy, which is unlikely.[19]

Use of the compact clause of the Constitution has been suggested as a solution,[20] but the obvious effect would be to remove the exclusive control from a single state.[21] Several systems of regulation by the federal government have been suggested, but these proposals also meet serious difficulties.[22] Until some workable solution through federal intervention can be found, the protection against multiple taxation must come from the state legislatures.[23] Several plans have been tried by the states,[24] but the most satisfactory one yet used is the system of interstate reciprocity.[25] First tried by Massachusetts

---

York. Furthermore, the Utah death tax is on the right to transmit. UTAH REV. STAT. ANN. (1933) §§ 80-12-1 to 80-12-44; State Tax Comm. v. Backman, 88 Utah 424, 55 P. (2d) 171 (1936). It is to be noted that the "person" in the Court's test for validity is the "person whose relationships are the origin of the rights," *i.e.* the corporation. Utah State Tax Comm. v. Aldrich, 62 S. Ct. 1008, 1010 (1942). As far as this tax is concerned, practically the only benefit which the railroad received from Utah was the corporate charter. This would hardly seem justification for the imposition of the tax, even on the basis of the test established by the majority. This is further indication that the decision is based on policy.

[18] Utah State Tax Comm. v. Aldrich, 62 S. Ct. 1008, 1012 (1942).

[19] *Ibid.*

[20] Frankfurter and Landis, *Compact Clause of the Constitution* (1925) 34 YALE L. J. 685, 704; see also Dutton, *Compacts and Trade Barrier Controversies* (1940) 16 IND. L. J. 204.

[21] Brady, *Statutory Solutions of Multiple Death Taxation* (1927) 13 A. B. A. J. 147, 150.

[22] A congressional bill providing that a certain percentage of revenue accruing from federal estate and income taxes be segregated and earmarked for distribution to those states which fall in line has been proposed. Rode, *A Primer on Interstate Taxation* (1935) 44 YALE L. J. 165, 1181 to 1185. But any plan providing for federal intervention must meet constitutional and administrative difficulties; furthermore, it is difficult to conceive of the states giving up their tax powers. Seligman, *Possible Methods of Removing Inheritance Tax Difficulties* (1925) 3 NAT. INCOME TAX MAG. 93.

[23] Even action by the state legislatures will not completely solve the problem. Mutual adjustments would call for over 2000 separate agreements. In the case of reciprocity acts, the greatest problem seems to be in uniform interpretation. For example, City Bank Farmers' Trust Co. v. New York Central R. Co., 253 N.Y. 49, 170 N. E. 489 (1930).

[24] The "Wisconsin Plan" calls for apportionment for tax purposes of the intangibles among the states where the tangible property representated is located; but here the valuation is almost impossible. Legis. (1928) 28 COL. L. REV. 806, 808. The "Mathews Flat Rate Plan," provides for taxation at uniform rates, without exemption, on the actual market value of the property transferred by a non-resident to his executor. New York tried this plan and found it expensive and beset with administrative difficulties.

[25] The individual statutes vary, but the general theory of the reciprocity acts is an exemption from taxation by the state adopting it,

in 1905, the plan was given up until 1925 when four states passed reciprocity statutes.[26] The impetus behind the movement grew to the extent that by 1932 over three-fourths of the states had joined the reciprocity group.[27] With the return of multiple taxation, a uniform state legislative effort will probably solve many of the difficulties of the reciprocity statutes and cause the "hold-out" states to fall in line.[28]

---

of the intangible property of other states which either (1) do not levy a succession tax, (2) do not tax the intangible property on non-resident transferors or decedents, or (3) provide that they will not tax such property in the case of residents of reciprocal states. Legis. (1930) 30 COL. L. REV. 806, 808. Indiana is in the third class. IND. STAT. ANN. (Burns, 1933) § 6-2427; IND. ADM. CODE (Horack, 1941) § 6-2427.

[26] Pa. Pub. Laws 1925, c. 717; N.Y. Laws, 1925, c. 143; Mass. Acts 1925, c. 338; Conn. Laws 1925, c. 239.

[27] Kappes, *Double Taxation by the States* (1940) 18 TAX MAG. 15, 17; Brady, *Death Taxes—Developments in Reciprocity* (1929) 15 A. B. A. J. 465, 466.

[28] See Brown, *Present Status of Multiple Taxation of Intangibles* (1942) 40 MICH. L. REV. 806, 829, 830.