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Multiple Taxation of Intangible Property

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TAXATION—MULTIPLE TAXATION OF INTANGIBLE PROPERTY.—Decedent, domiciled in Tennessee, transferred securities in trust to an Alabama trustee, reserving the power to remove the trustee and to dispose of the trust estate by her will. Decedent bequeathed the trust property to the trustee in trust but in different amounts and by different estates from those provided for by the trust indenture. Both Tennessee and Alabama asserted the right to impose an inheritance tax on the trust property passing under decedent's will. Plaintiffs allege that both states cannot constitutionally place a tax on the property. Held, both states may impose an inheritance tax on the trust property. *Curry v. McCanless* (1939), 307 U. S. 357, 59 S. Ct. 900. Decedent transferred bonds to a Colorado trustee to hold for specified trust purposes reserving the power to change any beneficiary and to revoke the trust and reinvest title in herself. After creating the trust, decedent became a domiciled resident of New York where she died without appointing new beneficiaries of the trust or revoking it. Both states assessed a tax on the transfer at death of the trust fund. Held, not in violation of the Fourteenth Amendment for New York to place an inheritance tax on the trust property after Colorado has already done so. *Graves v. Elliott* (1939), 307 U. S. 383, 59 S. Ct. 913.

Early in this century the Supreme Court held that it was a denial of due process for Kentucky to place a tax on an incorporeal hereditament (franchise) derived from Indiana and owned by a Kentucky corporation because the franchise had a situs in Indiana and had already been taxed by Indiana.¹ Next it was held that coal, property of a Pennsylvania corporation, but stored in other states, could not be used in enhancing the value of the capital stock of the corporation for purposes of taxation.² These two decisions were a foundation for the rule that tangible property is subject to taxation only in the state where permanently located and not by the state of the owner's domicile.³ The court was careful to point out that it was making no rule

¹⁷ Acts 1937, c. 37, § 1, p. 231, Burns '33, § 2-517 (Supp. 38).

¹⁸ Acts 1895, c. 45, Sec. 1, Burns '33, § 2-1043.

¹ *Louisville and Jeffersonville Ferry Co. v. Kentucky* (1903), 188 U. S. 385, 23 S. Ct. 463.

² *Delaware, Lackawanna and Western Railroad Co. v. Pennsylvania* (1905), 198 U. S. 341, 25 S. Ct. 669.

³ *Union Refrigerator Transit Co. v. Kentucky* (1905), 199 U. S. 194, 26 S. Ct. 36.

in regard to intangibles.⁴ Not until 20 years later was the principle extended to inheritance taxation so that taxation by decedent's state of domicile of tangible personal property permanently located without the state was held not to be due process of law.⁵ Tangible property has thus for some time enjoyed a consistent rule in regard to taxation. The domicile of the owner can levy a property tax even though the property is not physically present in the state,⁶ unless it has acquired a situs elsewhere,⁷ and in that event, that state alone may tax.⁸ Further, the basis of inheritance taxation of tangible personalty was held to be on the same principle as for property taxation: the jurisdiction of the property,⁹ although the formal subject matter is different.¹⁰ Multiple taxation of intangibles did not stop however, with the invalidation of multiple taxation of tangible property. When considering intangibles the court often stated, "the Fourteenth Amendment does not prohibit double taxation."¹¹ The first case that appeared to be a reversal of

⁴ "It is unnecessary to say that this case does not involve the question of the taxation of intangible property, or of inheritance or succession taxes. . ." *Union Refrigerator Transit Co. v. Kentucky* (1905), 199 U. S. 194, 211.

⁵ *Frick v. Pennsylvania* (1905), 268 U. S. 473, 45 S. Ct. 603.

⁶ *Southern Pacific Co. v. Kentucky* (1911), 222 U. S. 63, 32 S. Ct. 13; *New York v. Miller* (1906), 202 U. S. 584, 26 S. Ct. 714; *Tacoma Oriental S.S. Co. v. Tallant* (1931), 51 F (2nd) 359.

⁷ *Old Dominion Steamship Co. v. Virginia* (1904), 198 U. S. 299, 25 S. Ct. 686.

⁸ *Union Refrigerator Transit Co. v. Kentucky* (1905), 199 U. S. 194, 26 S. Ct. 36.

⁹ *Frick v. Pennsylvania* (1925), 268 U. S. 473, 45 S. Ct. 603. State of decedent's domicile forbidden to assess an inheritance tax measured by extra state tangible personalty. *First National Bank of Boston v. Maine* (1932), 284 U. S. 312, 52 S. Ct. 174, stated, "It was in the Frick case, however, that the rule became definitely fixed that, as to tangible personal property, the power to tax is exclusively in the state where the property has an actual situs."

¹⁰ *Mager v. Grima* (1850), 8 Howard 490, 493, states that the inheritance tax "is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property, real or personal, within its domain may be transmitted by last will and testament or by inheritance . . ." *U. S. v. Perkins* (1896), 163 U. S. 625, 629, 16 S. Ct. 1073, states, ". . . the tax is not a tax upon the property itself, but upon its transmission by will or descent."

¹¹ *Kidd v. Alabama* (1903), 188 U. S. 730, 23 S. Ct. 401; *Cream of Wheat Co. v. Grand Forks* (1920), 253 U. S. 325, 40 S. Ct. 558. It was held that debts could be taxed at the domicile of the debtor, *Blackstone v. Miller* (1903), 188 U. S. 189, 23 S. Ct. 277; at the domicile of the creditor, *Fidelity and Columbia Trust Co. v. Louisville* (1917), 245 U. S. 54, 38 S. Ct. 40; at a business situs, *New Orleans v. Stemple* (1899), 175 U. S. 309, 20 S. Ct. 110; *Bristol v. Washington County* (1900), 177 U. S. 133, 20 S. Ct. 585; and possibly in the case of a specialty debt, at the situs of the specialty, *Wheeler v. Sohmer* (1914), 233 U. S. 434, 34 S. Ct. 607. Shares of stock were taxable at the domicile of the stockholder, *Hawley v. Malden* (1914), 232 U. S. 1, 34 S. Ct. 201; *Frick v. Pennsylvania* (1925), 268 U. S. 473, 45 S. Ct. 603; and at that of the corporation, *Cory v. Baltimore* (1905), 196 U. S. 466, 25 S. Ct. 297. "Corporate excesses" (the excess of the market value of its outstanding stock over the value of its real and personal property and certain indebtedness) were taxable at the domicile of the corporation, *Cream of Wheat Co. v. Grand Forks* (1920), 253 U. S. 325, 40 S. Ct. 558; and proportionately at the place where the corporate business was transacted, *Adams Express Co. v. Ohio* (1897), 165 U. S. 194, 17 S. Ct. 305, 166 U. S. 185, 17 S. Ct. 604; *Adams Express Co. v. Kentucky* (1897), 166 U. S. 171, 17 S. Ct. 527.

this traditional attitude came in 1929. The court held that Virginia had no power to tax a trust fund administered in Maryland by a Maryland trustee for a Virginia cestui.¹² This was followed by a number of decisions which seemed to indicate that the court was changing its position from multiple taxation of intangibles to one of finding a situs for the property at the domicile of the owner and that the property was taxable there under the maxim *mobilia sequuntur personam*. A state could not impose an inheritance tax upon bonds issued by the state itself and its municipalities, owned by a decedent domiciled in a foreign state and kept at his domicile. Only the state of decedent's domicile could impose a tax on the transfer.¹³ A state where bank deposits and securities were located, could not tax their transfer by death when the decedent was domiciled in a foreign state.¹⁴ This was followed by a decision that the transfer of the indebtedness owed by a corporation to a non-resident decedent was not taxable by the state of incorporation of the debtor.¹⁵ These decisions culminated in the famous case of *First National Bank of Boston v. Maine*¹⁶ in which the court invalidated a tax by the state of incorporation upon a transfer of stock by a non-resident decedent, upon the ground that such a transfer could be taxed only by the state of his domicile. It was thought the death knell had been rung for multiple taxation and that tangibles and intangibles would be treated alike for taxation purposes in that they would be taxable in only one jurisdiction.¹⁷

The two present cases appear to be an about face by the court as they allow the taxation of the same intangible by more than one state. The securities of the two trusts were brought within the state of settlor's domicile solely by the fact that the trust agreement creating the trusts in Colorado and Alabama reserved to the settlor either the power of revocation or of disposition by will. This unexercised power is said to be carried by the settlor into the state of his domicile and brings in its train the entire corpus of the trust property. It has been said that the power of disposition is equivalent to ownership and that its relinquishment at death is an appropriate subject of taxation.¹⁸ The question however, is who shall levy the tax? The federal estate tax on the relinquishment of this interest is not analogous as there are no state boundaries to be considered. Cases where the property

¹² *Safe Deposit and Trust Co. v. Virginia* (1929), 280 U. S. 83, 50 S. Ct. 59.

¹³ *Farmer's Loan and Trust Co. v. Minnesota* (1930), 280 U. S. 204, 50 S. Ct. 98. This case specifically overrules *Blackstone v. Miller* (1903), 188 U. S. 189, 23 S. Ct. 277. See note in 43 *Harv. L. Rev.* 792

¹⁴ *Baldwin v. Missouri* (1930), 281 U. S. 588, 50 S. Ct. 436.

¹⁵ *Beider v. South Carolina Tax Commission* (1930), 282 U. S. 1, 51 S. Ct. 54.

¹⁶ (1932), 284 U. S. 312, 322, 52 S. Ct. 174. The court said, "Frick v. Pennsylvania, 268 U. S. 473, was one of the latest to approve that case [*Blackstone v. Miller*] and give countenance to the general doctrine that intangible property (unlike tangible property) might be subjected to a death transfer tax in more than one state; but this and all other instances of such approval, whether express or tacit, with the overthrow of the foundation upon which they rested, have ceased to have other than historical interest."

¹⁷ Brown, "Multiple Taxation By The States—What Is Left Of It?" (1935), 48 *Harvard L. R.* 407.

¹⁸ *Chanler v. Kelsey* (1907), 205 U. S. 466, 27 S. Ct. 550; *Chase National Bank v. U. S.* (1929), 278 U. S. 327, 49 S. Ct. 126; *Porter v. The Commissioner* (1933), 288 U. S. 436, 53 S. Ct. 451.

is in the same state in which decedent was domiciled are not applicable as there is no question of extraterritorial application of the state statute. The conflict arises when property held in trust and the decedent are in different states. The state of decedent's domicile has no jurisdiction over the property itself. If A dies in Indiana leaving tangible personalty located in Ohio and Illinois, clearly Indiana does not have the power to tax the transfer of the property because it is without the jurisdiction of the state. Yet A, if he had so desired during his lifetime, did not need to revoke any sort of instrument to bring that property into the state of his domicile. But, this power, while unexercised, did not detract from the taxing power of the state where the property was located, or permit taxation by the domiciliary state.¹⁹ It would seem therefore that the power of disposition by a resident of a state should give that state no authority to tax intangible property held in trust in another jurisdiction.

In the principal cases the securities have been localized in the states where the trusts were created, Alabama and Colorado. The settlor of the Alabama trust had no power of revocation since 1917, and the settlor of the Colorado trust never exercised her right of revocation. The exercise of any right or power reserved by the settlor was dependent on the laws of the state of the residence of the trustee and not upon or subject to the laws of the settlor's domicile. As Mr. Chief Justice Hughes says, "The fundamental question is thus not one of a reserved but unexercised power of revocation or of ultimate control in an owner, but whether securities, classed as intangibles, are necessarily and in all circumstances subject to a different rule from that obtaining in the case of tangible property. It is not perceived that there is a sound basis for such an invariable distinction, which is foreign to common thought and practical needs."²⁰ The Supreme Court long ago when considering the question in regard to tangible property did not hesitate to limit the application of the fiction *mobilia sequuntur personam*.²¹ If the court continues the view of the principal cases, multiple taxation can be avoided only by establishing the trust in the state of the domicile of the settlor, or as has been suggested by a recent writer,²² by reciprocity between the states.

F. J. N.

TAXATION OF JUDGES' SALARIES—CONSTITUTIONAL LAW.—Justice Woodrough took office as Judge of the Eighth United States Circuit Court May 1, 1933. The Federal Revenue Act of 1932 provided for the taxation of incomes including the compensation of judges of courts of the United States taking office after June 6, 1932.¹ This provision was included in subsequent Revenue Acts of 1934 and 1936.² Justice Woodrough paid the 1936 tax under protest and then sued to recover the amount on the grounds that

¹⁹ Frick v. Pennsylvania (1905), 268 U. S. 473, 45 S. Ct. 603.

²⁰ Graves v. Elliott (1939), 307 U. S. 383, 392, 59 S. Ct. 913, 917.

²¹ Union Refrigerator Transit Co. v. Kentucky (1905), 199 U. S. 194, 26 S. Ct. 36.

²² Lowndes, "The Passing of Situs" (1932), 45 Harvard L. R. 777.

¹ 47 Stat. 169, 178, 26 U. S. C. A. Sec. 22 (a), Federal Revenue Act of 1932, C. 209.

² 48 Stat. 680, 686, 687, 26 U. S. C. A. Sec. 22 (a), Federal Revenue Act of 1934, c. 277. 49 Stat. 1648, 1657, 26 U. S. C. A. Sec. 22 (a) (Supp. 1936) Federal Revenue Act of 1936, c. 690.