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Taxation-Intergovernmental Immunity-Taxation of the Income of Federal Employees by a State

TAXATION—INTERGOVERNMENTAL IMMUNITY—TAXATION OF THE INCOME OF FEDERAL EMPLOYEES BY A STATE.—Respondent, an attorney for the Home Owners' Loan Corporation, sought a refund of income tax paid to the State of New York on his salary for the year 1934. The New York Court of Appeals held such income immune on the authority of *New York ex rel. Rogers v. Graves.*[1] Held, such a tax is not a burden on national government as to be within an implied restriction upon the taxing power of the national and

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[16] 1 Fletcher, Cyclopedia of Corporations, § 209.

[17] Mt. Pleasant Coal Co. v. Watts (1926), 91 Ind. App. 501, 151 N. E. 7, allowed recovery etc. for an assignment of a lease, the court held that the corporation by accepting the lease and constructing a mine on the property had knowingly received the benefits of the contract. Seymour Improvement Co. v. Viking Sprinkler Co. (1928), 87 Ind. App. 179, 161 N. E. 389, holding corporation's silence when it received bills and learned plaintiff was looking to it for payment after allowing plaintiff to install sprinkler system was sufficient ratification of act of its president in entering into unauthorized contract. Hoosier Lumber Co. v. Spear (1935), 99 Ind. App. 532, 189 N. E. 633, holding corporation liable on contract of promoter beneficial to corporation and acquiesced in by three officers with knowledge.

[18] Cushion Heel Shoe Co. v. Hartt (1913), 181 Ind. 167, 103 N. E. 1063, holding evidence of silence when claim presented to directors not such affirmance as to constitute ratification.

[1] The New York Tax Law (c. 59, McKinney's Consolidated Laws), Sec. 359-2-f, provided expressly for exemption of salaries, wages and other compensation received from the United States of official or employees thereof, including persons in the military or naval forces of the United States. In the Rogers case, the Appellate Court of New York stated that the relator had not invoked Sec. 359-2-f, and decided the case only on the constitutional question. There does not appear in the decision in the instant case any attempt of the taxpayer to rely on the exemption statute. Subdivision f has been repealed by an act of May 28, 1937, L. 1937, c. 719, but the repeal was effective only as of that date. Compare State Tax Comm. of Utah v. Van Cott (1939), 59 S. Ct. 605.

state governments. *Collector v. Day*[2] and *New York ex rel. Rogers v. Graves*[3] overruled so far as they recognize an implied constitutional immunity from income taxation of the salaries of officers or employees of the national or a state government or their instrumentalities. *Graves v. People of State of New York ex rel. O'Keefe* (1939), 59 S. Ct. 595.

In the past decade the problem of inter-governmental immunity from taxation has been the subject of much litigation and of many discourses by legal writers. With the advantage of hindsight, it is interesting to follow the insertion of the doctrine of inter-governmental reciprocal immunity into our constitution and then watch it being slowly erased. The difficulty lies in the fact that so far the eraser has failed completely to expunge the insertion, leaving an illegible mark.

From the pen of Chief Justice Marshall came the phrase that "The power to tax involves the power to destroy,"[4] which caused later Justices fearing the abuse of this great power to create the implied constitutional intergovernmental immunity. The force of the decision of *Collector v. Day*[5] started the swinging of the pendulum in favor of immunity until the pendulum reached its peak in *Indian Motorcycle Co. v. United States*,[6] in which the Court recognized the immunity to be absolute without consideration of how great or small the burden might be upon either government. In recent years the pendulum has gone in the opposite direction with the court making distinctions between governmental and proprietary functions,[7] essential and non-essential activities,[8] and direct and indirect burdens.[9] Following this trend more classifications were made by striking out the independent government contractor[10] and then the government lessee[11] from the sanctified class of the immune. In the more recent case of *Helvering v. Gerhardt*[12] the Court abolished the theory that the immunity was absolute and required a direct and substantial burden upon the government in order to bring the taxpayer within the implied immunity. In the instant case the pendulum has apparently increased speed in its swing back by the Court's abolition of the implied constitutional immunity.

The Court definitely approves the theory that a non-discriminatory income tax on the salary of an employee of the government or its instrumentality is so indirect or incidental as not to constitute a burden upon either government, and therefore no grounds for an implied constitutional immunity. Beyond this point the Court gives grounds for many possible implications but few statements upon which to base an accurate prediction of the future movements of the pendulum.

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2 (1870), 11 Wall 113.
3 (1936), 299 U. S. 401, 57 S. Ct. 689.
4 McCulloch v. Maryland (1819), 4 Wheat. 316.
5 (1870), 11 Wall 113.
6 (1931), 283 U. S. 570, 51 S. Ct. 601.
7 South Carolina v. United States (1905), 199 U. S. 437, 26 S. Ct. 110.
8 Helvering v. Therrell (1938), 303 U. S. 218, 58 S. Ct. 539.
9 Education Films Corp. v. Ward (1931), 282 U. S. 379, 51 S. Ct. 170.
10 James v. Dravo Contracting Co. (1937), 302 U. S. 134, 58 S. Ct. 208.
11 Helvering v. Mountain Producers Corp. (1938), 303 U. S. 37, 58 S. Ct. 623.
12 Helvering v. Gerhardt (1938), 304 U. S. 405, 58 S. Ct. 969.

Relying on Mr. Chief Justice Marshall's theory that the state and federal powers of taxation do not stand on a parity which is based on the doctrine of federal supremacy,[13] the court inferred that it did not completely abolish the possible immunity of federal employees from state taxes although such taxes are non-discriminatory. Another reason stated for the possible immunity of federal employees is that the federal government is one of delegated powers, and has been given the implied power to do whatever is needful or appropriate, if not expressly prohibited, to protect its agencies.[14] Here, the Court stopped, however, expressly leaving open the question of how far Congress may go in protecting these instrumentalities from state taxation.[15]

The second inference comes from the statement that such a tax is laid upon income which becomes the property of the taxpayer when received as compensation for his services, and the tax laid upon the privilege of receiving it is paid from his private funds and not from the funds of the government, either directly or indirectly.[16] This seems to be a definite change from the old economic theory of Mr. Chief Justice Fuller in the Pollock case that a tax on the income of employees from the government, or receipts from governmental bonds is a tax on the governmental powers,[17] and a move toward the view that the income, be it salary or other compensation, when received has become merely money in the recipient's pocket and taxable as such without reference to the source from which it came. If this is true under what power can Congress make wages or interest received from the national government immune from state taxation? Should the Court follow such theory of income to a logical conclusion it would be inconsistent to allow even Congress to declare such earnings to be immune.[18]

The third possibility for an assumption arises in the Court's strong reliance

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[13] In answering the argument that the taxing powers of the state and federal government are concurrent, Mr. Chief Justice Marshall said, "The people of all the States, and the States themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the States, they tax their constituents and these taxes must be uniform. But, when a State taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control." McCulloch v. Maryland (1819), 4 Wheat 316, 435. Also see Willis, Constitutional Law, p. 236.

[14] Helvering v. Gerhardt (1938), 304 U. S. 405, 411, 58 S. Ct. 969, 971; Bank of New York v. Supervisors of New York County (1868), 7 Wall. 26, 30. Willis, Constitutional Law, p. 211.

[15] Why should the national government be able to exempt its employees from state taxation by legislative action, which would be allowing Congress to write an immunity which the court refuses to imply in the constitution, but not allow the states to protect their employees from taxation which is far more onerous?

[16] 59 S. Ct. 595, 598.

[17] Pollock v. Farmers' Loan & Trust Co. (1894), 158 U. S. 601, 630, 15 S. Ct. 673.

[18] Note, however, that the Court assumes the express congressional grant of immunity to the principal and interest of HOLC bonds from state taxation to be valid. The Court also states that there is a basis for implying an immunity from state income taxation upon the salary of an employee of the national government if there is such an economic burden by the tax as to amount to an interference by one government with another. Query, is this limited to discriminatory taxes?

upon *Helvering v. Gerhardt*[19] and its reiteration of the statement that a non-discriminatory tax on an employee of the national or state government is but the normal incident of the organization within the same territory of two governments, each possessing the taxing power; but then it goes beyond the Gerhardt decision by stating there is no implied restriction in the constitution prohibiting such taxation. This would seem to give a strong basis for prediction that the court may not concede to Congress the power to declare the employees or officers of the federal government or its instrumentalities immune from non-discriminatory taxation.

The Court has not taken a direct stand on the immunity of income from government bonds.[20] This leaves the question of whether or not the Court will make a distinction between the borrowing power and the employing power so as also to remove the implied immunity from interest on governmental bonds and obligations, state or federal. The same result should follow in either case if the court is to be consistent, but what the Court will actually decide is a matter for conjecure.

However, since the Supreme Court has failed to exercise a complete use of its eraser, it will be interesting to watch whether the next step will be another use of the eraser or the use of the pen. I. K.

TAXATION—MULTIPLE DOMICIL.—Edward Green was born in England in 1868, was educated in Vermont and New York, voted and carried on business in Texas from 1892 to 1911, was later engaged in business in New York, and after 1927 spent most of his time in Massachusetts and Florida alternating from one state to another thereby successfully evading taxes. Until his death, in 1936, he maintained that his domicil was in Texas. Texas, Florida, Massachusetts, and New York tax officials threatened to treat him as if he were domiciled in their respective jurisdictions at the time of his death and thus subject to their inheritance taxes on his intangible property wherever located. Since the aggregate of these taxes and the Federal Estate Tax would exceed the net value of the estate by over a million and a half dollars, and as Texas had little of the estate in its jurisdiction to levy on, there was danger of inability to enforce its tax. Therefore, Texas brought this original action against the other states in the United States Supreme Court in the nature of a bill of interpleader to get a determination of the domicil of decedent. Taking jurisdiction, the Supreme Court found the decedent's domicil was in Massachusetts at the time of death. *Texas v. Florida* (1939), 59 S. Ct. 563.

The jurisdiction to impose inheritance taxes on intangibles follows the domicil of the decedent; thus the determination of domicil is a jurisdictional issue.[1] Although it is a well accepted common law rule that a person can have but one domicil, nevertheless, on occasion two states have found the same person to be domiciled for tax purposes within their respective borders at the same time. The United States Supreme Court has refused to take

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[19] (1938), 304 U. S. 405, 58 S. Ct. 969.

[20] It is admitted that this problem was not in issue in the instant case.

[1] Farmers Loan and Trust Co. v. Minn. (1930), 208 U. S. 204, 74 L. ed. 371, 50 Sup. Ct. 98, 65 A. L. R. 1000; First Nat. Bank of Boston v. Maine (1932), 284 U. S. 312, 76 L. ed. 313, 52 Sup. Ct. 174, 77 A L. R. 1401.