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Electric Rates In Public Housing Projects

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ELECTRIC RATES IN PUBLIC HOUSING PROJECTS

The New York Public Service Law forbids electric companies charging one person or corporation more than any other person or corporation for a like service.[1] The statute does not refer to public buildings, and a question has, therefore, arisen as to whether public housing projects fall within its purview or whether they are entitled to the lower rates charged public buildings.

The only reported New York case directly on the point was recently decided by the Supreme Court of Richmond County. In a suit by Edison Corporation of Staten Island against the New York City Housing Authority and the City of New York,[2] the court held that residential buildings owned and operated by the Housing Authority were "public buildings", and therefore entitled to lower rates.

The court quotes with approval Missouri and Ohio cases where the question came before those courts, but feels bound by the case of *New York City Housing Authority v. Muller*.[3] The latter opinion can be cited as authority for one proposition only, to wit: The city has constitutional authority to acquire land to erect houses for residential purposes. It did not, however, declare such buildings for all purposes to be public buildings. One object only was sought under the act which set up the New York City Housing Authority, namely, slum clearance. The decision must be read in that light. To use the court's own words:

> In a matter of far reaching concern, the public is seeking to take the defendant's property and to administer it as part of a project conceived and to be carried out in its own interest and for its own protection. That is a public benefit and, therefore, *at least as far as this case is concerned,* a public use.[4] (Italics added.)

To emphasize the fact that the court there was interpreting the word "public" only to fit the facts of that case, it used these words:

> The cure [for slums] is to be wrought, not through the regulated ownership of the individual, but through the ownership and operation by or under the direct control of the public itself.[5]

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[1] N. Y. PUBLIC SERVICE LAW § 65, subd. 2, contains the following provision: "No . . . electric corporation . . . shall directly or indirectly, by any special rate, rebate, drawback or other device or method, charge, demand, collect or receive from any person or corporation a greater or less compensation for . . . electricity or for any service rendered or to be rendered or in connection therewith, except as authorized in this chapter, than it charges, demands, collects or receives from any other person or corporation for doing a like and contemporaneous service with respect thereto under the same or substantially similar circumstances or conditions."

[2] Staten Island Edison Corp. v. N. Y. City Housing Authority and City of New York, 52 N. Y. S. (2d) 639 (1944).

[3] 270 N. Y. 333, 1 N. E. (2d) 153 (1936).

[4] N. Y. City Housing Authority v. Muller, 270 N. Y. 333, 343, 1 N. E. (2d) 153 (1936).

[5] *Id.* at 341, 1 N. E. (2d) 153 (1936).

This citation makes it clear enough that the court there was upholding the authority of the city to own and operate buildings for residential purposes, not to purchase services at a lower rate, which services were furnished by a private corporation.

The case of *Bush Terminal Co. v. City of New York,*[6] seems to be even less controlling on the court in this case. The two quesions answered in that case were: 1. Does the New York Port Authority, concededly a public agency, have power to erect a building, part of which was not used for terminal purposes?, and 2. Could such buildings, by agreement with the municipalities involved, be exempt from the regular taxation to which other commercial buildings were subject? Both questions were answered in the affirmative. Nowhere does it appear, however, that the court passed upon any right of the public agency to require a private corporation to furnish it with services at a lower rate than that obtainable by other businesses in the area. The case does not even hold that public agencies are immune from taxation, much less that they are entitled to lower power rates or any other services. Chief Judge Lehman, at the close of the opinion, says with emphasis:

> We decide only that the parties may make a contract in accordance with the provisions of the statute.[7]

It might seem to be going somewhat afield to discuss the immunity of public agencies from taxation, but since the Supreme Court has relied largely on tax cases in support of its decision, we will examine two or three to see if they justify the decision reached by the court. As we have just seen, the *Bush Terminal* case, *supra,* does not hold that public agencies are immune from taxation, only that one could make an agreement to pay a certain sum annually in lieu of taxes to a municipality as provided by statute.

Lloyd v. Mayor,[8] relied on by the court, says that the City of New York possesses two kinds of powers, public and private. It does not distinguish between the two, but leaves that task to the courts as each case arises. It merely held that in cleaning sewers the city was exercising a private power, that it was responsible for the acts of its agents in leaving unguarded an excavation made in the street for purposes of cleaning the sewer, and that the city was liable in damages to plaintiff whose horse died from injuries sustained by stepping into the hole on a dark night. How that case can be construed as supporting the immunity of a public agency from taxation.

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[6] Bush Terminal Co. v. City of New York, 282 N. Y. 306, 26 N. E. (2d) 269 (1940).

[7] Bush Terminal Co. v. City of New York, 282 N. Y. 306, 322, 26 N. E. (2d) 269 (1940), cited *supra* note 6; Chapter 553 of the Laws of 1931 authorized the N. Y. Port Authority to enter into voluntary agreements with any municipality in the port district whereby it will undertake to pay a fair and reasonable sum annually in connection with any marine or inland terminal owned by it, "not in excess of the sum last paid as taxes upon such property prior to the time of its acquisition by the Port Authority."

[8] Lloyd v. Mayor of City of New York, 5 N. Y. 369 (1851).

or from regular electric rates, is very difficult to see.

Kennedy & Co. v. N. Y. World's Fair 1939, Inc.,[9] cited by the court, held that a mechanic's lien cannot attach to city-owned real estate and the improvements thereon, although it may attach to any sums that the municipality may have appropriated for making the improvements. Neither the tax issue nor any issue relating to service by a public utility was involved in that case.

County of Herkimer v. Village of Herkimer,[10] which the court cites in its interpretation of the tax law of this state, does not seem to be authority for the proposition that the Edwin Markham Houses involved in the *Staten Island* case are public buildings in every sense of the word, not even for taxation. On the contrary, the *Herkimer* case held that certain lands and buildings acquired by the county were *not* exempt from taxation by the village. Said the court:

> The expression "public use", as employed in the statute, has never been defined with exactitude. . . . Certainly the land is not used in the sense of being occupied or employed for any public purpose. Most of it is idle, and not used at all; the balance is in the possession of private individuals as lessees, and not of the public generally. Under these circumstances plaintiff is not entitled to exemption under the statute.[11]

The court takes pains to point out that in connection with the expression "public use":

> Its meaning must necessarily depend upon the peculiar circumstances of each case.[12]

An analysis of the foregoing cases does not support the decision of the court in the *Staten Island* case. It seems clear that the Edwin Markham Houses were not "public buildings" under the peculiar circumstances of this case and therefore not entitled to lower electric rates.

To the extent that the buildings are occupied by private individuals and families, they are, in that sense, private. They are not in the same category as schools, prisons, hospitals, asylums, or courthouses owned and operated by a state or municipality. A Missouri court had this to say of a housing project owned by the city:

> The apartments in these buildings are rented to private individuals in which these individuals and their families live. In fact, they are rented in competition with privately owned apartment buildings. They are not open to the public, and, therefore, are not public buildings.[13]

The Supreme Court of the State of Ohio, in a decision recently handed down by it, says:

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[9] Kennedy & Co. v. N. Y. World's Fair 1939, Inc., 260 App. Div. 386, 22 N. Y. S. (2d) 901 (2d Dep't 1940).

[10] County of Herkimer v. Village of Herkimer, 251 App. Div. 126, 295 N. Y. Supp. 629 (4th Dep't 1937).

[11] *Id.* at 127, 295 N. Y. Supp. 629 (4th Dep't 1937).

[12] *Id.* at 128, 295 N. Y. Supp. 629 (4th Dep't 1937).

[13] People *ex rel.* Ferguson v. Donnell, 349 Mo. 975, 163 S. W. (2d) 940 (1942).

In the instant case, the appellant is engaged in the business enterprise of being a landlord—a fact the true nature of which cannot be changed arbitrarily by mere legislative enactment alone. Clearly the appellant is a proprietor and as such cannot be heard to complain when its property is not permitted to escape the tax burden common to all proprietors.[14]

In the *Youngstown* case, this language appeared:

It seems to us clear that where dwellings are leased to family units for the purpose of private homes, the use of such dwellings is private and not public.[15]

It should not be overlooked that current supplied to such buildings is subject to taxation as current supplied to private buildings. The Federal Government taxes the Edison Corporation for this current supplied to the New York City Housing Authority at the rate charged to privately owned apartments, whereas it would be taxed at a lower rate if the Federal Government considered it a "public building".[16] Just as such buildings are taxed as private buildings, they should be charged the same rates as other buildings privately owned in the area.

It is the policy of the law to require all property to bear its just share of the expenses of government. That is a just and equitable rule. Unless expressly exempt by statute, all real estate, no matter by whom it is owned, is taxable.[17]

In the case of *Board of Education v. Baker*,[18] the New York Appellate Division said:

An exemption from taxation . . . relieves one class of persons or property from its obligation to bear its share of the expenses of government, no matter how deserving of assistance that class may be, and throws a correspondingly heavier burden upon all other classes, thus creating an inequality of taxation. It is for this reason that the courts have uniformly refused to favor exemptions, and have invariably construed statutes freeing property from the burden of enforced contribution to the expense of maintaining the government most rigidly against the claimant, and have declined to countenance such immunity unless the purpose of the legislature to exempt such property indisputably appears.[19]

For the same reasons that courts have been extremely reluctant to grant immunity from taxation, the state has been reluctant to

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[14] Federal Public Housing Authority v. Guckenberger, 143 Ohio St. 251, 55 N. E. (2d) 265 (1944).

[15] Youngstown Metropolitan Housing Authority v. Ewatt, 143 Ohio St. 268, 55 N. E. (2d) 122 (1944).

[16] INTERNAL REVENUE BULLETIN, No. 15.

[17] County of Herkimer v. Village of Herkimer, 251 App. Div. 126, 127, 295 N. Y. 629 (4th Dep't 1937).

[18] Matter of Board of Education of Jamestown v. Baker, 241 App. Div. 574, 272 N. Y. Supp. 801 (4th Dep't 1934), *aff'd*, 266 N. Y. 636, 195 N. E. 359 (1935).

[19] Matter of Board of Education of City of Jamestown v. Baker, 241 App. Div. 574, 272 N. Y. Supp. 801 (1934), *aff'd*, 266 N. Y. 636, 195 N. E. 359 (1935).

favor one class of persons or property over another in paying public utility rates.[20] If the tenants of the Edwin Markham Houses and other projects of a like nature are given lower electric rates, tenants in privately owned houses must of necessity pay higher rates than they otherwise would. It is not as if all the tenants in such projects were of the lower income group and all families outside are of a higher income group. The tenants of the Edwin Markham Houses form but a very small fraction of the families in the income group in which they fall. Justice Crouch, who wrote the opinion in the *Muller* case, made this observation:

> The designated class to whom incidental benefits will come are persons with an income under $2,500 a year, and it consists of *two-thirds of the city's population.*[21] (Italics added.)

Just why a small fraction of the city's population should pay lower rates than others in the same income group, the court in the *Staten Island* case does not make clear. What the court said in *Board of Education v. Baker* as to taxation is just as applicable to public utility rates. A discriminatory reduction of rates:

> Relieves one class of persons or property from its obligation to bear its share of the expenses . . . no matter how deserving of assistance that class may be, and throws a correspondingly heavier burden upon all other classes.[22]

The conclusion to be reached is that no reported decision prior to the *Staten Island* case held city-owned residential houses to be "public buildings" in the sense that they are entitled to lower electric rates; that the great majority of the cases, both in New York and in sister states, hold them to be "private" for tax purposes; and that the Richmond County Supreme Court was not bound by the *Muller* case nor any other cited case to hold that such houses are entitled to lower electric rates as "public buildings". Allowing city-owned residential houses to qualify as "public buildings" in order to obtain lower electric rates appears to be discriminatory and violative of Section 65, Subdivision 2, of the New York Public Service Law.[23]

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STOCK DIVIDENDS—ELIMINATING ACCRUED BUT UNDECLARED CUMULATIVE DIVIDENDS BY CHARTER AMENDMENT

In *Dodge v. Ford Motor Co.*,[1] the court said, "A business corporation is organized and carried on primarily for the profit of stockholders." Every stockholder, when purchasing shares of stock in a

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[20] N. Y. PUBLIC SERVICE LAW § 65, subd. 2, cited *supra* note 1.

[21] N. Y. City Housing Authority v. Muller, 270 N. Y. 333, 1 N. E. (2d) 153 (1936).

[22] Cited *supra* note 18.

[23] Cited *supra* note 1.

[1] 204 Mich. 459, 170 N. W. 668 (1919).