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# Constitutional Law--Tax on Privilege of Declaring Dividends--Due Process (State of Wisconsin, et al. v. J. C. Penny Company, 310 U.S. 618 (1940))

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exclude structures from the navigable streams authorizes such terms. Furthermore, the provision that gives the United States an option to acquire the licensed project and the riparian rights at less than a fair value does not violate the "due process of law" clause,[12] because this is part of the consideration that the licensee has to pay to procure the privilege to construct and maintain its project in a place where it could be forbidden absolutely, and the United States, having the power to erect a structure in such waters,[13] may constitutionally obtain one already built. Nor does such acquisition constitute an invasion of the states' rights under the Tenth Amendment of the United States Constitution, since the federal government's action is within the commerce clause. The dissenting opinion of the present case is based essentially on the premises that the Supreme Court should accept the factual findings concurred in by the two lower courts and that it should adhere to the rule of *The Daniel Ball* case without considering the possibility of improving the New River.

A. G.

CONSTITUTIONAL LAW—TAX ON PRIVILEGE OF DECLARING DIVIDENDS—DUE PROCESS.—The State of Wisconsin enacted a statute [1] which provided: "For the privilege of declaring and receiving dividends out of income derived from property located, and business transacted, in this state there is hereby imposed a tax equal to two and one-half per centum of the amount of such dividends declared and paid by all corporations (foreign and local) . . ." The remaining provisions of the act refer to the method of computing and collecting the tax and are not pertinent to the issues here involved. The defendant is a foreign corporation licensed to do business in the State of Wisconsin. It receives income in that state, and after whatever tax is levied upon its net profit is paid, such income is forwarded to its home office (New York); from there it is employed in any way the management sees fit; perhaps, some or all of it may be disbursed as dividends. Whether the tax on the privilege of paying such dividends may apply to a foreign corporation licensed to do business in Wisconsin without offending the due process clause [2] is the question raised by this appeal. *Held,* four judges dissenting, the statute is constitutional. The substantial privilege of carrying on business in Wisconsin clearly supports the tax, and the fact that the tax is contingent upon events brought to pass without the state does not destroy

[12] U. S. CONST. AMEND. V.
[13] Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 56 Sup. Ct. 466 (1936).

[1] Wis. Laws 1935, c. 505, § 3, as amended by Wis. Laws 1935, c. 552.
[2] U. S. CONST. AMEND. XIV, § 1.

the nexus between such a tax and the transactions within the state for which the tax is an exaction. *State of Wisconsin, et al.* v. *J. C. Penny Company,* 310 U. S. 618, 61 Sup. Ct. 246 (1940).

A state has the right to levy a general corporate income tax on the earnings of a foreign corporation attributable to activities within the state,[3] but the question herein presented is whether the additional tax on the privilege of declaring dividends by a foreign corporation is valid.

Shortly after the statute involved was enacted it was before the court in the case of *State, ex rel. Froedtert G. & M. Co.* v. *Tax Commission.* It was then argued that the statute deprived non-resident stockholders of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.[4] It was also contended that to tax a non-resident over whom the state had no jurisdiction was taking property without due process.[5] The court in that case conceded that this would be true, if the tax were considered a tax imposed on the non-resident, but said that it was rather an excise tax; a tax on the transaction involved and cited authority to the effect that such a tax did not violate the United States Constitution.[6] While the application of the law to foreign corporations was not before the court upon the pleadings in that case, the court felt constrained to point out that the tax would be valid as against a foreign corporation doing business in the state on such dividends as were derived from earnings within the state, because that portion of the dividends was given a constructive situs within the state. The court drew an analogy between these facts and the situation where an employer was liable for the income tax on salaries of non-residents earned within the state, which tax has been upheld as a tax on the corporation over which the state had jurisdiction.[7]

When the instant case came before the same tribunal the court receded from the position it previously took with regard to foreign corporations. The court in effect overruled the prior decision [8] insofar as it related to a foreign corporation declaring dividends without the State of Wisconsin out of earnings from business conducted in Wisconsin. It held that a privilege tax for declaring dividends may not be constitutionally imposed upon a foreign corporation declaring such dividends in another state, because the privilege, not being granted by Wisconsin, is not subject to the taxing power of that state. The court relied principally on a decision of the United States Su-

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[3] U. S. Glue Co. v. Oak Creek, 247 U. S. 321, 38 Sup. Ct. 499 (1918); Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 41 Sup. Ct. 45 (1920).

[4] 221 Wis. 225, 265 N. W. 672 (1936).

[5] First Nat. Bank v. State of Maine, 28 U. S. 312, 52 Sup. Ct. 174 (1932).

[6] Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 18 Sup. Ct. 594 (1898).

[7] Travis v. Yale and Towne Mfg. Co., 252 U. S. 60, 40 Sup. Ct. 228 (1920).

[8] See note 4, *supra.*

preme Court in *Connecticut General Life Insurance Co.* v. *Johnson* [9] wherein it was held that California could not constitutionally impose a privilege tax in respect to reinsurance premiums received under a reinsurance contract made and performable in Connecticut by a Connecticut insurance company from other insurance companies who had insured the original risks in California in the conduct of business transacted in that state. That decision was followed in other companion cases.[10] When the present case came before the United States Supreme Court it distinguished it from *Connecticut General Life Insurance Co.* v. *Johnson* [11] by saying that, "the California tax neither in its measure nor in its incidence was related to California transactions. In the present case, on the contrary, the incidence of the tax as well as its measure is tied to the earnings which the State of Wisconsin has made possible." In making the distinction between the two cases, the reasoning appears to be finely drawn and seems not to be in consonance with the decision in the California case. In declaring the tax in that case void the court used words [12] which it would seem might, with equal accuracy, be said of the tax in the instant case which the court has declared to be valid.

However, it now appears to be settled that there is no constitutional infirmity in a tax by a state on the privilege of declaring corporate dividends on earnings within the state regardless of whether it involves a domestic corporation or a foreign corporation, licensed by that state to do business within its borders, and regardless of whether such dividends are paid to foreign or resident stockholders. It is, perhaps, an indication of what might be expected in the future in the way of taxes on the "privilege of doing business" because it is obvious that this decision may have widespread repercussions.

F. D. M.

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[9] Connecticut General Life Ins. Co. v. Johnson, 303 U. S. 77, 58 Sup. Ct. 436 (1938).

[10] F. W. Woolworth Co. v. Wisconsin Tax Commission, 233 Wis. 305, 289 N. W. 685 (1940); Minnesota Min. & Mfg. Co. v. Wisconsin Tax Commission, 233 Wis. 306, 289 N. W. 686 (1940).

[11] See note 9, *supra.*

[12] In describing the incidence of the void tax in *Connecticut General Insurance Company* v. *Johnson,* 303 U. S. 77, 58 Sup. Ct. 436 (1938), the court said: "Apart from the facts that appellant was privileged to do business in California, and that the risks reinsured were originally insured against in that state by companies also authorized to do business there, California had no relationship to appellant or to the reinsurance contracts. No act in the course of their formation, performance or discharge, took place there. The performance of those acts was not dependent upon any privilege or authority granted by it, and California laws afforded to them no protection. . . . The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state or as a tax on a privilege granted by the state."