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Public Salary Tax Act of 1939

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> "Appearance in person or by attorney. A party who is of full age may prosecute or defend a civil action in person or by attorney unless he has been judicially declared to be incompetent to manage his affairs. If a party has an attorney in the action he cannot appear to act in person except with the consent of the court. *Any corporation or voluntary association must appear by an attorney-at-law duly licensed to practice under the laws of this state.*" (Italics ours.)

Section 280 of the Penal Law was amended by striking therefrom the words "other than itself." The omission of these words from the Penal Law destroys the contention in the *Victor & Co.* case that the intent of the Legislature was to permit the appearance in person by a corporation by immunizing them from liability.

III.

Through these amendments, a corporation now has absolutely no right to appear in person, since the so-called "enabling statutes" have been amended to exclude definitely corporate bodies, and the immunizing section has been amended, striking out the immunity. A corporation is now subject to prosecution for practicing law, even if it appears in person.

The corporations may see fit to contest Section 236 as being unconstitutional, on the ground that they are denied equal protection of the laws under the United States Constitution. By Section 37 of the General Business Law the term "person" includes corporations, and the Fourteenth Amendment to the United States Constitution states that: " * * * nor shall any state * * * deny to any *person* within its jurisdiction the equal protection of the laws." [34] However, a probable answer is that corporations are mere creatures of statutes [35] and may, therefore, be regulated by the state which created them.

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PUBLIC SALARY TAX ACT OF 1939.—Ever since the Federal Government has undertaken to combat the evils caused by the great world-wide economic depression, the burden of our national debt has become steadily more onerous. The governmental measures taken to bring about a financial recovery, although they are quite different

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[34] 3 WILLOUGHBY, THE CONSTITUTION OF THE UNITED STATES (2d ed. 1929) 1931 ("The provisions of the Fourteenth Amendment guarantee to individuals and to corporations that they shall not by state law be excluded from the enjoyment of privileges which other persons and corporations similarly circumstanced enjoy, or that they may not have imposed upon them burdens which others similarly circumstanced are free from").

[35] N. Y. STOCK CORP. LAW; N. Y. GEN. CORP. LAW.

from one another in many respects, all have one attribute in common. They are expensive. Thus, the National Government has had to make pecuniary outlays. As a consequence Congress has found it necessary to accumulate funds for the Treasury with greater rapidity. Accordingly, new and different sources of and methods for taxation have been discovered and devised by the Legislators. One of the new tax laws is aimed at the salaries of governmental and state employees; popularly it is called the Public Salary Tax Act of 1939.

That the power of taxing the people and their property is essential to the very existence of government, is a well settled constitutional doctrine.[1] Moreover, the Sixteenth Amendment provides the Federal Government with the power to tax private incomes.[2] However, the determination as to whether such right extends to governmental functions, and to the compensation paid its officers and employees engaged in a governmental capacity, has been greatly responsible for a vast amount of litigation. The problem has been whether this constitutional power to impose taxes is subject to limitation.

Since the Federal Government is a government by virtue of delegated powers granted expressly by the people and contained in the United States Constitution,[3] it cannot exercise any authority except that expressly or impliedly granted it by the Constitution. There is no express provision in the Constitution prohibiting the Federal Government from taxing the instrumentalities of the state nor is there any such provision in regard to the states taxing instrumentalities of the Federal Government. It follows as a necessary corollary that taxation of the compensation paid to officers and employees of state and Federal Government, is likewise not expressly prohibited. Such exemption, if it exists, must rest upon implication.[4]

The application of implied immunity descends from *McCulloch* v. *The State of Maryland*,[5] decided in 1819, where the State of Maryland sought to impose a tax upon notes of a bank of the United States. From this case was derived the doctrine that immunity from taxation was essential to the preservation of our dual system of government, the independence of each government within its respective sphere. The doctrine, that "the power to tax involves the power to destroy",[6] brought forth the conviction that the dual system of government might disappear if each were permitted to tax the other.[7]

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[1] U. S. CONST. Art. I, § 8, cl. 1 ("The Congress shall have power to lay and collect taxes * * *").

[2] U. S. CONST. Amend. XVI ("The Congress shall have the power to lay and collect taxes on incomes, from whatever source derived").

[3] U. S. CONST. Preamble; U. S. CONST. Art. I, § 1.

[4] U. S. CONST. Art. I, § 8, cl. 18 ("to make all laws which shall be necessary and proper for carrying into execution the foregoing powers").

[5] 4 Wheat. 316 (U. S. 1819).

[6] McCulloch v. The State of Maryland, 4 Wheat. 316, 431 (U. S. 1819).

[7] Dobbins v. Commissioner of Erie County, 16 Pet. 435 (U. S. 1842); Collector v. Day, 11 Wall. 113 (U. S. 1870); Waneless Iron Co. v. Commis-

In 1842, the tax immunity of the governmental employee was conceived in *Dobbins* v. *Commissioner of Erie County*,[8] which held the income of a federal officer exempt from state tax. *Collector* v. *Day*,[9] in 1870, held the salary of a state judicial officer exempt from federal tax. Both these cases reiterated the doctrine laid down in *McCulloch* v. *The State of Maryland*. From these cases sprang a growing area of tax immunity[10] because they created another doctrine, which the Constitution does not state, namely, that the immunities are correlative. Since the National Government is immune from state taxation, therefore the state government must be immune from federal taxation. As the result of fusion of these two hypotheses there arose a confusion as to what constituted a governmental function. The courts took cognizance only of essential and usual governmental functions, thus narrowing the basis of exemption.[11]

Since 1937 there has been evidenced a positive trend away from tax immunity.[12] The old fears, that the dual system of government might disappear if one could tax the other, have been abating.[13] Although in Canada and Australia, where substantially the same question of taxation exists,[14] the doctrine of intergovernmental immunity was at first followed, the Supreme Court of Canada and the High Court of Australia eventually rejected the doctrine completely. Subsequent decisions of the United States Supreme Court limited the interpretation of the doctrine of intergovernmental immunity. No longer can it be thought that the power to tax involves the power to de-

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sioner of Internal Revenue, 75 F. (2d) 779 (C. C. A. 8th, 1935); Commissioner of Internal Revenue v. Modjeski, 75 F. (2d) 468 (C. C. A. 2d, 1935); Halsey v. Helvering, 75 F. (2d) 234 (D. of C. 1934); Helvering v. Powers, 293 U. S. 214, 55 Sup. Ct. 171 (1934).

[8] 16 Pet. 435 (U. S. 1842).

[9] 11 Wall. 113 (U. S. 1870).

[10] Patterson v. Kentucky, 97 U. S. 501 (1877) (wherein it was held that states cannot tax United States patents); Mercantile Bank v. New York, 121 U. S. 138, 7 Sup. Ct. 826 (1887) (exemption of municipal bonds from federal tax); California v. Cent. Pac. R. R., 127 U. S. 1, 8 Sup. Ct. 1073 (1887) (state cannot tax a federal corporate franchise); Indian Motorcycle Co. v. United States, 283 U. S. 570, 51 Sup. Ct. 601 (1931) (sale of motorcycles to municipal corporation for use in its police service is not subject to federal taxation).

[11] Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342 (1911); Helvering v. Powers, 293 U. S. 214, 55 Sup. Ct. 171 (1934); United States v. California, 297 U. S. 175, 56 Sup. Ct. 421 (1936).

[12] (1939) 17 TEX. L. REV. 452; (1939) 11 ROCKY MT. L. REV. 200; (1939) 12 So. CALIF. L. REV. 417.

[13] Lewinsohn, *Tax Exempt Salaries and Securities: A Re-examination* (1937) 23 A. B. A. J. 685.

[14] BRITISH NORTH AMERICAN ACT, 30, 31 VICT. c. 3; COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT, 63, 64, VICT. c. 12. See Bank of Toronto v. Lambe, [1887] 12 A. C. 575; Forbes v. Attorney-General for Manitoba, [1937] 35 T. L. R. 211; Amalgamated Society of Engineers v. Adelaide Steamship Co., [1920] 28 C. L. R. 129; Webb v. Outtrim, [1907] A. C. 81; Caron v. The King, [1924] A. C. 999.

stroy;[15] nor that a tax upon net income is a tax on the source of the income;[16] nor that the economic burden of the tax may be passed on to the Government, the employee of which is taxed.[17]

The gradual trend away from immunity reached its climax in the latest case to come before the Supreme Court—*Graves* v. *New York ex rel. O'Keefe*.[18] In this case the respondent, a resident of New York, and lawyer for the Home Owner's Loan Corporation, sought a refund of the tax paid upon his salary upon the grounds that a wholly owned instrumentality of the United States, the Home Owner's Loan Corporation, is immune from state taxation, and to tax the employee of the Government's corporation would be to impose a burden upon and impair a governmental function. The court held that the imposition of such a tax by the State of New York did not place an unconstitutional burden upon the Federal Government. "The immunity sought by the respondent is not one to be implied from the Constitution because, if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the state governments." [19]

The termination of immunity of the governmental and state employee was consummated by an Act of Congress [20] providing for taxation of state employees by the Federal Government and the taxation of federal employees by the state government.[21] It may be contended that such legislation will be sustained as constitutional,[22] since the rationale of the doctrine of implied immunity necessary to the preservation of our dual system of government has been destroyed by previous decisions of the United States Supreme Court.

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[15] Western Union Telegraph Co. v. Attorney-General of Massachusetts, 125 U. S. 530, 8 Sup. Ct. 961 (1888); City of New Brunswick v. United States, 276 U. S. 547, 48 Sup. Ct. 371 (1928).

[16] New York *ex rel.* Cohn v. Graves, 300 U. S. 308, 57 Sup. Ct. 466 (1937); Hale v. State Board, 302 U. S. 95, 58 Sup. Ct. 102 (1937).

[17] James v. Dravo Contracting Co., 302 U. S. 134, 58 Sup. Ct. 208 (1937); Helvering v. Mountain Producers Corp., 303 U. S. 376, 58 Sup. Ct. 623 (1938); Helvering v. Gerhardt, 304 U. S. 405, 58 Sup. Ct. 969 (1938); Metcalf & Eddy v. Mitchell, 269 U. S. 514, 46 Sup. Ct. 172 (1926); Burnet v. A. T. Jergins Trust, 288 U. S. 508, 53 Sup. Ct. 439 (1933); McLoughlin v. Commissioner, 303 U. S. 218, 58 Sup. Ct. 539 (1938).

[18] 306 U. S. 466, 59 Sup. Ct. 595 (1939).

[19] Graves v. O'Keefe, 306 U. S. 466, 478, 59 Sup. Ct. 595 (1939).

[20] 53 STAT. 574, 26 U. S. C. A. §§ 22, 116, 5 U. S. C. A. § 84a (Supp. 1939).

[21] "Section 22(a) of the Internal Revenue Code is amended by inserting after the words 'compensation for personal service' the following: ('including personal service as an officer or employee of a state for any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing')."

[22] 53 STAT. 574, 26 U. S. C. A. §§ 22, 116, 5 U. S. C. A. § 84a (Supp. 1939); see N. Y. Times, Jan. 26, 1940, p. 19, col. 5.