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Income Tax--Trust Situs--Intangibles--Double Taxation (Edward W. Hutchins et al., Trustees v. Commissioner of Corporations and Taxation (Mass., U.S. Daily 2361, Oct. 2, 1930))

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as laid by the court in past decisions.[10] Although it has been held that the taxpayer's liability for damages on account of a breach of contract in 1920, was a loss sustained and deductible in that year, and though the amount of damages was negotiated, agreed upon and paid the following year,[11] this decision has been limited to cases in which the taxpayer admits liability by offer of settlement immediately after the breach.[12]

R. D. F.

INCOME TAX—TRUST SITUS—INTANGIBLES—DOUBLE TAXATION.—These are three cases, decided together, involving three complaints for the abatement of certain income taxes assessed by the Commonwealth of Massachusetts [1] and paid by the complainants, residents of Massachusetts, as trustees under three wills, two being administered in New York and one in the District of Columbia. The trust property, consisting of intangibles, had previously been taxed by New York and the District of Columbia respectively. Plaintiffs allege that, the trustees having been appointed by the courts of New York and the District of Columbia, and the trusts being administered in those jurisdictions, these trusts are liable to the state of New York and the District of Columbia for an income tax on the gains and profits here sought to be taxed. *Held,* that the fact that trustees were residents of Massachusetts did not authorize that State to impose income taxes on the trust, since, the property having already been taxed in New York and the District of Columbia respectively, such action would render them liable to double taxation. Edward W. Hutchins *et al.,* Trustees v. Commissioner of Corporations and Taxation, Massachusetts Supreme Judicial Court (U. S. Daily 2361, Oct. 2, 1930).

The Court states that the taxing section indicates an intention on the part of the General Court to tax all the income there described which is within its power to tax. "It is as broad as the jurisdiction of the Commonwealth." The question of jurisdiction is disposed of not as an original problem, but on the theory enunciated in Farmers' Loan and Trust Company v. Minnesota,[2] that the courts of New York and the District of Columbia have already settled the *situs* of the trusts, and that such *situs* for the purpose of taxation having been established in New York and the District of Columbia, the Commonwealth is powerless, under the due process clause of the Fourteenth

[10] Empire Printing & Box Company, 5 B. T. A. 303 (1926); Hidalgo Steel Company, 8 B. T. A. 76 (1927).
[11] Producers Fuel, 1 B. T. A. 202 (1925).
[12] Hamler Coal Company, 4 B. T. A. 947 (1926).
[1] Under Mass. Gen. Laws, ch. 62, sec. 10.
[2] 280 U. S. 204, 50 Sup. Ct. 98 (1930).

Amendment, to tax them again. It is true that in the light of the recent case of The Farmers' Loan and Trust Company v. Minnesota, and in the even more recent case of Baldwin v. Missouri [3] (both decided at the last term of the United States Supreme Court) this decision of the court is correct. Yet in view of the fact that until these very recent decisions the fact that one state had power to tax intangibles was repeatedly held by the Supreme Court to be no bar to the power of another state to tax said property,[4] and in view also of the fact that the former case was decided over the dissent of Mr. Justice Holmes, Mr. Justice Brandeis concurring, and that in the second case both Justice Holmes and Justice Stone wrote dissenting opinions, in which Mr. Justice Brandeis concurred, we think that it may be well to consider at this time whether those decisions were wisely made. The opinion of Mr. Justice Holmes was not only significant from the point of view of our subject, but unique in its vigor. Said Mr. Justice Holmes: "I have not yet adequately expressed the more than anxiety I feel at the ever-increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this court as for any reason undesirable * * *" [5] As time goes on the distinction between the political, economic, and social beliefs of the judges and the meaning of the Constitution is becoming fine almost to the point of non-existence. "The words he must construe are empty vessels into which he can pour nearly anything he will." [6] Such words from the lips of a great jurist are vitally significant as a measure of the present-day judicial attitude, which seems to regard the law itself, at least as it emanates from the Legislature, as of very little significance. That

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[3] 281 U. S. 586, 50 Sup. Ct. 436 (1930).

[4] Kidd v. Alabama, 188 U. S. 730, 23 Sup. Ct. 401 (1903); Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277 (1903); Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. 475 (1886).

[5] "Of course the words 'due process of law' if taken in their literal meaning have no application to this case; and while it is too late to deny that they have been given a much more extended and artificial signification, still we ought to remember the great caution shown by the Constitution in limiting the power of the states, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide by the Court's own discretion, the validity of whatever laws the States may pass. * * * It seems to me to be exceeding our powers to declare such a tax a denial of due process of law. And what are the grounds? Simply, as far as I can see, that it is disagreeable to a bond owner to be taxed in two places. Very probably it might be a good policy to restrict taxation to a single place and perhaps the technical conception of domicil may be the best determinant. But it seems to me that if the result is to be reached it should be reached through understanding among the states, by uniform legislation or otherwise, not by evoking a constitutional prohibition from the void of 'due process of law' when logic, tradition and authority have united to declare the right of the state to lay the now prohibited tax."

[6] Mr. Justice Learned Hand, in an address to a group of young lawyers in Philadelphia.

attitude is visible in the decision of the Baldwin case, for there is nothing inherent in the power of double taxation which renders it liable to the indictment of taking property without due process of law, as the Supreme Court itself maintained for many years, and the fact that bond owners resent being taxed in two places is no reason for invoking constitutional prohibitions. The remedy should be in the hands of the Legislatures, either of the several states, or of the Federal Government. It is submitted that the question of double taxation is properly the subject of social and economic considerations which should make their appeal to the Legislatures, rather than constitutional control by the courts under the Fourteenth Amendment.

V. B.

WHAT INTERESTS MAY A TRANSFEROR RETAIN IN TRANSFERRED PROPERTY WITHOUT LIABILITY FOR THE FEDERAL ESTATE TAX?—Since the days of yore people have matched their wits against revenue collectors, in attempts to avoid payment of taxes. Human nature has not changed a whit and today we find a similar situation present in the collection of estate taxes.

The purpose of the Federal Inheritance Tax laws [1] is to tax the privilege of passing property [2] and not the right to receive the property which is the *sine qua non* of the divers state inheritance tax laws.[3] The absolute transfers of property during the life of the donor fall outside the provisions of the tax since they are clearly not in

[1] The Federal Estate Tax can be traced back to 1797, when, under the Stamp Tax Act an inheritance tax was imposed. During the Civil and Spanish-American Wars similar taxes were levied, but for short periods. Our present Act is based on the Rev. Act of 1916, 39 Stat. 777 (1916), which has frequently been amended. Rev. Act of 1918, 40 Stat. 1097 (1919); Act of 1921, 42 Stat. 277 (1921); Rev. Act of 1924, 43 Stat. 303 (1924), 26 U. S. C., sec. 1092; Rev. Act of 1926, 44 Stat. 69 (1926). The present inheritance tax laws are under title III.

[2] Knowlton v. Moore, 178 U. S. 41, 20 Sup. Ct. 747 (1899). The Court stated, "It is the power to transmit, or the transmission from the dead to the living, on which such taxes are immediately rested." Edwards v. Slocum, 264 U. S. 61, 44 Sup. Ct. 239 (1924), Holmes, *J.*, "A taxable interest is not one to which some person succeeds but is an interest which ceases by reason of the death." Matter of Schmidlapp Est., 236 N. Y. 278, 140 N. E. 697 (1923), "It is a tax upon the creation of a right, not a charge upon the fruition in enjoyment or possession." Nichols v. Coolidge, 274 U. S. 531, 47 Sup. Ct. 710, 71 L. ed. 1084 (1927); see also Kroeger, Inheritance Taxation of Transfers Not Taking Place at Death (1930), 15 St. Louis L. Rev. 113, 117.

[3] The entire question of state and Federal inheritance taxes is treated in an exhaustive and scholarly series of articles by Professor Rottschaefer, *Taxation of Transfers Intended to Take Effect in Possession or Enjoyment at Grantor's Death* (1930), 14 Minn. L. Rev. 453 and 603; see also Stimson, *When Revocable Trusts Are Subject to Inheritance Taxes* (1926), 25 Mich. L. Rev. 839; Pinkerton and Millsaps, Inheritance and Estate Taxes (1926), p. 9; Gleason and Otis, Inheritance Taxes (3rd ed.). p. 4; Leaphart, *Trust to Escape Federal Income and Estate Taxes* (1930), 15 Corn. L. Rev. 587.