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Determination of the Situs to Avoid Double Taxation of Intangibles

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and precludes the employment of the devices formerly utilized to avoid taxation. It is submitted that factually the retention by the donor of any "economic[20] benefits" moreover in the trust causes a tax to be imposed. At last, the original intention of the designers of the much-discussed section of the law is realized. Whether the present amendment can be made retroactive in its scope, as is the intention of its sponsor[21] is a question not at all free from doubt.

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DETERMINATION OF THE SITUS TO AVOID DOUBLE TAXATION OF INTANGIBLES.—The maxim "mobilia sequuntur personam" has proven inadequate for the solution of all our modern problems relating to the taxation of intangibles. It is therefore not to be expected that it can be easily applied to the taxation of intangibles. Indeed the Supreme Court has said of the maxim:

> "It was intended for convenience and not to be controlling where justice does not demand it."[1]

With the courts, therefore, readily disregarding the maxim as justice required, its principle soon lost significance with regard to tangible personal property. It was held, for example, that where personal property had acquired a permanent situs in a state, that state had the right to tax the property regardless of the place of residence of the owner. This proposition is of course predicated on the theory that a state is entitled to tax and to derive revenue from any property within its jurisdiction to which it affords protection. Nor was this proposition at all shaken by the realization that double taxation would thus ensue. In Blackstone v. Miller the proposition was put by Mr. Justice Holmes in these words:

> "The fact that two states, dealing each with its own law of succession, both of which have to be invoked by the person claiming rights, have taxed the right which they respectively confer, gives no ground for complaint on constitutional grounds."[2]

[20] Rothschaeffer, op. cit. *supra* note 6; see also note 5, St. John's L. Rev. 147.

[21] Congressman Garner in advocating the amendment asserted that the retroactive feature would have accompanied this act, but for the fear that it would have defeated the entire bill.—Congressional Record of March 3, 1931.

[1] Board of Assessors v. Comptoit National D'Escompte, 191 U. S. 388, 24 Sup. Ct. 109 (1903).

[2] 188 U. S. 189, 207, 23 Sup. Ct. 277 (1903); see also Black, Constitutional Law (2nd ed., 1897) at p. 451: "There is nothing in the Constitution

But the doctrine of Blackstone v. Miller was not to endure. Soon the Supreme Court found distinctions, and after the decision in Frick v. Pennsylvania,[3] Blackstone v. Miller may no longer be regarded as authority. In the Frick case, the Court discussed the difference between a property tax and an inheritance tax and points out that:

> "A tax is an enforced contribution of money or other property assessed in accordance with some reasonable rule or apportionment by authority of a sovereign state on person or property within its jurisdiction, for the purpose of defraying the expenses of government and continuing in operation the various legitimate functions of the state.
>
> "An inheritance tax is the right of the state to tax the transfer of property." [4]

Here it was held that:

> "The jurisdiction possessed by the state of the situs was not partial but plenary and included power to regulate the transfer both inter vivos and on the death of the owner, and the power to tax both the property and the transfer." [5]

The increase in the importance of intangibles could not fail to have important significance. When we consider the huge amount of property consisting of corporate bonds and stock, we cannot fail to realize that the essential problems of taxation have changed. Again

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of the United States to afford protection against double taxation of a state." 263 U. S. 134 (1923): "The constitutions of some of the states contain express prohibitions against double taxation; in others such a prohibition is considered to follow as a corollary from the requirement of equality and uniformity; but in some duplicate taxation is not unconstitutional and the question of its imposition is held to be one of expediency for the consideration of the legislature and not one of power for the consideration of the courts.
Universally, however, it is considered unjust, unfair, and unreasonably burdensome and the courts will avoid it by construction when possible; that is, it will never be presumed that the legislature intended to impose double taxes, but on the contrary, a statute will not be held to produce that result unless it is so required by its plain, expressed and unmistakable terms. Nevertheless it is not practically possible to avoid double taxation entirely. Any comprehensive system of taxation, and particularly where taxes are laid upon both tangible and intangible personal property, will result in some duplications of the burden and this is not a fatal objection to a revenue law. * * * And it is not double taxation where the same article or property is taxed in two states, where each has a right to tax it on account of its situs or domicile of the owner."

[3] 268 U. S. 473, 34 Sup. Ct. 603 (1925).

[4] Black, *supra* note 2, p. 429.

[5] *Ibid.* at p. 492.

the problem of the old maxim is presented. Can it apply to intangibles? In an early case the Supreme Court answered by saying:

> "It is well settled that the State of the domicile may constitutionally assess an inheritance tax on tangible property within the State and on intangibles wherever found." [6]

However, more recent decisions have thrown some doubt on this proposition. In the case of Francis Beidler II v. South Carolina Tax Commission,[7] it appeared that one Francis Beidler, a resident of Illinois, died in that state leaving a will which was duly probated, the plaintiff and one other qualifying as executors.

At the time of the death of the testator, he was possessed of seven thousand (7,000) shares of the capital stock of Santee River Cypress Lumber Co., a corporation organized under the laws of South Carolina and doing business in that State. The Corporation was also indebted to the testator in the sum of $556,864.22 for advances made by him to the Corporation and in the sum of $64,672 for dividends previously declared on his shares but not paid. These amounts were included by the attorney-general of Illinois in computing the inheritance tax payable to that State. The South Carolina Tax Commission also levied a tax on these amounts, overruling the claim of the executors that the State of Carolina had no jurisdiction to impose such a tax, and that the levy of it would constitute deprivation of property without due process of law in violation of the fourteenth amendment to the Federal Constitution. The Supreme Court of South Carolina upheld the Tax Commission, and the case was brought to the Supreme Court of the United States for review. As a result of this decision, it is perfectly plain that the rule in Blackstone v. Miller [8] is now completely overruled for the Court definitely held that the mere fact that the debtor is domiciled within the state does not give it jurisdiction to impose an inheritance tax or succession tax upon the transfer of the debt by a decedent who is domiciled in another state. The Court cites cases in which it was held that choses in action may acquire a business situs and then looks into the record and fails to find any evidence to warrant the finding that the property here in question had acquired such a business situs in South Carolina. But neither in the case referred to nor in the earlier case of Farmer's Loan and Trust Co. v. Minnesota [9] and Baldwin v. Missouri [10] did the Court attempt to answer the problem of whether intangibles, if they did acquire a business situs in a state other than that of the owner's domicile may be properly taxed by the owner's domicile. On the whole it seems that the courts are follow-

[6] Blodgett v. Silverman, 277 U. S. 1, 48 Sup. Ct. 410 (1927).

[7] 51 Sup. Ct. 54 (1930).

[8] *Supra* note 2.

[9] 280 U. S. 204, 50 Sup. Ct. 98 (1929).

[10] 281 U. S. 586, 50 Sup. Ct. 436 (1929).

ing the same path with regard to intangible property as that marked out with regard to tangible property. Intangibles, however, present greater difficulties. Securities are easily passed from hand to hand and likewise from state to state. In that way they might escape taxation entirely if they were to be taxed only at the situs. The two evils of double taxation or no taxation at all seem inescapable, but the Court seems to prefer the latter.

In the Safe Deposit case [11] the Court held that where intangibles had a permanent situs they are taxable in the state of the situs. In that case a trust was established in Virginia and the Court held that it had acquired a permanent situs in Virginia, even though the beneficiaries were domiciled in Maryland. The latter state could not impose a tax thereon, the point being made by McReynold, *J.*

> "A statute of a state which undertakes to tax things wholly beyond her jurisdiction or control conflicts with the 14th Amendment." [12]

In Farmer's Loan and Trust Co. v. Minnesota [13] it is stated that:

> "Tangibles with permanent situs therein, and their testamentary transfer may be taxed only by the state where they are found. And, we think the general reasons declared sufficient to inhibit taxation of them by two states apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction."

But here too, there is as yet no answer to the problem of whether intangibles may also be taxed at the owner's domicile.

It seems therefore, that the courts will recognize a business situs for intangibles which render them subject to taxation, but has as yet not answered the question whether these intangibles thus permanently situated may be taxed by the state of the domicile of the owner as well. In point of legal theory however, there would seem to be no constitutional objection to the right of a state to tax the succession of property no matter where situated. The view has been expressed by eminent juristic writers.[14]

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[11] Safe Deposit and Trust Co. v. Virginia, 280 U. S. 83, 50 Sup. Ct. 59 (1929).

[12] *Ibid.* at p. 92.

[13] *Supra* note 9 at p. 211; see also (1930) 4 St. John's L. Rev. 322.

[14] Powell, *Extra-Territorial Inheritance Taxation,* (1920) 20 Col. L. Rev. 7: "Certainly, if it be true that the right of testamentary disposition is purely statutory, the state has a right to require a contribution to a public treasury before the bequest shall take effect. Thus the tax is not upon the property in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the state that it becomes the property of the legatee."

Mr. Justice Holmes has consistently held that there is nothing unconstitutional in double taxation and that the Fourteenth Amendment has been stretched too far in the cases above referred to. In these views, Justice Brandeis has concurred. Nevertheless, they acquiesce in the case under discussion in view of the failure of their previous views to obtain the concurrence of a majority. The failure of the dissent to reiterate its position affords the conclusion that double taxation may now definitely be stated to be beyond the power of the states under the Constitution. In vain did Justice Holmes remark:

> "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." [15]

And again, in suggesting a remedy he says:

> "Very probably it might be a good policy to restrict taxation to a single place and perhaps the technical conception of domicile may be the best determinant. But it seems to me that if that 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." [16]

The judicial vacillation with regard to the meaning of due process of law is now familiar learning. But the extent of federal control over state legislation which the Fourteenth Amendment has made possible, is still to be fully realized.

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ESTATE TAX—SUCCESSION TAX—POWER TO RETROACTIVELY TAX FUTURE INTERESTS—CONTRACTS.—By an irrevocable trust created in 1907, settlors retained a life income during their joint lives, the principal to be paid over to their five sons on the death of the survivor of the settlors. If any of the sons should predecease the survivor then, over to those entitled to take his intestate property. In 1917, the settlors assigned their interest in the trust to their sons, all of whom survived the termination of the trust. The settlors died in 1921 and 1923 respectively, and Massachusetts sought to tax

[15] Baldwin v. Missouri, 281 U. S. 586, 50 Sup. Ct. 436 (1930); see also (1930) 5 St. John's L. Rev. 136.

[16] Baldwin v. Missouri, at p. 596; Dissenting opinion of Holmes, *J.*