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Federal Tax--Gifts Inter Vivos--Constitutionality (Bromley v. McCaughn, 280 U.S. ___ (1929))

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the tax is not levied directly on the instrumentality and does not affect the proper functioning of the government, it is more difficult to fit the case to the principle. In a recent decision by the Circuit Court of Appeals a federal tax on profits derived from the *resale* of municipal bonds was declared unconstitutional.¹⁶ The protective cloak is thus thrust about that which is without need of protection.

What ultimate effect the Macallen decision will have, no one can prophesy with any degree of accuracy. This may be due in part to the lack of judicial candor on the part of the Court on its decision and to its departure from the course established heretofore. Certainly the decision has instilled "fear" into the taxing bodies of states possessing statutes similar to that in question.¹⁷

A. K. B.

FEDERAL TAX—GIFTS INTER VIVOS—CONSTITUTIONALITY.—Bromley, a resident of the United States, brought suit to recover a tax alleged to have been illegally exacted under the Revenue Acts of 1924 and 1926, since repealed, which imposed a tax upon a transfer of property by gift, *inter vivos*, not made in contemplation of death. The plaintiff contended that the tax thus imposed was a direct unapportioned tax and therefore unconstitutional because it violated the third clause of Section 2 and the fourth clause of Section 9 of Article 1 of the Constitution. *Held*, that the provisions of the Revenue Acts of 1924 and 1926 relating to taxation by the Federal Government of gifts *inter vivos*, levied an excise tax and did not impose such a direct tax as is prohibited by the Constitution. *Bromley v. McCaughn*, 280 U. S. —, 50 Sup. Ct. Rep.—Decided Nov. 25, 1929.

Taxes are of two kinds, direct and indirect. A direct tax is a tax levied upon the owner of property merely because he happens to be the owner and not because of any use or disposition he might make of it; a tax on the property itself.¹ An indirect tax is one which is assessed upon commodities before they reach the consumer and are paid by those upon whom they ultimately fall, not as taxes, but as part of the market price of the commodity. Among indirect taxes fall duties, imposts and excises.²

A direct unapportioned tax being forbidden by Section 2 of Article 1 of the Constitution which requires "direct taxes to be ap-

¹⁶ *Willcuts, etc. v. Bunn*, 35 F. (2d) 29 (C. C. A. 8th, 1929). See (1929) 4 St. John's L. Rev. 138.

¹⁷ *Graves, The Macallen Decision*, N. Y. State Bar Assn. Bull., Dec. 1929.

¹ *Billings v. United States*, 232 U. S. 261, 34 Sup. Ct. Rep. 421 (1913); *Pollock v. Farmers Loan & Trust Company*, 157 U. S. 429, 15 Sup. Ct. Rep. 673 (1894); *rehearing* 158 U. S. 601, 15 Sup. Ct. Rep. 912 (1895).

² *Bouvier, Law Dictionary*, 3rd Revision (Ed. 8) N-Z: "A tax upon certain kinds of property having reference to their origin and their intended use is not a tax on the property but is an excise." *Patton v. Brady*, 184 U. S. 608, 619, 22 Sup. Ct. Rep. 493 (1902).

portioned" and by Section 9 of the same article which provides that "no capitation or other direct tax shall be laid unless in proportion to the census," the tax complained of therefore being unapportioned, is unconstitutional, if direct.

A tax levied upon the exercise of only one of the powers incidental to ownership of property is an excise and as such falls into the class of indirect taxes which need not be apportioned and does not violate any of the provisions of the Constitution.³

The tax in the instant case was levied against a particular use made by the plaintiff of his property, that of giving it away. This tax is indistinguishable from the unapportioned tax levied upon the use of carriages, which tax was declared valid in *Hylton v. United States*,⁴ or the tax on the privilege to use foreign-built yachts upheld in *Billings v. United States*.⁵ Taxes of this nature levied upon the exercise of a particular power incidental to ownership of property never having been understood to be direct, the Court is very reluctant to curtail or limit by construction the sovereign power of taxation.

The presumption in favor of the constitutionality of any act of Congress is overcome when the question is free from any reasonable doubt, and only in the event that there is no reasonable doubt will the Court hold an act of Congress to be unconstitutional.⁶ The power to tax being the most important power of Government it is doubly essential to regard this presumption of validity in regard to Revenue Acts of Congress.

E. S.

GROSS RECEIPTS TAX—INTERSTATE COMMERCE—CONSTITUTIONALITY.—The plaintiff, a New Jersey corporation, having a part of its lines in and over New Jersey roads, transmits messages over them to places both within and without the state. The state levied a property and franchise tax of 5% on such part of the gross receipts received from all the work transacted within the state, as the lines in the public places bear to the total lines in the state. The lines in public places are about half of the total lines, fully a quarter of the total receipts in the intrastate business results from an extensive interstate commerce. The plaintiff contends that the tax is invalid inasmuch as it is a direct tax on the gross receipts derived from interstate commerce. *Held*, that the tax sought to be imposed is in violation of the commerce clause since it is a direct tax on the gross receipts derived from interstate commerce rather than a franchise tax on property, using gross receipts as a measure of value of property rights in accordance with Constitution N. J., Art. 4, Sec. 7,

³ *Hylton v. U. S.*, 3 Dall. 171 (U. S. 1796); *Billings v. U. S.*, *supra* Note 1.

⁴ *Hylton v. U. S.*, *supra* Note 3.

⁵ *Billings v. U. S.*, *supra* Note 1.

⁶ *Nicol v. Ames*, 173 U. S. 509, 514, 515, 19 Sup. Ct. Rep. 522 (1898).