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Income--Deductions--Obsolescence--Good Will (Haberle Crystal Spring Brewing Co. v. Clark, 280 U.S. ____ (1930))

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Para. 12. *N. J. Bell Telephone Co. v. State Board of Taxes and Assessment of N. J.*, 280 U. S. —, 50 Sup. Ct. Rep. 111. Decided Jan. 15, 1930.

Although a state may tax property used entirely in interstate commerce, it may not burden such commerce by taxing gross earnings derived therefrom by imposing a license fee for the privilege of carrying on such commerce.¹ A direct tax on gross receipts derived from interstate commerce is not a tax on property, and is therefore void.² If the gross earnings are not taxed, but are used merely to ascertain value the tax is legitimate.³ The dissenting opinion in the case is founded upon the theory that the fixing of a price for the privilege of using something to which the state's consent is essential is within the constitutional power of the state.⁴ Even interstate commerce must pay its way.⁵ It is submitted that the Supreme Court should have given greater weight to the right of the state to tax the privilege which it had granted.

W. S.

INCOME—DEDUCTIONS—OBSCOLESCENCE—GOOD WILL.—The plaintiff brought this action to recover taxes alleged to have been illegally exacted from it. The defendant, Collector of Internal Revenue, refused to allow plaintiff's claim for a deduction from its income, for the obsolescence of its good will due to the imminence of Prohibition Legislation. The plaintiff contended that its good will was such property as was meant by Section 234 (a), Subdivision 7 of Revenue Act of 1912 (Act of Feb. 24, 1919) C 18; 40 Stat. 1057, 1078, allowing as deductions, *inter alia*, a reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. The collector disallowed the claim on the ground that the obsolescence intended by Section 234 (a), Subdivision 7 of Revenue Act of 1918 could only apply to obsolescence of property used in the trade or business as was subject to exhaustion, wear and tear, and therefore could not include good will or obsolescence of the good will. *Held*, that a deduction for obsolescence of good will of a brewery due to the imminence of national prohibition legislation is not allowable under Section 234 (a),

¹ *Pullman Co. v. Richardson*, 261 U. S. 330, 338, 43 Sup. Ct. Rep. 366, 368 (1922), and cases cited therein; *Sprout v. South Bend*, 277 U. S. 163, 171, 48 Sup. Ct. Rep. 502, 62 A. L. R. 45 (1928).

² *U. S. Express Co. v. Minnesota*, 223 U. S. 335, 32 Sup. Ct. Rep. 211 (1912); *Pullman v. Richardson*, *supra* Note 1; *U. S. Glue Co. v. Oak Creek*, 247 U. S. 321, 38 Sup. Ct. Rep. 449, Ann. Cas. 1918 E, 748 (1918).

³ *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, 38 Sup. Ct. Rep. 373 (1917).

⁴ *Per Holmes, J.*

⁵ *Postal Telegraph Cable Co. v. Richmond*, 249 U. S. 252, 39 Sup. Ct. Rep. 265 (1918).

Subdivision 7 of the Revenue Act of 1918. *Haberle Crystal Spring Brewing Co. v. Clark*, 280 U. S. —, 50 Sup. Ct. Rep. —. Decided Jan. 27, 1930.

Good will,¹ although property, is not such property as can be segregated from the capital assets and has no existence except as an incident of a going business.² This intangible property,³ not being subject to depreciation, cannot be classed with other intangibles as patents, copyrights, licenses and franchises,⁴ and is not an assignable asset apart from the business. Upon the sale of a business the price received would reflect the loss or gain of good will and any such loss would be a basis for a deduction under the statute 234a.⁵ The section⁶ under which the plaintiff claims the deduction has been construed to refer to the obsolescence only of property used in trade or business as is subject to exhaustion, wear and tear.⁷

The Supreme Court, in upholding the decision of the collector, held that when a business is extinguished as noxious under the Constitution the owners cannot demand a partial compensation from the government in the form of an abatement of taxes otherwise due. Further the Court held that obsolescence as intended by Congress in the Revenue Act of 1918 was not meant to include extinguishment of business, caused by operation of law.

E. S.

INCOME—RESIDUARY LEGATEES—ACCRETION IN VALUE OF LEGACIES.—The father of the petitioner died testate, May 20, 1918. Under a final decree of the Surrogate's Court entered on April 19, 1920 certain stocks were distributed to the petitioner as one of the residuary legatees. He sold some of the stocks in 1920, 1921 and 1922. In computing the amount of his income tax, he used as a basis for arriving at the profit or loss on each sale, the selling price

¹ "Goodwill is the advantage or benefit, which is acquired by an establishment, beyond the mere value of the capital, stock, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position, or common celebrity, or reputation for skill or affluence, or punctuality, or from other accidental circumstances or necessity or even from ancient partialities or prejudices." *Metropolitan Bank v. St. Louis Dispatch Co.*, 149 U. S. 436, 446.

² *Joseph Garneau Co., Inc. v. Commissioner of Internal Revenue*, 8 B. T. A. 1041 (1927); *Kaufmann v. Kaufmann*, 239 Pa. 42, 86 Atl. 634 (1913).

³ "Goodwill is property of an intangible nature and the term property includes goodwill." *Metropolitan Bank v. St. Louis Dispatch Co.*, *supra* Note 1.

⁴ *Red Wing Malting Co. v. Willcuts*, 15 F. (2nd) 626 (C. C. A. 8th, 1926).

⁵ *Supra* Note 4, *supra* Note 2.

⁶ Rev. Act of 1918, Sec. 234a, Subd. 7 (Act of Feb. 25, 1919). C18, 40 Stat. 1057, 1078.

⁷ *Supra* Note 4.