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CONSTITUTIONALITY OF STATE INCOME TAXES

The constitutionality of state income taxation has been considered by several courts with the result that some have held state income tax laws constitutional and some have held them unconstitutional. The courts which have passed upon the question have been confined to a consideration of the provisions of the constitution of the particular state and have held that such a tax is in conflict with the constitutional limitations or that such a tax is permissible as not being prohibited by the constitution. The decision in each instance in which the income tax was held unconstitutional has been based upon the conclusion that an income tax is a property tax¹ within the meaning of the term as used in the constitution under consideration. The Supreme Court of Washington has fallen in line with several jurisdictions in holding that

collect the money due on the contract. Since the condition precedent here of getting tax¹ insurance was performed neither by *D* nor by *N Co.*, but *D* thereafter accepted payments on the car, knowing that *P* had not waived the performance of the condition, *D* was held liable to *P* on the contract although *D* had neither expressly nor impliedly assumed in its contract with the assignor the duty of taking out this insurance. The court said that the appellant "in accepting and exacting payments, assumed the corresponding duty to perform the conditions the contract imposed as a consideration for their payment." It would not allow *D* "to receive the benefits without performing the burdens."

¹Cases holding that an income tax is not a property tax: *Glasgow v. Rouse*, 43 Mo. 479 (1869) *Waring v. Savannah*, 60 Ga. 93 (1878) *In re Opinion of Justices*, 77 N. H. 611, 93 Atl. 311 (1915) *Ludlow Saylor Wire Co. v. Wollbrinck*, 275 Mo. 339, 205 S. W. 196 (1918) *Hattiesburg Grocery Co. v. Robertson State Ra. Agent*, 126 Miss. 34, 38 So. 4, 25 A. L. R. 743 (1921) *Diefendorf v. Gallet*, 10 Pac. (2d) 311 (Idaho 1932) *O'Connell v. State Board of Equalization*, 25 Pac. (2d) 114 (Mont. 1933).

Cases holding income taxes to be property taxes: *State v. Frear* 148 Wis. 456, 134 N. W. 673, 135 N. W. 164, L. R. A. 1915 B. 569, 606 Ann. Cas. 1913 A. 1147 (1912). Since Wisconsin specifically provides for an income tax the statement by the court should not be given much weight as an authority holding income to be property. It would seem a more logical conclusion would be that Wisconsin recognizes an income tax as a separate class of taxes, especially since the constitution provides for property taxes, excise taxes and income taxes. *Opinion of the Justices*, 220 Mass. 613, 108 N. E. 570 (1915) *State v. Pinder* 30 Del. 416, 108 Atl. 43 (1919). "We prefer to take the natural, logical and reasonable position that income is property, within the meaning of that word as used in the exemption clause, Sec. 1, Art. 8, of the Delaware Constitution, and we are inclined to believe that no court in this country today, in construing a constitutional provision similar to ours, would maintain the contrary position." The qualifying phrase "within the meaning of that word as used in the exemption clause, Sec. 1, Art. 8, of the Delaware Constitution" tempers the case and holding. The court clearly indicates that they are considering income as property only because the word "property" manifestly meant "anything that was taxable under the inherent power of the legislature." Whether or not the justices would have reached the same result if they had been considering the nature of income tax generally, or under the Washington Constitution, is a question for conjecture. *Eliasberg Bros. Merc. Co. v. Grimes*, 204 Ala. 492, 86 So. 56, 11 A. L. R. 300 (1920). "The constitution of Alabama placed a limitation of 65/100 of 1 per cent on the value of the taxable property within the state." Here again the court was deciding that "property" as used in the state constitution was broad enough to include income taxes. The reasoning of the court is criticized by Mr. Harsch in 6 Wash. L. R. 97. In *Barchrach v. Nelson*, 182 N. E. 909 (Ill. 1932), holding the tax to be a property tax the court says, "money or anything of value acquired as gain or profit from capital or labor is property, and that, in the aggregate these acquisitions constitute income, and, in accordance with the axiom that the whole includes all of its parts, income includes property and nothing but property,

such a tax is a property tax² within the definition in our constitution that, " 'property' as used herein shall mean and include everything, whether tangible or intangible, subject to ownership." If it is truly determined that a tax on net income is fundamentally a property tax there can be no quarrel with the conclusion that a graduated income tax is in violation of the "uniformity clause" and must therefore be held unconstitutional. A review of the cases holding a net income tax to be a property tax would seem to indicate that all courts which have so held have failed to take into full consideration the fundamental factors which determine the proper classification of any given tax. Such cases have also disregarded certain well recognized rules of constitutional construction in that limitations on the taxing power not expressly stated have been read into the constitution by an all inclusive definition given to the word property.

It is important to examine the characteristics of excise and property taxes in order to determine the proper classification of a net income tax. Excise taxes are defined³ as, "including every form of charge imposed by public authority for the purpose of raising revenue upon the performance of an act, the enjoyment of a privilege, or the engaging in an occupation." Obviously the subject of an excise tax is the exercise of a privilege or right or the doing of certain acts specified by the legislature to be taxable. The tax is upon the individual and such individual is liable only when he has brought himself within the statute providing for the tax by the exercise of a privilege, right or act made taxable. Excise taxes are commonly computed by the value of the right exercised. In this connection we must keep in mind that there is a clear distinction between the subject matter of the tax and the method used to determine the amount of the tax.⁴ Washington has recognized this distinction in the case of inheritance taxes.⁵

Property taxes are usually assessed to the owner of the property as of a certain date.⁶ The owner is liable for the taxes because ownership is the reason for the tax attaching.⁷ A popular misconception that the tax is levied on the property itself is probably a result of the fact that taxes have generally become a lien on property by statute.⁸ The fact that the state, through its legislature, has given up its right to proceed against the individual taxpayer in the collection does not and cannot alter the subject of taxation.

and therefore is itself property" The court finds that a very broad meaning has been attached to property as used in the constitution. A careful reading of cases cited by the Illinois court as holding income to be property does not reveal a very impressive array of authority supporting such a holding.

For splendid law review articles discussing the problem of constitutionality of state income tax laws see 12 Minn. L. R. 683, by Prof. Rottschaffer, and 6 Wash. L. R. 97, by Mr. Alfred Harsch.

Culliton v. Chase, 74 Wash. Dec. 342, 25 Pac. (2d) 81 (1933).

³*Hattiesburg Grocery Co. v. Robertson*, *supra*.

⁴*Diefendorf v. Gallet*, *supra*.

⁵*In re Corbins Estate*, 107 Wash. 424, 181 Pac. 910 (1919).

Rem. Rev. Stats. 11111-2.

Cooley on Taxation. 4th Ed., Vol. 1, Sec. 24, p. 930. *Wilbert v. Yakima County*, 132 Wash. 219, 231 Pac. 931 (1925).

⁸*Heme v. Levee Commissioners*, 86 U. S. 655 (1874) *State v. O'Neil*, 55 N. J. L. 58, 25 Atl. 273 (1892).

It is obvious that excise taxes and property taxes are in fact levied upon the individual. The distinction between them lies in the fact that excise taxes are levied because of the doing of an act or the exercise of a privilege or right, whereas property taxes are levied because of ownership.

Clearly the income tax is not upon the individual because of ownership of property. Whether the taxpayer has one cent of the income earned by him during the tax year on any given date is immaterial. The income tax becomes payable because the person has earned more than a certain amount of money during the course of one year. It seems more logical to say that the income tax is a privilege tax which attaches because the individual has exercised a right or privilege of acquiring material wealth. If, therefore, the income tax does not satisfy the test of a property tax but does satisfy the test of an excise tax, is it not arguable that the courts which have decided an income tax was a property tax either did not carefully distinguish between property and excise taxes or were misled by a failure to distinguish between the subject matter of the tax and the method used to determine the amount of the tax?

The conclusion that an income tax should be classed as an excise tax seems more apparent when the analogy between income taxes and inheritance taxes is shown. Inheritance taxes are a tax upon the individual, which attach because of the exercise of a right or privilege⁹ and the amount of the tax is determined by applying a rate to the value of the estate inherited. If we were to apply to inheritance taxes the logic used in construing the income tax as a property tax, the following result would be reached. Inheritance is composed of money or things of value which are subject to ownership, and therefore a graduated inheritance tax is a property tax and void under the uniformity clause. Obviously this logic is not applied to inheritance taxes as they are universally held to be excise taxes. If the true basis of an inheritance tax or an income tax is the power of the sovereign to tax any act, whatsoever, done within the state when not prohibited by the state or federal constitution, logically, it seems that no proper interpretation could be placed on the Fourteenth Amendment which would result in a holding that income taxes and inheritance taxes are property taxes. And it seems even more difficult to justify decisions which declare an income tax to be a property tax and declare an inheritance tax to be an excise tax. As inheritance taxes can be levied even though the taxing government does not confer the privilege of passing or receiving property, any distinction which may be drawn on the basis of a privilege conferred by the state is unsound.¹⁰

It seems equally unsound to attempt to distinguish inheritance taxes and income taxes on the ground that an inheritance tax may only be collected once while income taxes may be collected several times. Clearly the income tax is only collectible once on the income earned in any one year. Each time the privilege is exercised

⁹ *Magoun v. Illinois Trust and Savings Bank*, 170 U. S. 283 (1898) *In re Corbins Estate*, *supra*.

¹⁰ *Knowlton v. Moore*, 178 U. S. 41, 20 Sup. Ct. Rep. 747, 44 L. Ed. 969 (1899)

the excise tax will attach. If it can be said that the basis of an inheritance tax or an income tax is the exercise of a privilege or right, then the fact that the exercise of this privilege or right may exist more often in the case of an income tax than in the case of an inheritance tax should not make any difference.

The constitutional definition of property suggests that the fundamental basis of a property tax is ownership. It seems that the real intent and purpose of the definition is to secure a uniform rate of taxation on tangibles and intangibles and not to unreasonably extend the limitations¹¹ on taxation by including within the class of property taxes¹² those forms of taxes which are clearly and properly excises. If it is more reasonable to classify an income tax as an excise rather than a property tax, the problem of its unconstitutionality in violation of the uniformity clause is removed and the tax may be sustained.¹³

HAROLD HESTNES.

RECENT CASES

ASSIGNMENTS—FUTURE WAGES—UNDER CONTRACT, EMPLOYMENT OR POSSIBLE CONTRACT OR EMPLOYMENT. H attempted to assign to W "33 1/3% in all plays, novels, motion picture scenarios and stories now and hereafter written by me and all returns of money received by me." At the time of the purported assignment H, a writer, was not employed, but later W proved that he had worked 28 weeks for Warner Bros. The character of the employment was not shown. Upon suit by W against H for an accounting under the written assignment, the court held that the assignment was invalid, since it was not based on present employment or existing contract, *Orkow v. Orkow*, 23 Pac. (2) 781, (Cal. 1933).

Besides upholding assignments of salaries or money due, *Rodgers v. Torrent*, 111 Mich. 680, 70 N. W. 335 (1899) *Carnegie Trust Co. v. Battery Place Realty Co.*, 67 Misc. Rep. 452, 122 N. Y. S. 697 (1910) *Vollmer v. Vollmer* 46 Idaho 97, 266 Pac. 677 (1928) the courts sanction assignments of wages to be earned in the future under a contract, or employment in existence at the time without a contract binding the employer, *State St. Furniture Co. v. Armour & Co.*, 259 Ill. App. 589, Judg. Aff. 345 Ill. 160, 177 N. E. 702 (1931) *Cox v. Hughes*, 10 Cal. App. 553, 102 Pac. 956

¹¹ The state constitutions are limitations upon and not grants of legislative powers. *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316, 4 L. Ed. 759; *Gentier v. Ditmar* 204 N. Y. 20, 97 N. E. 464 (1912) *Everett v. Anderson*, 106 Wash. 355, 180 Pac. 144 (1919). "Nothing but express constitutional limitations upon legislative authority can exclude anything, to which the authority extends from the grasp of the taxing power, if the legislature in its discretion shall at any time select it for revenue purposes." Cooley on Taxation, 4th Ed., Vol. 1. paragraph 71.

¹² The constitutions of California, Massachusetts, North Carolina, Tennessee, Texas, Virginia and Wisconsin expressly provide for an income tax.

¹³ In an attack upon the constitutionality of any statute the burden of proof is upon the opponents of the statute to prove beyond a reasonable doubt that it is in conflict with the constitution and therefore void. Washington has recognized this rule and in *State v. Ide*, 35 Wash. 576, 77 Pac. 961 (1904), determines the rule to be: "When the constitutionality of an act of the legislature is drawn in question, the court will not declare it void unless its invalidity is so apparent as to leave no reasonable doubt upon the subject." In view of the difference of opinion on the subject of whether an income tax is a property or an excise tax it seems questionable whether the invalidity of the income tax law is so apparent as to leave no reasonable doubt upon the subject.