WestVirginiaUniversity
THE RESEARCH REPOSITORY @ WVU

Volume 50 | Issue 1 Article 9

December 1946

Taxation--Excise on Gasoline--Prior Payment as Condition to Refund

L. J. B.
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

 Part of the Environmental Law Commons, and the Tax Law Commons

Recommended Citation
L. J. B., *Taxation--Excise on Gasoline--Prior Payment as Condition to Refund*, 50 W. Va. L. Rev. (1946).
Available at: https://researchrepository.wvu.edu/wvlr/vol50/iss1/9

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

The limitations imposed upon deductibility of claims based upon a promise or agreement would seem to have been inserted primarily to prevent collusive arrangements to avoid tax liability. The probability of a taxpayer's resorting to such an extreme device as divorce to avoid payment of estate taxes is remote. In analyzing the purpose of the legislation the court said, at page 555, "Divorce decrees are not collusive but adversary in their nature. Such decrees do not subvert Congressional intent because the dower or curtesy interest of a spouse would not and could not survive the divorce, and, therefore, would never be included in gross estate under the statute in question." A man may have much different and ordinarily stronger reasons for wishing that his spouse no longer live with him as his wife than for wishing that she not live as his widow after him, and the same danger of over-generosity to induce the desired result accordingly does not exist in the two cases. The present decision conforms with the general purpose of the relevant legislation and achieves a desirable result. But cf. Comment (1942) 56 HARV. L. REV. 314.

J. G. H.

TAXATION—EXCISE ON GASOLINE—PRIOR PAYMENT AS CONDITION TO REFUND.—*T* was a distributor of gasoline both before and after July 1, 1939, the effective date of the statute substantially amending the prior gasoline tax system and which is the basis of the present system. W. Va. Acts 1939, c. 125. The former tax scheme had, as to distributors, given an option as to the time of accrual of liability, one alternative, which was elected by *T* being that liability should accrue at the time of sale. The amended tax scheme provided for accrual of liability at the time of production or receipt of the gasoline with respect to which the tax was imposed, W. VA. REV. CODE (Michie, 1937) c. 11, art. 14, §3, a provision which the court construed as imposing liability on account of gasoline theretofore acquired by distributors as of July 1, 1939, the effective date of the act, with respect to stocks theretofore acquired and actually held by distributors on that date. *T* had a considerable stock of gasoline on July 1, to which additions and from which withdrawals for sale were made in the next few months. On October 19, there was a loss by breakage in the storage tanks of 44,588 gallons. *T* paid taxes on account of all gasoline acquired by it between July 1 and October 19, and all gasoline held in stock on July 1, except for a sum substantially equivalent to the taxes attributable to the 44,588 gallons lost by breakage, as to which amount it asserted a claim of nonliability, relying on the statutory provision for refund to distributors on amounts paid for gasoline lost by speci-

fied hazards, including breakage, in the event of prescribed notification and affidavit of loss by claimant distributor. Proceeding by the state by notice of motion for the unpaid balance of taxes to which *T* demurred and filed a special plea, a plea of accord and satisfaction, and notice of setoff. *Held,* that the statutory relief was exclusive and was available only as a refund for taxes paid and not to defeat or condition the state's right to recover unpaid taxes. *State v. Penn Oak Oil & Gas Co., Inc.,* 36 S. E. (2d) 595 (W. Va. 1945).

The court's position was embodied in its statement, "the word 'refund' in the sense it is used in the statute means a return of money previously paid. Failure of the defendant to pay the tax, which, in our opinion, was legally chargeable against it, creates an insuperable barrier to any refund." *Id.* at 600. The taxpayer was limited to the remedy specifically provided by statute for those in his position and could not assert others not within its terms.

In so holding, the court would seem to be supported by the meager body of earlier authorities. Thus, the United States Supreme Court has held that an overpayment must appear before refund is authorized, *United States v. Factors & Finance Co.,* 288 U. S. 89, 53 S. Ct. 387, 77 L. ed. 633 (1933), and has applied a similar principle under somewhat different circumstances in distinguishing a "claim for abatement" from a claim for refund on the basis that the former has relation to taxes assessed but unpaid. *Rock Island, Arkansas & Louisiana R. R. v. United States,* 254 U. S. 141, 41 S. Ct. 55, 65 L. ed. 188 (1920).

The result is to require payment of the tax and initiation of an independent proceeding by the taxpayer. However consistent this may be with the prior authorities, it is opposed to the general policies for avoiding circuity of action, multiplicity of suits, inconvenience, and expense to suitors and avoidable waste of the court's energies which have historically supported in succession extensions of equitable jurisdiction, McCLINTOCK, HANDBOOK OF EQUITY (1936) §44, real-party-in-interest statutes, Clark & Hutchins, *The Real Party in Interest* (1925) 34 YALE L. J. 239, the broadening of setoff and counterclaim, Millar, *Notabilia of American Civil Procedure, 1887-1937* (1937) 50 HARV. L. REV. 1017, 1025, *et seq.,* and the adoption of declaratory judgment proceedings, BORCHARD, DECLARATORY JUDGMENTS (2d ed. 1941) c. IV. Revision of the former federal tax procedure, by which the taxpayer had in all events to pay and then to bring a separate court proceeding for amounts as to which he denied liability, a procedure which bred attempts at tax avoidance, so as to permit a predetermination of liability before

payment was motivated by the considerations mentioned. BICKFORD, COURT PROCEDURE IN FEDERAL TAX CASES (1928) 3.

Popular, professional, and legislative recognition of the desirability of expeditious determination of an entire controversy in a single proceeding, in causes involving private litigants, has been widespread. The same considerations would seem applicable in matters between the taxpayer and the state. To the private citizen, even the payment of taxes justly due is a painful necessity and payments of amounts for which he is not liable will tend to render the tax system doubly odious and to make the ways of courts and judicial proceedings seem incomprehensible and unworthy of support. See *Report of the Standing Committee on Federal Taxation* (1938) 63 A. B. A. REP. 245 at 252, 253. Part of the justification for the result attained in the instant case is the well-recognized doctrine requiring the exhaustion of administrative remedies (GELLHORN, ADMINISTRATIVE LAW, CASES AND COMMENTS (1940) 793 *et seq.*); but that doctrine which ordinarily operates to speed and simplify the disposition of claims has the contrary effect in the situation here presented.

In view of the court's understandable reluctance to depart from a position so grounded on prior authority, it is submitted that the legislature should amend the statute to provide a more flexible and comprehensive manner of relieving taxpayers from payment of amounts for which they are not ultimately liable.

L. J. B.

TAXATION—EXEMPTIONS—INCOME-PRODUCING REAL PROPERTY OF CHARITY.—A business section containing a hotel building, in the downtown section of Huntington, was conveyed to trustees in trust for a charity. The trustees leased the property and applied the rentals exclusively to charitable purposes pursuant to the trust. The assessor proposed to omit the property from the assessment list on the ground that it was exempt because of the beneficial ownership and receipt of income by the charity. Mandamus by a real estate firm owning similar properties to compel the assessor to list the property for taxation. *Held,* writ granted; under the West Virginia constitutional provision exempting from the taxation property "used" by a charitable organization, W. VA. CONST. art. X, §1, the exemption is limited in the case of real property to property held for actual use and occupancy of the charity, and the statute purporting to extend the exemption to properties the income from which is received by the corporation and applied exclusively to charitable purposes is unconstitutional to the extent it makes such extension. *Central Realty Co. v. Martin,* 30 S. E. (2d) 720 (W. Va. 1944).