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Taxation--Exemptions--Income-Producing Real Property of Charity

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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).

The constitutional exemption for charities is not self executing. Implementing legislation was necessary and was adopted, providing an exemption for all property "belonging to" benevolent associations not conducted for private profit. W. VA. CODE (Michie, 1943) §678. The instant case involved the determination whether a statute so phrased was within the contemplated limits of permissible taxation for property of such organizations "used" by them.

Two earlier cases had passed on this same question, although directly passing upon a different proviso in the exemption statute with respect to property held in trust for charitable beneficiaries, the income from which was paid over to such cestuis. *Prichard v. County Court,* 109 W. Va. 479, 155 S. E. 542 (1930); *Patterson Memorial Fund v. James,* 120 W. Va. 155, 197 S. E. 302 (1938). In so far as they are in conflict with the instant case, they are disapproved by it. The constitutional authority to exempt is limited to cases where the use is primary and immediate, in case of real property, and may not be extended to situations where physical occupancy is let to another and the use consists of receipt of income. In adopting this view, the court puts West Virginia in line with the prevailing view elsewhere. *Fitterer v. Crawford,* 157 Mo. 51, 57 S. W. 532 (1900); *State v. Church of the Advent,* 208 Ala. 632, 95 So. 3 (1923). For a collection of cases in accord see 51 AM. JUR. (1944) 588. The use of real property and of its income are distinguished in tax law; devotion of the rents and proceeds exclusively to the charitable purposes with no personal profit to any individual does not suffice as a use of the property. The law looks to the property as it finds it and not to its accumulation. *Y. M. C. A. v. Douglas County,* 60 Neb. 642, 83 N. W. 924 (1900).

As to intangibles, the decision recognizes that the situation may be otherwise. Receipt and enjoyment of the income is the only use of which they are capable, and hence may justify exemption from taxation of property in that category whatever the circumstances as to its possession.

A contrary result would put owners and occupiers of similar property at a competitive disadvantage by burdening them with a business cost not shared by the charity while at the same time they must seek customers in the same market as the lessor from the charity and at a comparable price. It is submitted that the constitutional provision was not designed to have such a result, and no such consequence is necessary to achieve the ordinarily recognized purpose of exemption for charities, namely, to bestow on them a bounty to perform services of benefit to the state, and in some measure discharge duties which the state would otherwise undertake. *People v. O'Donnell,* 327 Ill. 474, 158 N. E. 727 (1927).

The doctrine established a number of years ago and recently reaffirmed by which the benefit of inter-governmental tax immunities is not accorded to proprietary activities of the states involves a similar consideration that the exemption is to facilitate the discharge of public functions and not to subsidize the beneficiary of the exemption in competing with private business. *South Carolina v. United States,* 199 U. S. 437, 26 S. Ct. 110, 50 L. ed. 261 (1905); *Ohio v. Helvering,* 292 U. S. 360, 54 S. Ct. 725, 78 L. ed. 1307 (1934); *New York v. United States,* 66 S. Ct. 310, 90 L. ed. 265 (1946). True, an inconsistent position seems to have been taken in connection with some activities of the federal agencies specifically with the operation as landlord of housing agencies. To some extent, however, these cases have been rationalized on special grounds. *Chapman v. Huntington Housing Authority,* 121 W. Va. 319, 3 S. E. (2d) 502 (1939). Whatever their validity, in the instant case it is believed the result has behind it both the weight of reason and authority.

M. D. B., JR.

TAXATION—RECEIPTS FROM EXTRASTATE ACTIVITY—"SERVICE" OR "COLLECTING INCOME."—*T,* a West Virginia linen supply business, furnished towels and similar articles to customers locally and in Ohio, regularly collected soiled linen, and laundered it in West Virginia for its patrons. *T* omitted the Ohio revenue from its return of gross receipts for computation of the West Virginia privilege tax, and *D,* state tax commissioner, made a supplementary assessment to include such income. W. VA. CODE (Michie, 1943) c. 11, art 13, §2, provides: "There is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business and other activities, and in the amounts to be determined by the application of rates against values or gross income as set forth in sections two-(a) to two-(i) inclusive of this article . . . (2h) . . . Upon every person engaging or continuing within this state in any service business or calling not otherwise specifically taxed under this law, there is likewise hereby levied and shall be collected a tax equal to one per cent of the gross income of any such business. (2i) . . . Upon every corporation or association engaging or continuing within this state in the business of collecting incomes from the use of real or personal property or of any interest therein, whether by lease, conveyance, or otherwise, and whether the return be in the form of rentals, royalties, fees, interest or otherwise, the tax shall be one per cent of the gross income of any such activity." *T* sued to enjoin collection of the additional tax claiming that gross income from interstate rental or lease of a chattel was not subject to tax. *D* asserted that a linen supply business is basically