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Taxation--"Apportionment" of income Derived from Interstate and Intrastate Activities for the Purposes of State Taxation

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extremities to which such a practice may go is a District of Columbia case,⁷ in which no process issued for two years; and a Pennsylvania case⁸ which states the requirement that the alias be issued within six years after the original writ was issued.

What is the practical value of the West Virginia rule? It appears from the cases that this point becomes material only in instances where the plaintiff desires either to toll the Statute of Limitations or to avoid payment of costs for the institution of a new action and issuance of original process therein. It may safely be said that a litigant in this state may now prevent both the running of the Statute of Limitations and payment of additional court costs by having process returnable or outstanding on each rule day.

Thus, it seems that the West Virginia court has reached a sound conclusion between the two extremes, avoiding the liberal result of other jurisdictions, and at the same time curing the evil mentioned by Judge Burks, without adopting his strict view.

H. P. B., JR.

TAXATION—"APPORTIONMENT" OF INCOME DERIVED FROM INTERSTATE AND INTRASTATE ACTIVITIES FOR THE PURPOSES OF STATE TAXATION.—Under four Federal Government contracts, *P* constructed locks and dams within the territorial jurisdiction of West Virginia. Payments were made in installments—some upon construction of materials at *P*'s shops in Pittsburgh, title therein immediately vesting in the Government, others upon delivery at the work site of these and other materials purchased outside of the state by *P*—with final payments upon installation in the dams. Under the West Virginia gross sales tax¹ (a privilege tax upon the subject of "engaging or continuing within the state in the business of contracting" being measured by the gross income of the business²), *D* tax commissioner based the assessment on *P*'s

based its holding upon any statutory provision, but more on laches, as shown by the case of *O'Neills' Estate*, 29 Pa. Super. 415 (1905), in which the court declared a discontinuance where alias was not issued for nearly seven years, saying, at page 420: "We are of opinion that the decree of the learned court below was right and that it ought to be sustained on the ground of laches, even if in strictness the statute of limitations is not a bar." *Quaere*, on what is this seeming limitation of six years based?

⁷ *Parsons v. Hill*, 15 App. D. C. 532 (1900).

⁸ *Curcier's Estate*, 28 Pa. St. 261 (1857).

¹ W. VA. CODE (Michie, 1937) c. 11, art. 13. Statute was sustained as applied to mining in *Hope Natural Gas Co. v. Hall*, 102 W. Va. 272, 135 S. E. 582 (1926), 274 U. S. 284, 47 S. Ct. 639, 71 L. Ed. 1049 (1927).

² W. VA. CODE (Michie, 1937) c. 11, art. 13, § 2e.

income derived from payments in West Virginia: namely, on payments upon delivery at the work site and upon installation. *P* contended that the income from the whole contract represented work performed in both states and that it could not be apportioned in the absence of statutory direction. *Held*, that in the absence of a statutory provision, the court may not apportion income for the purposes of taxation; but the court may separate such income as was derived from an event within the state from that derived without, using the former as a measure of the tax. *Dravo Contracting Co. v. James*.³

Upon the first appeal in the *Dravo* case, the Supreme Court held that the taxing of an independent contractor for the Federal Government was not an unconstitutional burden upon the operation of the Government, remanding the case to the district court for "apportionment".⁴ Precisely what the Court intended is not known since it was concerned primarily with the constitutionality of the tax, and not with the inner workings of the assessment, though one may assume the Court's familiarity with its decisions to the effect that an attempted apportionment of a tax according to activities within and without a state in the absence of statutory direction is invalid.⁵ Thus interpreting an apparently ambiguous statement, since the state statute did not provide for an apportionment, the federal district court felt free to assess the tax as it saw fit. It was accordingly held below that the tax should be based upon the cost of work done in the respective states. Such a result seemed to disregard the language of the tax statute which based the tax upon the gross income and not upon the cost of work. One plausible explanation, however, may lie in the connotation of the

³ 114 F. (2d) 242 (C. C. A. 4th, 1940), *cert. denied* January 13, 1941.

⁴ *James v. Dravo Contracting Co.*, 302 U. S. 134, 58 S. Ct. 208, 82 L. Ed. 155 (1937). In passing upon the validity of the tax, Mr. Chief Justice Hughes ruled (at page 139): "It is clear that West Virginia had no jurisdiction to lay a tax upon respondent with respect to this work done in Pennsylvania. As to the material and equipment there fabricated, the business and activities of the respondent in West Virginia consisted of the installation at the respective sites within the State and an *apportionment* would in any event be necessary to limit the tax accordingly. *Hans Rees' Sons v. North Carolina*," 283 U. S. 123, 51 S. Ct. 385, 75 L. Ed. 879. (Italics supplied.) The Chief Justice's reticence as to the taxing of the payments upon delivery at the sites within West Virginia may possibly be explained by his dissent in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565 (1940).

⁵ *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, 59 S. Ct. 325, 83 L. Ed. 272 (1939); *J. D. Adams Mfg. Co. v. Storen*, 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365 (1938); *Bowman v. Continental Oil Co.*, 256 U. S. 642, 41 S. Ct. 606, 65 L. Ed. 1139 (1921); *Meyer v. Wells, Fargo & Co.*, 223 U. S. 298, 302, 32 S. Ct. 218, 56 L. Ed. 445 (1912).

word "apportionment", it being an assignment in just proportion.⁶

The circuit court of appeals sought to explain away the Chief Justice's use of the word "apportionment" by substituting the term "separation"; reasoning that it being well-settled that in the absence of statutory direction there can be no apportionment by the courts, this being a legislative function,⁷ what the Supreme Court actually intended was that there should be a "separation" of income for the purposes of taxation. Following precedent, the circuit court of appeals separated the West Virginia payments from those in Pennsylvania,⁸ fixing upon acceptable activities subject to state taxation—payments upon installation clearly a local activity,⁹ and payments upon delivery at the work site.¹⁰

The practical effect of the distinction between apportionment and separation is the narrowing of the doctrine that the state may not reach, for the purposes of taxation, activities in interstate commerce outside their jurisdiction. The legislature, by taxing a local activity, the delivery and the installation, and the Court, by eliminating the necessity of an apportionment, have accomplished a twofold result: they have decreased the difficulty of administration and review of a complex apportionment statute, and at the same time greatly increased the revenues of the state.¹¹ The de-

⁶ WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1938).

⁷ *Supra* n. 5.

⁸ *Bowman v. Continental Oil Co.*, 256 U. S. 642, 41 S. Ct. 606, 65 L. Ed. 1139 (1921); *Ratterman v. Western Union Telegraph Co.*, 127 U. S. 411, 8 S. Ct. 1127, 32 L. Ed. 229 (1888) (holding that where income from interstate and intrastate activities is separable, the state may tax that from intrastate commerce).

⁹ Sustaining the general proposition that a state may tax income from purely the local activity of installation are the following: *General Railway Signal Co. v. Virginia*, 246 U. S. 500, 38 S. Ct. 360, 62 L. Ed. 854 (1918); *Browning v. Waycross*, 233 U. S. 16, 34 S. Ct. 578, 58 L. Ed. 828 (1914). Sustaining taxation of other local activities are *Utah Power & Light Co. v. Pfost*, 286 U. S. 165, 52 S. Ct. 548, 76 L. Ed. 1038 (1932); *South Carolina Power Co. v. South Carolina Tax Commissioner*, 52 F. (2d) 515 (E. D. S. C. 1931), *aff'd* 256 U. S. 525, 52 S. Ct. 494, 76 L. Ed. 1268 (1932) (upon the generation of electricity for interstate shipment); *Williams v. Fears*, 179 U. S. 270, 21 S. Ct. 128, 45 L. Ed. 186 (1900) (upon emigrant agents); *Ware & Leland Co. v. Mobile County*, 209 U. S. 405, 28 S. Ct. 526, 52 L. Ed. 855 (1908) (upon dealings in cotton futures); *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250, 58 S. Ct. 546, 82 L. Ed. 823 (1938) (upon sale of advertising space in a newspaper sold largely out of the state).

¹⁰ *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 60 S. Ct. 388, 84 L. Ed. 565 (1940).

¹¹ The amount of the tax assessed by the district court (opinion unreported), based upon the cost of work performed in the respective states, was \$63,214.25; that assessed by the tax commission, including penalties and interest, was \$135,761.51. The final assessment will be somewhat less than that claimed by the

cision in the instant case may possibly herald a new era in state taxation, the state being permitted to burden interstate commerce more freely in satisfaction of its economic needs.¹²

K. W., JR.

TAXATION—PROPERTY TAX—CHATELS REAL NOT TAXABLE AS PERSONALTY WITHIN CLASS I.—An assessor listed for property tax a leasehold of real estate within a municipality under Class IV of the statute.¹ The lessee claimed that the circuit court's ruling upholding the assessor was erroneous. *Held*, that less than freehold leaseholds of realty within municipalities are intangible personal property under Class IV rather than Class I and will be taxed accordingly. *Greene Line Terminal Co. v. Martin, Assessor*.²

Whether "chattels real" should be assessed under Class I or Class IV depends upon the interpretation of the statute and the tax limitation amendment³ upon which it is based. Class I, under the statute, consists, *inter alia*, of "all money and all notes, bonds,

commission owing to the ruling in the instant decision that penalties and interest be deducted.

¹² This sentiment is voiced clearly in the dissents of Mr. Justice Black in *J. D. Adams Mfg. Co. v. Storen*, and *Gwin, White & Prince, Inc. v. Henneford*, both *supra* n. 5.

¹ W. VA. CODE (Michie, 1937) c. 11, art. 8, § 5:

"For the purpose of levies, . . . property shall be classified as follows:

"Class I. All tangible personal property employed exclusively in agriculture, including horticulture and grazing;

"All products of agriculture (including livestock) while owned by the producer;

"All money and all notes, bonds, bills and accounts receivable, stocks and any other intangible personal property;

"Class II. All property owned, used and occupied by the owner exclusively for residential purposes;

"All farms, including land used for horticulture and grazing, occupied and cultivated by their owners or bona fide tenants;

"Class III. All real and personal property situated outside of municipalities, exclusive of classes I and II.

"Class IV. All real and personal property situated inside of municipalities, exclusive of classes I and II."

² 10 S. E. (2d) 901 (W. Va. 1940).

³ W. VA. CONST. art. X, § 1, as amended in 1932. The part of the section applicable to this comment is as follows: "No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value; except that the aggregate of taxes assessed in any one year upon personal property employed exclusively in agriculture, including horticulture and grazing, products of agriculture as above defined, including live stock, while owned by the producer, and money, notes, bonds, bills and accounts receivable, stocks and other similar intangible personal property shall not exceed fifty cents on each one hundred dollars of value thereon and upon all property owned, used and occupied by the owner thereof exclusively for residential purposes and upon farms occupied and cultivated by their owners or bona fide tenants one dollar; and upon all other property situated outside of municipal-