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Constitutional Law--Taxation--Power of State to Tax Gross Receipts from Contracts of the Federal Government

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Was *P* not shown to be the procuring cause of the sale?⁷ The dissent makes no mention of any right of the dealer to a commission and it is evident that he was not entitled to such, as he was not an effective cause of the sale, though his efforts may have been of some value to *P*.⁸ According to the dissent, then, *D* is not liable for any commission, though the sale was effected by the efforts of others. The purchaser became the object of a new series of negotiations, begun by the introduction to *D* by *P* (all *P* contracted to do) which series culminated directly in the sale.

W. G. W.

CONSTITUTIONAL LAW — TAXATION — POWER OF STATE TO TAX GROSS RECEIPTS FROM CONTRACTS OF THE FEDERAL GOVERNMENT.—The Dravo Contracting Company, a Pennsylvania corporation, contracted with the federal government to construct locks and dams on navigable rivers in West Virginia. The West Virginia Tax Commissioner assessed the Dravo Company upon gross receipts from the contracts, under the West Virginia statute providing for a tax of “two per cent of the gross income of the business” of “every person engaging or continuing within this State in the business of contracting.”¹ A three-judge district court enjoined the collection of the tax,² and the Commissioner appealed. *Held* (four justices dissenting), that the tax was valid. Decree reversed. *James v. Dravo Contracting Co.*³

⁷ *Hill v. McCoy*, 1 Cal. App. 159, 81 Pac. 1015 (1905) (the introduction to the seller of the purchaser was found to be the procuring cause of the sale); *McCampbell v. Cavis*, 10 Colo. App. 242, 50 Pac. 728 (1897) (the broker was held to be entitled to his commission where he had introduced the purchaser who bought sometime later after acquiring the purchase money); *Myers v. Dean*, 10 Misc. 402, 31 N. Y. S. 119 (1894) (the act of bringing the parties together was held sufficient to entitle the broker to a commission).

⁸ *Mears v. Stone*, 44 Ill. App. 444 (1892); *Crain v. Miles*, 154 Mo. App. 338, 134 S. W. 52 (1911); *Walker v. Van Valkenberg*, 291 S. W. 936 (Tex. Civ. App. 1926); *Alexander v. Sherwood Co.*, 72 W. Va. 195, 77 S. E. 1027 (1913) (dictum that *P* may avail himself of the broker's efforts if the broker was unsuccessful in his attempts to sell).

¹ W. Va. Acts 1935, c. 86; W. VA. REV. CODE (Michie, 1937) § 960 (5), amending W. VA. REV. CODE (1931) c. 11, art. 13, § 2.

² *Dravo Contracting Co. v. Fox*, 16 F. Supp. 527 (S. D. W. Va. 1936).

³ 58 S. Ct. 208, 82 L. Ed. 125 (1927). The Dravo case was held to be decisive of *Silas Mason Co. v. Tax Commission*, 58 S. Ct. 233, 82 L. Ed. 154 (1937), involving a similar provision of the Washington occupation tax law. In the Dravo case there was also a question as to the territorial jurisdiction of West Virginia. And see *Helvering v. Mountain Producers Corp.*, 5 U. S. L. WEEK 797 (decided March 7, 1938).

The superstructure of ramifications erected upon *McCulloch v. Maryland*⁴ and its companion case, *Collector v. Day*,⁵ is indeed delicately balanced.⁶ The extent to which the equilibrium has been disturbed by the *Dravo* case is somewhat doubtful, the opinion being of such an equivocal nature that it provides ample means of retreat to the doctrine that the power to tax is the power to destroy,⁷ but might be used as a steppingstone to a new doctrine of intergovernmental immunities.⁸ A comparison with precedent may tend to prove that the principal case will be somewhat more of a landmark than some seem to believe.⁹

(1) If a state has no power to tax receipts from a contract between the federal government and a telegraph company,¹⁰ how can it tax receipts from a contract between the federal government and a contracting company? The Chief Justice, speaking for the majority of the Court, attempted to distinguish the cases on the ground that the telegraph company had accepted the terms of a congressional act permitting such companies to use post roads, thus giving it a peculiar status in relation to the government; but, as Mr. Justice Roberts pointed out in dissent, the true basis of the telegraph case was that the tax burdened the federal government, this being illustrated by other cases in which the same type of tax was upheld even though the telegraph company had accepted the terms of the act, because transactions of the United States were not affected.¹¹

⁴ 4 Wheat. 316, 4 L. Ed. 579 (U. S. 1819).

⁵ 11 Wall. 113, 20 L. Ed. 122 (U. S. 1870). *Collector v. Day* lays down the rule that the federal government and the states are on an equal basis in so far as immunity from taxation is concerned.

⁶ For an excellent and comprehensive analysis of the cases, see Note (1938) 51 HARV. L. REV. 707.

⁷ Marshall is often misquoted to this effect. What Marshall in fact said in *McCulloch v. Maryland*, 4 Wheat. 316, 431, was “. . . the power to tax involves the power to destroy . . .”

⁸ In nature the opinion is not unlike that parodied by T. R. Powell, *An Imaginary Judicial Opinion* (1931) 44 HARV. L. REV. 389.

⁹ See Note (1938) 51 HARV. L. REV. 707, in which it is said: “In view of the state of the authorities, it is evident that the *Dravo* case, with its mild and hesitant majority opinion and its strongly-worded minority, will be no landmark.”

¹⁰ *Western Union Telegraph Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067 (1881).

¹¹ *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530, 8 S. Ct. 961, 31 L. Ed. 790 (1888); *Attorney General of Massachusetts v. Western Telegraph Co.*, 141 U. S. 40, 11 S. Ct. 889, 35 L. Ed. 628 (1891).

(2) Receipts from a contract of sale of gasoline¹² or motorcycles¹³ to one governmental unit cannot be taxed by the other. The Court simply said that the sales tax cases had previously been distinguished,¹⁴ and must be limited to their particular facts; which may be equivalent to saying that there is no distinction.

Three cases are relied upon to sustain the holding of the *Dravo* case. In *Metcalf & Eddy v. Mitchell*,¹⁵ two consulting engineers were held to be subject to federal taxation upon net income which was in part derived from contracts with states and subdivisions of states. A tax upon net income after all allowable deductions have been made from the gross differs in degree from a tax upon gross income, just as a tax upon the property¹⁶ of one making a sale to the federal government would differ in degree from a tax upon the receipts under the sale — the burden in the one case being said to be remote and consequential, in the other, direct. This distinction between net and gross income taxes is made in the interstate commerce field.¹⁷ *Alward v. Johnson*¹⁸ upheld a California tax upon the gross receipts of an operator of an automotive stage line, the principal part of such receipts being derived from a mail-carrying contract with the federal government. The distinguishing feature of the *Johnson* case was that the gross receipts tax was imposed in lieu of all other taxes, hence while the subject of the tax and the directness of the burden were the same as in the *Dravo* case, the measure was vastly different, the exaction in the latter case being in addition to and not in lieu of other taxes. The third

¹² *Panhandle Oil Co. v. Mississippi ex rel. Knox*, Att'y Gen., 277 U. S. 218, 48 S. Ct. 451, 72 L. Ed. 857, 56 A. L. R. 583 (1928); *Graves v. Texas Co.*, 298 U. S. 393, 56 S. Ct. 818, 80 L. Ed. 1236 (1936); But see *Trinityfarm Construction Co. v. Grosjean*, 291 U. S. 466, 54 S. Ct. 469, 78 L. Ed. 918 (1934), holding that an independent contractor may be taxed upon gasoline used in the performance of a contract with the federal government, just as he may be taxed upon any other property.

¹³ *Indian Motorcycle Company v. United States*, 283 U. S. 570, 51 S. Ct. 601, 75 L. Ed. 1277 (1930), holding invalid a federal sales tax as to motorcycles sold to municipalities.

¹⁴ In *Wheeler Lumber Bridge & Supply Co. v. United States*, 281 U. S. 572, 50 S. Ct. 419, 74 L. Ed. 1047 (1930), a tax was held to be upon transportation, not upon sale; and in *Liggett & Myers Tobacco Co. v. United States*, 299 U. S. 383, 57 S. Ct. 239, 81 L. Ed. 294 (1937), the tax was held to be upon manufacture rather than sale.

¹⁵ 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384 (1925).

¹⁶ Taxes upon the property of an independent contractor with the federal government are upheld. *Union Pacific R. R. Co. v. Peniston*, 13 Wall. 5, 21 L. Ed. 787 (U. S. 1873); *Trinityfarm Construction Co. v. Grosjean*, 291 U. S. 466, 54 S. Ct. 469, 78 L. Ed. 918 (1934).

¹⁷ *Peck v. Lowe*, 247 U. S. 165, 38 S. Ct. 432, 62 L. Ed. 1049 (1918).

¹⁸ 282 U. S. 509, 51 S. Ct. 273, 75 L. Ed. 496, 75 A. L. R. 9 (1931).

case cited by the Chief Justice was *Fidelity & Deposit Co. of Maryland v. Pennsylvania*,¹⁹ in which the Attorney General, acting in pursuance of an act of Congress, authorized the Fidelity Company to become surety upon bonds of federal officials, and Pennsylvania levied a gross receipts tax upon the premiums of these bonds. Since the premiums were paid by the officials, not the federal government, obviously the receipts were obtained from the governmental contract in too indirect a manner to support a contention of constitutional invalidity of the tax.

Since none of the cases relied upon lends anything but the weakest of support for the *Dravo* case, and since the *Dravo* case is not reconcilable with previous decisions, perhaps there is merit in Mr. Justice Roberts' statement that the judgment seems to overrule, *sub silentio*, a century of precedents, and to leave the application of the rule uncertain and unpredictable.

The most interesting feature of the *Dravo* case is that in the brief filed by the Solicitor General²⁰ as *amicus curiae* it was suggested that the sole criterion of the validity of a tax under the principle of intergovernmental immunities should be whether or not the tax is discriminatory. According to Mr. Justice Roberts' opinion, the Solicitor General was not willing to go so far as to say that states should be allowed to tax directly property of the federal government. The extent to which the majority opinion in the *Dravo* case adopts the doctrine advocated by the Solicitor General is not clear, inasmuch as the holding may be based upon any one or more of four factors, *i. e.*, (1) the taxpayer was an independent contractor; (2) the tax was nondiscriminatory; (3) the tax was not laid upon the contract of the government; (4) should the burden of such a tax become too heavy, Congress has the means of redress.

What is meant by saying that Congress has the means of redress? It is well-settled that Congress may *consent* to the levying by a state of a tax which otherwise would be invalid,²¹ but can Congress *prohibit* an exaction by a state which would otherwise be valid? If so, would it not be required by *Collector v. Day*,²² as

¹⁹ 240 U. S. 319, 36 S. Ct. 298, 60 L. Ed. 664 (1916).

²⁰ Now Mr. Justice Reed.

²¹ *Van Allen v. Assessors*, 3 Wall. 573, 18 L. Ed. 229 (U. S. 1865); *Fidelity & Deposit Co. of Md. v. Pennsylvania*, 240 U. S. 319, 36 S. Ct. 298, 60 L. Ed. 664 (1916); *Baltimore National Bank v. State Tax Commission*, 297 U. S. 209, 56 S. Ct. 417, 80 L. Ed. 586 (1936).

²² 11 Wall. 113, 20 L. Ed. 122 (U. S. 1870). See note 6, *supra*.

is suggested by the dissent, that the states should have the same power as respects federal taxation? It is significant that the Chief Justice went out of his way to exhume this doctrine from some dicta of Chief Justice Chase in *Thompson v. Union Pacific Railroad Co.*,²³ and it is not impossible that future cases may bring about a complete resurrection, but it is submitted that the logic of *Collector v. Day* would not, for reasons of political expediency, be carried to the extent of allowing states to nullify acts of Congress.

The root of the difficulty in the field of intergovernmental immunities was aptly stated by Mr. Justice Holmes in a dissenting opinion in *Panhandle Oil Co. v. Mississippi ex rel Knox*,²⁴ which overruled the holding of a state supreme court that a tax of one cent per gallon on retailers of gasoline was valid as applied to sales to the Federal Government:

"It seems to me that the State Court was right. I should say plainly right, but for the effect of certain dicta of Chief Justice Marshall which culminated in or rather were founded upon his often quoted proposition that the power to tax is the power to destroy. In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the States had any power it was assumed that they had all power, and that the necessary alternative was to deny it altogether. But this Court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this Court sits."

H. A. W., JR.

CORPORATIONS — EFFECT OF DISSOLUTION UNDER STATUTE CONTINUING DISSOLVED CORPORATIONS — POWER TO COMMIT ACT OF BANKRUPTCY. — A, a Virginia corporation, had its charter revoked in 1935 for failure to pay its registration fee and franchise taxes. Thereafter, the corporation continued to carry on business with no indication that it was winding up its affairs. In November, 1936, B company secured a judgment against A in A's corporate name, on a debt contracted prior to the charter revocation. In December, 1936, A made a general assignment for the benefit of its creditors. Alleging this assignment as an act of bankruptcy,

²³ 9 Wall. 579, 19 L. Ed. 792 (U. S. 1870).

²⁴ 277 U. S. 218, 223, 48 S. Ct. 451, 453, 72 L. Ed. 857, 56 A. L. R. 583 (1928).