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TAXATION — BUSINESS SITUS OF CREDITS — DOMESTICATION OF FOREIGN CORPORATIONS

The Wheeling Steel Corporation chartered in Delaware, with its chief offices in this state, was assessed upon its intangible property consisting of bank deposits and accounts and notes receivable, to the extent of $4,491,323.67. The bank deposits amounted to $2,307,773.61 and were made in five states, of which there was $849,161.91 cash in West Virginia banks, $121,684.91 of this amount being derived from the sale of goods manufactured in this state. The accounts and notes receivable were estimated at the probable worth of $2,234,743.11 only $374,410.42 being due on account of goods manufactured in this state. The circuit court reduced the assessment to $496,095.33 thereby limiting it to credits and cash arising from the sale of the corporations’ West Virginia product. Upon an appeal by the state and county taxing units the Supreme Court of Appeals upheld the original assessment, subject to a reduction of $250,133.42 assessed by the State of Ohio, upon two grounds: First, that the intangibles had acquired a business situs in this state for the purpose of taxation and: Second, that the corporation had been domesticated in West Virginia for purposes of taxation and had acquired a commercial domicile here. In re Wheeling Steel Corporation Assessment.1

Bank deposits and accounts receivable have frequently been given a business situs, for the purpose of taxation, in a state other than that of the creditor’s domicile2 but the mere fact that the deposit was made within the taxing state or that the credit upon account was receivable there contributes little or nothing toward establishing a basis upon which to rest the jurisdiction to tax.3

1 177 S. E. 535 (W. Va. 1934).
3 The mere presence of the evidence of the credits in the taxing state is not enough to give them a business situs for the purpose of taxation, Buck v. Beach, 206 U. S. 392, 27 S. Ct. 313 (1907); Lockwood v. Blodgett, 106 Conn. 525, 138 Atl. 520 (1927); nor is physical presence within the taxing state a prerequisite to their taxation. Bristol v. Washington County, 177 U. S. 133, 20 S. Ct. 585 (1900); Metropolitan Life Ins. Co. v. New Orleans, 205 U. S. 305, 27 S. Ct. 499 (1907); cf. City of New Orleans v. Stempel, supra n. 2; State Assessors v. Comptoir Nat. d’Escompte, 191 U. S. 388, 24 S. Ct. 109 (1903).
While incapable of exact definition business \textit{situs} would seem to mean what the words indicate, that is a \textit{situs} in a place other than the domicile of the owner, where such owner, either directly or, more commonly, through an agent, manager or the like, is conducting a business out of which credits or open accounts arise and are used as a part of the business.\textsuperscript{4} Since credits need not be evidenced in any particular manner in order to render them subject to taxation at their business \textit{situs}\textsuperscript{5} to determine, in a given case, whether credits owing a non-resident are taxable upon this principle it is believed essential to ascertain: First, whether the credits grew out of business conducted within the taxing state\textsuperscript{6} and, Second, what constitutes the doing of business within the meaning of the rule.\textsuperscript{7}

Heretofore the courts have confined their inquiry to the former question in deciding whether particular credits had

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\begin{enumerate}
\item Crane Co. v. Des Moines, 208 Iowa 164, 225 N. W. 344 (1929).
\item Liverpool, etc., Ins. Co. v. Board of Assessors, supra n. 2; Orient Ins. Co. v. Board of Assessors, 221 U. S. 538, 31 S. Ct. 554 (1911).
\item Powell, \textit{Business Situs of Credits} (1922) 28 V. A. L. Q. 89, at 106, "Thus we see that we may select passages from supreme court decisions which indicate that the important element in business \textit{situs} is the doing of business within the state and other passages which lean hardest on the fact that the debtors were domiciled within the state. But we know that domicile of the debtor is not of itself sufficient to justify the taxation of the debt. Therefore we are certain that to have a business \textit{situs} of credits, the credits must be the product of a business within the jurisdiction." The business must be continuing or permanent and not mere isolated transactions. State Assessors v. Comptoir Nat. d'Escompte, supra n. 3; Metropolitan Life Ins. Co. v. New Orleans, supra n. 3: That the debtors need not be domiciled within the taxing state, Bemis Bros. Bag Co. v. La. Tax Comm., supra n. 2; Buck v. Miller, 147 Ind. 586, 47 N. W. 8 (1896); Endicott J. & Co. v. Multomah County, 96 Ore. 679, 190 Pac. 1109 (1920).
\item Perhaps in the majority of cases upholding a tax upon credits by a state other than that of the creditor's domicile, the business conducted within the taxing state consisted of loaning money, exclusively, or in connection with an established business, City of New Orleans v. Stempel, supra n. 3; Metropolitan Life Ins. Co. v. New Orleans, supra n. 3; Bristol v. Washington County, supra n. 3; Commonwealth v. Dunn, supra n. 2; Hathaway v. Edwards, 42 Ind. App. 22, 85 N. E. 28 (1908); Buck v. Miami County, 103 Kan. 207, 173 Pac. 344 (1918); Texas Land & Cattle Co. v. Fort Worth, 73 S. W. 860 (Tex. Civ. App. 1904). Open accounts or credits secured by notes or other evidence of indebtedness arising out of mercantile or insurance business within the taxing state, Orient Ins. Co. v. Assessors, supra n. 5; Liverpool etc., Ins. Co. v. New Orleans Assessors, supra n. 2; Bemis Bros. Bag Co. v. La. Tax Comm., supra n. 2; French Piano & Organ Co. v. Dallas, 61 S. W. 942 (Tex. Civ. App. 1901); New England Mutual Life Ins. Co. v. Board of Assessors, supra n. 2; Armour Packing Co. v. Savannah, supra n. 2; Bluefields Banana Co. v. Board of Assessors, supra n. 2.
\end{enumerate}
acquired a business situs. But obviously a jurisdictional prerequisite so comprehensive and flexible of meaning as the latter must succumb to judicial delimitation in the near future and it is suggested, without prediction, that those limits may not be sufficiently extensive to embrace a business such as that of the Steel Corporations in the instant case. The doctrine of Bemis Bros. Bag. Co. v. Louisiana Tax Commission appears to be authority for upholding the assessment, as reduced by the circuit court, in the principal case, providing the sales of the company's West Virginia product should be found to have been made within the state. The fact that the sales are made within the taxing state, rather than that the product is manufactured or produced, there, has been considered the jurisdictional element. In Miami Coal Co. v. Fox credits arising from the sale of coal produced by a domestic corporation but sold in another state in which the company had its principal offices and place of business, were held to have a business situs in the latter state and subject to taxation there and not at the creditor's domicile. Upon the authority of these two cases presumably only that portion of the assessment attributable to sales made in West Virginia, though to customers outside the state, could be sustained.

The Supreme Court of Ohio, in Hubbard v. Brush, decided

8 State Assessors v. Comptoir Nat. d'Escompte, supra n. 3; Metropolitan Life Ins. Co. v. New Orleans, supra n. 3, Johnson County v. Hewitt, 76 Kan. 516, 93 Pac. 181 (1907); Armour Packing Co. v. Savannah, supra n. 2; Crane Co. v. Des Moines, supra n. 4.
9 Supra n. 2.
10 Supra n. 2. A tax upon the credits of a foreign corporation arising from sales within the state to customers outside the state, was upheld though a daily remittance, by check against a local bank balance for the amount of such sales, was made to the home office. The reason assigned was that the tax was upon the capital employed in the business and that the credits were merely valued for the purpose of arriving at the average amount of capital employed within the taxing state.
11 203 Ind. 99, 176 N. E. 11 (1931). Bills and accounts receivable for coal sold in Illinois declared not subject to a property tax at the corporation's domicile in Indiana, where the sole business of the corporation in the latter state was the production and shipping of coal. The company's principal office and place of business was in Illinois, where sales were made, collections received and deposited in local banks, and all bills and dividends paid.
12 Supra n. 11. It is interesting to observe that in the Miami Coal Co. case, the Indiana court after deciding credits were subject to taxation in only one state proceeded to answer the question reserved for future adjudication in First National Bank v. Maine, 284 U. S. 312, 52 S. Ct. 174 (1932), and held that the state in which credits had acquired a business situs could tax to the exclusion of the state of the creditor's domicile.
13 61 Ohio St. 252, 55 N. E. 829 (1899).
that a West Virginia corporation, with principal offices and place of business in Ohio, where it engaged in the extraction of materials, the manufacture of cement therefrom, and the sale of the product, was taxable in Ohio upon all of its real and personal property, tangible and intangible. But this case is distinguishable from the principal case in that the entire corporate business was apparently localized in Ohio; or at least the court so considered it. In Commonwealth v. Consolidated Casualty Co.14 bonds secured by mortgages upon lands in Kentucky, owned and held in West Virginia by a corporation domiciled in the latter state, were held to have no business situs for the purpose of taxation in the former. After finding that the bonds were not held in Kentucky or used exclusively there or accumulated from business done there, the court declared that the fact that the corporation had its principal offices in Kentucky was immaterial. Emphasis was given the point that Kentucky had recognized the appellee to be a foreign corporation and had treated it accordingly.15

A dictum in Commonwealth v. United Cigarette Machine Co.16 supports the original assessment made in the instant case. In the former, bonds, notes, bank deposits and open accounts of a foreign corporation were held taxable in Virginia where the court said it "technically" conducted all of its business while at the same time characterizing the business as "world wide." Business situs was urged as a basis for upholding the assessment and was favorably considered by the court but the assessment was finally sustained on the ground that the corporation had been domesticated and had acquired a commercial domicile within the state of Virginia. Unquestionably the Steel Corporation is doing business in West Virginia but it would seem to depend upon the position taken as to the questions "did the credits taxed grow out of a business conducted within the state?" and "what is meant by doing business?"

14 170 Ky. 103, 185 S. W. 508 (1916).
15 Supra n. 14. "It appears from the record before us that appellee has been regarded and treated by the State of Kentucky as a foreign corporation by collecting from it a license tax on business done by it in Kentucky, which is not collected from domestic corporations, and it has made itself amenable to the laws of the state by such acceptance of the provisions of its constitution as are required of a non-resident . . . . While its chief or executive offices are in Kentucky, it has not abandoned its corporate domicile in West Virginia . . . . it cannot remove its corporate residence from that state to this without ending its corporate life."
16 119 Va. 447, 89 S. E. 935 (1916).
whether the principal of business situs was properly applied and the assessment correctly computed. The decisions upon this point are neither plentiful nor enlightening. The principal case seems to reach the very extremity of the application of business situs especially in connection with the foreign bank deposits, resulting from the production and sale of the corporation’s goods in other states. It is difficult to comprehend how such credits could possibly be said to arise out of business conducted within this state.

The two bases upon which the court sustained the assessment in the principal case are believed to be irreconcilable because business situs presupposes the non-residence of the creditor and derives its sanction from the protection afforded business of non-residents by the taxing state. On the other hand, the domiciliation theory is predicated upon the principle that the corporation has, by acquiring a commercial domicile within a foreign state, become domiciliated therein for purposes of taxation, although its domicile of origin is elsewhere. Consequently if business situs is the basis of taxation the credits must be the property of a non-resident, while the theory of domiciliation overrides non-residence and arbitrarily establishes a status of residence to support an assessment under the mobilia sequuntur personam maxim. Thus the position taken by the court that a corporation may at one and the same time be a resident and a non-resident appears to be paradoxical and untenable.

—William F. Wunschel.

17 Liverpool, etc., Ins. Co. v. Board of Assessors, supra n. 2. "But as we have seen the jurisdiction of the state of his domicile over the creditor’s person does not exclude the power of another state in which he transacts his business, to lay a tax upon the credits there accruing to him against resident debtors, and thus to enforce contribution for the support of the government under whose protection his affairs are conducted."

18 Commonwealth v. United Cigarette Machine Co., supra n. 15; and see the principal case, supra n. 1.