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Limitation of the Prohibition of a State to Tax the Federal Government

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the nature of such right, in the hands of future stockholders, from a vested property to a defeasible property. If corporate management needs more freedom of action in this direction the remedy lies with the legislature and not with the courts.

LEO SALON.

LIMITATION OF THE PROHIBITION OF A STATE TO TAX THE FEDERAL GOVERNMENT.

The right of a sovereign state to tax its subjects is universally recognized. This right of taxation, where it exists, is necessarily unlimited in its nature and thus carries with it the inherent power to embarrass and destroy.¹ Both the state government and the federal government possess this right of taxation, but their reciprocal rights and immunities are safeguarded by the observance of two limitations upon their respective powers of taxation: (1) that the exactions of the one must not discriminate against the means and instrumentalities of the other, and (2) that they must not burden the operation of that other.² As early as 1819 it was settled that a state cannot exercise this right of taxation in respect to any of the instrumentalities which the federal government may create for the performance of its constitutional functions.³

The immunity of federal instrumentalities from state taxation may be waived,⁴ wholly or with such limitations and qualifications as may be deemed proper by the law-making power of the nation, but the waiver must be clear and unambiguous.⁵ An officer of the

¹ *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579 (U. S. 1819).

² *Brush v. Commissioner of Internal Revenue*, 300 U. S. 352, 57 Sup. Ct. 495 (1937).

³ MR. CHIEF JUSTICE MARSHALL in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579 (U. S. 1819) said, "The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think not. Those powers are given by the people of the United States, to a government whose laws made in pursuance of the Constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them." See also *Farmers and Mechanics Savings Bank of Minneapolis v. Minnesota*, 232 U. S. 516, 34 Sup. Ct. 354 (1914); *People ex rel. Donne-Hanna Coke Corp. v. Burk*, 217 N. Y. Supp. 803, 128 Misc. 195 (1926), *aff'd*, 248 N. Y. 507, 162 N. E. 503 (1928); *Appeal of Van Dyke*, 217 Wis. 528, 259 N. W. 700 (1935).

⁴ "A waiver is the intentional or voluntary relinquishment of a known right," *Lehigh Val. R. R. v. Ins. Co.*, 172 Fed. 364, 97 C. C. A. 62 (1909); "or such conduct as warrants an inference of the relinquishment of such right", *Rand v. Morse*, 289 Fed. 339 (C. C. A. 1923); "or is inconsistent with claiming it", *Marfield v. Cincinnati, D. & T. Traction Co.*, 111 Ohio St. 139, 144 N. E. 689 (1924).

⁵ *Austin v. Aldermen*, 74 U. S. 694 (7 Wall.), 19 L. ed. 224 (1868).

United States Government may not waive this immunity as such waiver can only be made by an express congressional consent.⁶ Under the fundamental principles of waiver, a waiver may be implied from the silence of a party who has the power of waiving⁷ under such circumstances as require him to speak.⁸ This is a deceptive silence accompanied by an intention to defraud which amounts to a positive beguilement.⁹ However, mere silence when one is not bound to speak,¹⁰ where there is no occasion to speak¹¹ and especially where such silence is unaccompanied by any act calculated to mislead,¹² will not constitute a waiver, in the absence of conduct amounting to an estoppel.¹³ There can be no silent waiver by Congress in respect to the imposition of state taxes on federal agencies for there is no duty to speak nor to act on the part of Congress, in reference to such an unlawful imposition.¹⁴

The rules in regard to immunity from state taxation have relaxed somewhat in recent years and today a state tax on the income of a federal employee or employee of a federal agency is no longer deemed to be a burden on the government.¹⁵ A state may also tax the equipment and materials of an independent contractor used in the performance of his contract with the federal government. An independent contractor does a piece of work according to his own methods and control without being subject to the control of his employer, being reimbursed at a flat fee for his employment, notwithstanding any addition or lessening of the cost of the work to be performed.¹⁶ Thus,

⁶ *United States v. Wright*, 53 F. (2d) 300 (1931), *certiorari denied*, 285 U. S. 539, 52 Sup. Ct. 312 (1932); *Jaybird Mining Co. v. Weir*, 271 U. S. 609, 46 Sup. Ct. 592 (1926).

⁷ *Collission v. Wier*, 91 Misc. 501, 154 N. Y. Supp. 951 (1915); *People v. Abetti*, 152 N. Y. Supp. 890 (Gen. Sess. N. Y. 1914).

⁸ *Jones v. Savin*, 29 Del. 68, 96 Atl. 756 (1916).

⁹ *Lord Const. Co. v. Edison Portland Cement Co.*, 234 N. Y. 411, 138 N. E. 39 (1923).

¹⁰ *Barnard v. Megorden*, 178 N. E. 868 (Ind. 1931); *Lord Const. Co. v. Edison Portland Cement Co.*, 234 N. Y. 411, 138 N. E. 39 (1923).

¹¹ *Solberg v. Sunburst Oil and Gas Co.*, 76 Mont. 254, 246 Pac. 168 (1926); *Crawford v. Winterbottom*, 88 N. J. L. 588, 96 Atl. 497 (1916).

¹² *Northwestern Fire and Marine Ins. Co. v. Pollard*, 74 Mont. 142, 238 Pac. 594 (1925); *Dale v. Continental Ins. Co.*, 95 Tenn. 38, 31 S. W. 266 (1895).

¹³ *Campbell Paint and Varnish Co. v. Hall*, 131 Miss. 671, 95 So. 641 (1923).

¹⁴ *STONE, J.*, in *Graves v. People ex rel. O'Keefe*, 306 U. S. 466, 59 Sup. Ct. 598 (1939), "It is true that the silence of Congress when it has authority to speak may sometimes give rise to an implication as to Congressional purpose. The nature and extent of the implications depend upon the nature of the Congressional power and the effect of its exercise. But there is little scope for the application of that doctrine to the tax immunity of governmental agencies."

¹⁵ Congress must expressly exempt such employees, or their income may be taxed by the state. *Graves v. People ex rel. O'Keefe*, 306 U. S. 466, 59 Sup. Ct. 598 (1939), *overruling* *Collector v. Day*, 11 Wall. 113, 20 L. ed. 122 (1871).

¹⁶ *Humpton v. Unterkircher*, 97 Iowa 509, 66 N. W. 776 (1896); *Pottorff v. Fidelity Coal Mining Co., et al.*, 86 Kan. 774, 122 Pac. 120 (1912); *Waters*

he must pay the sales taxes and other taxes imposed by the state, as the charge is fixed before the work has begun and the tax is not thereafter imposed upon the federal government, directly nor indirectly.

In pursuance of its war effort, the United States Government has been entering into what are designated as cost-plus fixed-fee construction contracts with various firms. Under such contracts, the federal government reimburses the contractor for all actual expenditures in the performance of work, to be approved by the contracting officer, in addition to the payment of the contractor's fixed fee. The contracts also contain provisions to the effect that the contractor should be reimbursed for payments made by him for Social Security taxes and any applicable local or state taxes.¹⁷ It is to be noted that this is not the *express* waiver necessary to the imposition of the local or state taxes on agencies of the federal government, as they are not only inapplicable, but are improper.

Under the contracts, the parties provide, as they may do,¹⁸ that the materials bought by the builder shall become the property of the government even before they have been actually affixed to the structure. "The government is to and does acquire title to the things desired for its purposes. The contractors are not acting for themselves in buying the material though they are the named purchasers. They have no power of disposition of the property other than to use it within the project. They cannot use it as their own property but as the property of the government which is to pay them the exact amount which they pay or are obligated to pay. Their only interest in the material is that its quality and amount be satisfactory to the government."¹⁹ They are thus brokers²⁰ or agents²¹ of the federal government in the transactions. As agents of the federal govern-

v. Pioneer Fuel Co., 52 Minn. 474, 55 N. W. 52 (1893); Powell v. Virginia Const. Co., 88 Tenn. 692, 13 S. W. 691 (1890); Stricker v. Industrial Comm. of Utah, 55 Utah 603, 188 Pac. 849 (1920).

¹⁷ King and Boozer v. State, 3 So. (2d) 572 (Ala. 1941).

¹⁸ Duylan Silk Co. v. Spiner, 53 C. C. A. 321, 115 Fed. 689 (1902); Morgan v. Goddard, 239 Mich. 174, 214 N. W. 155 (1927).

¹⁹ LIVINGSTON, J., in King and Boozer v. State, 3 So. (2d) 572 (Ala. 1941).

²⁰ "A broker is one who is engaged for others on a commission basis to negotiate contracts relative to property". Messick v. Johnson, 115 Okla. 139, 8 P. (2d) 28 (1931); Rodman v. Manning, 55 Ore. 336, 99 Pac. 657 (1909); Gile v. Tsutskawa, 109 Wash. 366, 187 Pac. 323 (1920); DAVIS, J., in Lamprecht v. State, 84 Ohio St. 32, 95 N. E. 65 (1911), "A broker has the right to take title to the property in his own name where he advances the purchase money but ordinarily such vests in the customer subject to the broker's lien for advances and commissions whether it is purchased in the broker's name or not."

²¹ "Every broker is in a sense an agent although every agent is not a broker". Stratford v. City Council of Montgomery, 110 Ala. 619, 20 So. 127 (1895); Gay v. Lavina State Bank, 61 Mont. 449, 202 Pac. 753 (1921); SEARLS, J., in Ayres v. Thomas, 176 Cal. 140, 47 Pac. 1013 (1897), "All brokers are agents and there are certain well defined principles of law applicable to them as such and as to the different classes certain other principles are applicable dependent upon the peculiarities of the class."

ment, the contracting companies should be exempted from state legislation, so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government.²² It has been held that a contractor supplying a military post with provisions cannot be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed, nor could he be fined or taxed for doing so.²³

A construction company in pursuing such a contract with the United States Government, authorized a sub-contractor to procure lumber for them, to be used in the construction of army barracks at Ft. McClellan, Alabama. The State of Alabama sought to impose a sales tax²⁴ upon the lumber procured by the authorized sub-contractor. Under the terms of the contract and in the light of the tax's true designation as a consumer's tax,²⁵ the burden of payment ultimately fell upon the federal government. The court in a prior case had held the state could not tax such a contractor furnishing materials for the army.²⁶ But the Supreme Court of the United States, in reversing the state court of Alabama,²⁷ held the sub-contractor liable.²⁸ Thus, in this limitation on the prohibition of a state to tax the agencies of the federal government, millions of dollars which could normally be used in the furtherance of arms manufacturing is diverted to the coffers of the states' treasuries.

The agencies of the federal government are subject to a great impairment, due to the findings²⁹ of the Supreme Court which

²² MR. JUSTICE MILLER in *First National Bank of Louisville v. Commonwealth of Kentucky* said, "Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers."

²³ *Osborn v. Bank of the United States*, 9 Wheat. 738, 6 L. ed. 204 (U. S. 1824); *reiterated* in *Johnson v. Maryland*, 254 U. S. 51, 41 Sup. Ct. 16 (1920).

²⁴ ALABAMA SALES TAX ACT, General Acts 1939, p. 16, Code 1940, tit. 51, §§ 752-783, 785, 786.

²⁵ "The tax sought to be imposed is designated as a privilege or license tax levied upon every person engaged in the business of selling tangible personal property at retail determined by a stated percentage of the gross proceeds of sale, GENERAL ACT No. 18, General Acts of Alabama of 1939, § II, but it is made unlawful for any person to fail or refuse to add to the sales price and collect from the purchaser the amount due on the tax, GENERAL ACT No. 18, General Acts of Alabama of 1939, § XXVI." LIVINGSTON, J., in *King and Boozer v. State*, 30 So. (2d) 572 (Ala. 1941); *see also* *Steward Dry Goods Co. v. Lewis*, 294 U. S. 550, 55 Sup. Ct. 525 (1935); *Lawrence v. State Tax Commission*, 286 U. S. 276, 52 Sup. Ct. 556 (1932); *National Linen Service Corp. v. State Tax Commission*, 237 Ala. 360, 186 So. 478 (1939); *Long v. Roberts and Son*, 234 Ala. 570, 176 So. 213 (1937).

²⁶ *Osborn v. Bank of the United States*, 9 Wheat. 738, 6 L. ed. 204 (U. S. 1824); *reiterated* in *Johnson v. Maryland*, 254 U. S. 51, 41 Sup. Ct. 16 (1920).

²⁷ *King and Boozer v. State*, 3 So. (2d) 572 (Ala. 1941.)

²⁸ *State of Alabama v. King and Boozer, et al.*, 314 U. S. 1, 62 Sup. Ct. 43 (1941).

²⁹ *Curry v. United States, et al.*, 314 U. S. 14, 62 Sup. Ct. 48 (1941), which

allowed the state to do indirectly what it could not do directly.³⁰ In ordinary times, the ruling of the Supreme Court would, perhaps, be a fair furtherance of the great trend towards limiting the government's immunity from state taxation.³¹ But in view of the national emergency, it is believed that the immunity should be stabilized, for the duration of the war, thus enabling the government to get, on its armament appropriations, the 100 per cent return which is so necessary to ultimate victory. Immediate passage of the *Cochrane Bill*, which is now before Congress, or one drawn along similar lines, which will prohibit the states taxing federal war expenditures, is vital, in order to counteract the effect of the decision handed down by the Supreme Court which was so injurious to the national war effort.

ARTHUR MARCHIANO.

followed the rule laid down in *State of Alabama v. King and Boozer, et al.*, 314 U. S. 1, 62 Sup. Ct. 43 (1941).

³⁰ "And of course the taxation may not be accomplished by indirection". *Miller v. City of Milwaukee*, 272 U. S. 713, 47 Sup. Ct. 280 (1927).

³¹ *Graves v. People ex rel. O'Keefe*, 306 U. S. 466, 59 Sup. Ct. 598 (1939), overruling *Collector v. Day*, 11 Wall. 113, 20 L. ed. 122 (U. S. 1871).