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Taxation—Receipts from Services Affecting Interstate Commerce, but Local in Nature, Taxable

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present. On this point Chief Judge Desmond and Judge Burke were correct. There was an offer, and an acceptance coupled with reliance on the part of the plaintiff.[48]

It is submitted that Judge Fuld's position on the constitutionality of Section 45-a, although he specifically refused to pass on this issue, is more tenable, no matter whether Section 45-a is considered as a surrender of the tax power or a tax exemption subject to amendment. As Judge Fuld pointed out, if this statute is not a tax statute, then it would probably be unconstitutional under the public monies theory of Judge Dye, although Chief Judge Desmond and Judge Burke failed to discuss this possibility. But aside from that, it is apparent that plaintiff's construction is being financed as a result of lower taxes. Under Article XVI, Section 1 of the New York Constitution it would seem that the State cannot be bound by such a contract.

It is noteworthy that Judge Fuld did not rely on the constitutional issues involved in Section 45-a but attacked the 1959 amendment directly in an attempt to avoid the main constitutional issues. It was especially appropriate to avoid discussion of the constitutional issues involved in Section 45-a, when for all practical purposes the validity of Section 45-a may never arise again.[49]

It is to be noted also that the avoiding of the constitutional issues removes the need to answer the contention of Judges Burke and Froessel that this statute is authorized by another constitutional provision, Article I, Section 9. If such an issue must be faced, it must necessarily result in making a choice between Article I, Section 9 and Article XVI, Section 1, unless it can be held that Article XVI, Section 1 is inapplicable, or unless the decision turns upon the grounds that Judge Dye put forth. In his opinion, Judge Fuld, although discussing Section 45-a generally, impliedly rejected this contention.

In any event four Judges did hold the 1959 amendment valid per se under both provisions of Article XVI, Section 1. This was the only actual holding in the case. The various positions of the Judges on Section 45-a can be considered dicta at this point in time.

M. A. L.

RECEIPTS FROM SERVICES AFFECTING INTERSTATE COMMERCE, BUT LOCAL IN NATURE, TAXABLE

In *Mohegan International Corp. v. City of New York*,[50] petitioner sought a declaratory judgment that the New York City General Business and Financial

48. Cf., People ex rel. New York Cent. and H.R.R. Ry. Co. v. Mealey, 224 N.Y. 187, 120 N.E. 155 (1918), aff'd sub nom., Troy Union Ry. Co. v. Mealey, 254 U.S. 47 (1920); New York Electric Lines Co. v. Empire City Subway, 235 U.S. 179 (1914); American Smelting and Refining Co. v. Colorado, 204 U.S. 103 (1906).

49. In a supreme court case just decided the plaintiff was held to have no standing to sue. See St. Clair v. Yonkers Raceway, Inc., an unreported case decided in the Supreme Court in Erie County.

50. 9 N.Y.2d 69, 211 N.Y.S.2d 161 (1961).

Tax[51] was unconstitutional as applied to its activities. Petitioner is a broker performing administrative services for domestic exporters and foreign importers in connection with the shipment of American-produced goods through the port of New York. This entails booking space aboard vessels, co-ordinating delivery of the goods to the pier in time for sailing, preparing Customs forms and bills of lading, arranging for insurance, and advancing ocean freight money. For these services it receives a fee based on the amount of time its employees devote to each shipment. It is on this income that the local tax was imposed. No attempt was made to tax petitioner's receipts from the carriers with which it did business.

On the basis of its recent decision in *Berkshire Fine Spinning Associates Inc. v. City of New York*,[52] the Court of Appeals affirmed, as had a unanimous Appellate Division,[53] the dismissal of the complaint.[54] In the *Berkshire* decision, the Court had conducted an extensive analysis of the Supreme Court decisions on the subject in an attempt to define the permissible scope of a local tax imposed on the privilege of doing business. There it noted that "local authorities may validly tax the privilege of doing business locally if the local business operations though related to interstate movements of goods extend substantially beyond the sale and promotion of the products and include a 'local incident' which is 'sufficient to bring the transaction within its taxing power.' "[55] The test is whether the activity sought to be taxed is "such an integral part of the interstate process, the flow of commerce that it cannot realistically be separated from it."[56]

While the test may be readily stated, its application presents a more difficult problem. In the instant case, although petitioner's services are connected with and important to foreign commerce, they are local in scope, are performed for non-carriers and do not include any actual transportation services. Further, receipts for services rendered to carriers were not included in those sought to be taxed. The case in fact represents an instance where a difficult rule of law has been deftly applied.

Bd.

TORTS

IMPACT THEORY OVERRULED

After sixty-five years of adherence, distinction, exception, and avoidance, the New York Court of Appeals has expressly overruled *Mitchell v. Rochester*

51. New York City Admin. Code § B46-2.0. Cities in New York State having a population of one million or more are permitted to impose a gross receipts tax. N.Y. Gen. City Law § 24(a).

52. 5 N.Y.2d 347, 184 N.Y.S.2d 623 (1959), noted 9 Buffalo L. Rev. 79 (1959).

53. 10 A.D.2d 841, 200 N.Y.S.2d 359 (1st Dep't 1960).

54. 17 Misc. 2d 104, 184 N.Y.S.2d 142 (Sup. Ct. 1959).

55. Supra note 52 at 355, 184 N.Y.S.2d at 628, citing Norton Co. v. Department of Revenue, 240 U.S. 534, 537 (1951).

56. Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 166 (1954).