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Intangible Tax: Nonresident Creditors Secured by Florida Realty

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INTANGIBLE TAX: NON-RESIDENT CREDITORS SECURED BY FLORIDA REALTY

State ex rel *U. S. Sugar Corp. v. Gay, 46 So.2d 165 (Fla. 1950)*

The creditor, a New York corporation, held in New York a note secured by a mortgage on Florida realty. The debtor was a Delaware corporation having its principal place of business in Florida and owning real property in several counties of this state. No domestic agency had any part in negotiating the loan, nor did the loan have any relation to the creditor's insurance business in Florida. When the mortgage was presented for recording in Florida the tax commissioner imposed the Class C levy of two mills pursuant to the Florida intangible tax statute.[1] The creditor paid the tax and charged it against the loan, whereupon the debtor sought mandamus to compel the Comptroller to refund the tax on the ground that this type of levy is construed in Florida as an ad valorem property tax on the ownership of intangible property[2] and is therefore inapplicable to a non-resident owner unless he has acquired a business situs here or unless the instrument evidencing the debt on which the tax is based is itself here.[3] HELD, the tax was validly imposed on this non-resident creditor in return for the protection afforded him by Florida.

In 1924 the requirement of the Florida Constitution that the tax rate be uniform and equal was amended to permit the Legislature to provide special rates which ". . . shall not exceed five mills on the dollar of the assessed valuation. . ." of intangibles;[4] pursuant thereto the Legislature eventually defined and classified intangibles,[5] and provided a different tax rate on each of the four classes.[6] In 1944 the constitutional maximum was lowered to two mills,[7] which is, of course, the rate now in effect.

Ambiguities in the statutory language employed have provoked litigation as to whether the tax on Class C intangibles is an ad valorem tax resting on ownership of property or an excise tax based

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[1]FLA. STAT. §199.11(3),(5) (1949); for a critique of this statute see Legis., 2 U. OF FLA. L. REV. 262 (1949).

[2]State *ex rel.* Seaboard A.L. Ry. v. Gay, 160 Fla. 445, 35 So.2d 403 (1948).

[3]New Orleans v. Stempel, 175 U.S. 309 (1899).

[4]FLA. CONST. Art. IX, §1, as it appears in FLA. STAT. 1941.

[5]FLA. STAT. §§199.01, 199.02 (1949).

[6]FLA. STAT. §199.11 (1949).

[7]FLA. CONST. Art. IX, §1.

on the privilege of recording. The result in the principal case is helpful to a state crucially in need of additional revenue, but is the decision legally sound?

Class C intangibles are defined as notes, bonds, and other monetary obligations secured by Florida realty.[8] Assessment of these on a separate tax roll at full cash value[9] and annual returns by the taxpayer[10] are required. An "annual levy" is imposed on "all intangible personal property" at rates varying according to classification;[11] Class C intangibles are listed along with the others, and the rate is set at two mills.[12] Thus far a legislative purpose to impose an annual property tax on these intangibles seems clear.

There follow, however, provisions decidedly suggestive of an excise rather than a property tax. Though Section 199.11 is entitled Annual Levy, subsection 3 provides that the Class C tax ". . . shall be due and payable when the mortgage, deed of trust or other lien is executed and shall be paid . . . before the mortgage, deed of trust or other lien securing such indebtedness is presented for recordation."[13] Neither recordation nor enforcement of the instrument in Florida is permitted until the tax is paid; failure to pay it constitutes a misdemeanor; and it is specifically designated as the only intangible tax that can be levied on such obligations.[14] Furthermore, the Constitution itself prescribes that this type of tax ". . . shall be payable at the time such mortgage, deed of trust, or other lien is presented for recordation, said tax to be in lieu of all other intangible assessments on such obligations."[15] The provisions outlined in this and the pre-

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[8]FLA. STAT. §199.02(3) (1949) reads in full:

"Class C intangible personal property is hereby defined as being all notes, bonds and other obligations bearing date subsequent to December 31, 1941, for payment of money which are secured by mortgage, deed of trust or other liens upon real property situated in Florida; provided, that only that part of the value of the mortgage, deed of trust, or other lien, the real property of which is located within the state shall bear to the whole value of the real property described in said obligation shall be included."

[9]FLA. STAT. §§199.04, 199.05 (1949). A tax of less than 25 cents is not to be extended on the roll.

[10]FLA. STAT. §199.07 (1949).

[11]FLA. STAT. §199.11 (1949).

[12]*Id.* subsection 3. Sec. 199.11(3) has inadvertently not yet been corrected to two mills, although this reduction is specifically prescribed by §199.11(5).

[13]*Ibid.*

[14]*Ibid.*

[15]FLA. CONST. Art. IX, §1; *cf.* FLA. STAT. §199.11(5) (1949).

ceding paragraphs are plainly inconsistent and yield no clear answer concerning the nature of the tax.

Prior judicial decisions,[16] although placing the tax in the ad valorem category, have not questioned the administrative treatment of it as non-recurring. Yet, if the tax is properly regarded as a one-shot tax on recording, it is an excise tax and not a property tax.

There is at least one other argument that the tax on Class C intangibles is non-recurring and therefore excise, namely, the relatively large discrepancy between the rate prescribed for this class and that established for each of the other three classes. The highest for the others is one mill, as against two mills for Class C.[17] This difference is difficult to explain unless the Class C tax is to be imposed once only.

Little is gleaned from decisions under statutes of other states. Generally, a recordation tax has been classified as excise,[18] and courts so holding have stressed both its non-recurring nature and its inapplicability until the mortgage is recorded. In *Wheeler v. Weightman*[19] the Supreme Court of Kansas characterized a Kansas recordation tax as an ad valorem property tax, but it was imposed annually and other ad valorem taxes were assessable upon failure to pay it.

At the outset the Court in the principal case was confronted with its prior decision in *State* ex rel. *Seaboard Air Line Ry. v. Gay*,[20] followed in *State* ex rel. *Tampa Electric Co. v. Gay*.[21] In the *Seaboard* case a mortgage debt evidenced by bonds or similar instruments in the hands of non-resident holders was held immune from the Class C intangible tax. The rationale was that the tax is based on ownership of personalty rather than on the privilege of recording a mortgage, that *mobilia sequuntur personam,* and that accordingly Florida lacks jurisdiction to impose such a tax unless either the written evidence of the debt is physically here or the creditor has acquired a domicil or business situs in this state.

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[16]State *ex rel.* Tampa Electric Co. v. Gay, 40 So.2d 225 (Fla. 1949); State *ex rel.* Seaboard A.L. Ry. v. Gay, 160 Fla. 445, 35 So.2d 403 (1948).

[17]FLA. CONST. Art. IX, §1; see also note 12 *supra.*

[18]Crosland v. Federal Land Bank, 207 Ala. 456, 93 So. 7 (1922); Middendorf v. Goodale, 202 Ky. 118, 259 S.W. 59 (1923); People v. Trust Co. of America, 205 N.Y. 74, 98 N.E. 207 (1912); Trustees, Ex'rs & Securities Ins. Corp. v. Hooten, 53 Okla. 530, 157 Pac. 293 (1916).

[19]96 Kan. 50, 149 Pac. 977 (1915).

[20]160 Fla. 445, 35 So.2d 403 (1948).

[21]40 So.2d 225 (Fla. 1949).

In the principal case the Court, without expressly rejecting its prior holding that such a tax is a property tax, nevertheless validates it, using as a predicate the benefits and protection afforded a nonresident secured creditor by the Florida courts when the underlying mortgage is recorded. The *Seaboard* and *Tampa Electric* decisions are accordingly overruled on this basis; and in reaching its decision the Court emphasized the non-recurring nature of the tax. Such discussion is of vital import to an excise tax but has no relevance to one based on ownership of property. Unfortunately, the Court vacillates between the two, without committing itself to either.

Assuming the tax to be a levy on ownership of property, the validity of its imposition must be considered on such basis. The principal case upholds it. The *Seaboard* and the *Tampa Electric* cases forbade it. Three major decisions[22] were handed down by the Supreme Court of the United States between 1939 and 1942, several years before these two Florida cases arose. All three refused, as a matter of federal law, to restrict taxation of a given intangible to one state unless it is judicially pronounced within that state alone.[23] The now famous *Curry v. McCanless* opinion stated:[24]

> "Whether we regard the right of a state to tax as founded on power over the object taxed . . . through dominion over tangibles or over persons whose relationships are the source of intangible rights, or on the benefit and protection conferred by the taxing sovereignty, or both . . . there are many circumstances in which more than one state may have jurisdiction to impose a tax and measure it by some or all of the taxpayer's intangibles."

These cases and this point were either not raised by counsel or rejected by the Court in the *Seaboard* and *Tampa Electric* cases; the

[22]Utah v. Aldrich, 316 U.S. 174 (1942) (permitting Utah to tax at death transfer of shares of a Utah corporation although certificates and transfer agent were in New York and decedent died domiciled there); Wisconsin v. J. C. Penney Co., 311 U.S. 435 (1940) (permitting Wisconsin to levy tax on foreign corporations for privilege of declaring and receiving dividends out of income derived from property located and business transacted there); Curry v. McCanless, 307 U.S. 357 (1939) (permitting two taxes on transfer at death measured by value of certain stocks and bonds: one by Alabama from trustee there, the legal owner; and one by Tennessee from executors of its citizen dying as the equitable owner with reserved power of appointment).

[23]Curry v. McCanless, 307 U.S. 357, 363 (1939).

[24]*Id.* at 367.

opinions mention neither the cases nor their rationale. Yet their reasoning now appears as the decisive factor in the principal case. While their broad language evidences deep solicitude for the fiscal needs of the states in taxing the citizens, the fact remains that in each instance either the instrument itself was physically within the taxing jurisdiction, or its owner or the taxpayer exercising some privilege had his domicil or a business situs therein, or the corporation issuing the stock was a citizen thereof. Validity of this Florida imposition, if construed as an ad valorem tax on ownership of property, is at present not clearly beyond attack on federal grounds, although as an excise tax it would be unassailable. It must be remembered that the mortgage realty is itself taxed by Florida,[25] the note can be taxed at its physical situs, and the debt can be taxed as an asset of its owner at his domicil, as far as federal law is concerned.

The Legislature has presented the judiciary and the bar, as well as the general public, with a highly ambiguous statute. In seeking a solution the Court has in this case reached the conclusion that it makes no difference whether the levy is an excise tax or a property tax; it is validly imposed when levied on a non-recurring basis. Logically, however, provided it is construed as a property tax, there is no reason why it cannot be imposed annually, even on non-resident creditors, if it can properly be imposed at all. The result reached can be sustained on an excise tax basis, but on a property tax predicate the position taken is not beyond question. It is difficult to discover just what property is here to be taxed. The realty is here, of course, but it is already taxed to the mortgagor. The note is in New York. The owner of the note is also in New York and has no business situs here in relation to the debt. The recordation copy of the mortgage is here, and the protection of it by Florida is furnished here; but this is the language of excise tax.

It is unfortunate that the Court has reopened an ambiguity resolved by the *Seaboard* and *Tampa Electric* cases, which held this type of levy a tax on ownership of property and therefore not applicable to a situation such as that presented in the principal case, without at the same time definitely characterizing the levy in such a way as to place it on firm ground. Legislative correction of this statute, aimed at expression of a definite meaning, has been suggested

[25]By 1940 amendment to FLA. CONST. Art IX, §2, effective in 1941, the state was forbidden to levy an ad valorem tax on any property other than intangibles; such taxes on other personalty and on realty were left to counties and municipalities as their major source of revenue.

at least once.[26] A body at pains to devise effective new means of securing necessary revenue can hardly afford to overlook obvious remedies. The suggestion is accordingly repeated.

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JURORS: FEDERAL FELONS NOT DISQUALIFIED

Duggar v. State, 43 So.2d 860 (Fla. 1950)

The defendant, convicted of first degree murder, filed a motion for new trial upon the sole ground that two members of the trial jury had been convicted in a federal court of a felony and as such were incompetent to serve as jurors under the laws of Florida. The trial judge denied the motion for new trial. On appeal, HELD, one who has been convicted of a violation of federal liquor laws, a felony under federal statutes, and who has not been restored to his civil rights, is not thereby disqualified as a juror in the state courts of Florida. Judgment affirmed, Chief Justice Adams, Justices Hobson and Roberts dissenting.

Prior criminality of veniremen has long been a bar to their service as jurors. At common law[1] a challenge to the poll lay against a juror on the ground that he had been convicted[2] of one of those crimes or misdemeanors that affected his integrity and made him infamous.[3] Conviction, in either a state or federal court of record, of a crime punishable by imprisonment for more than one year renders the criminal incompetent to serve as a juror in the federal courts unless his civil rights are subsequently restored.[4] In Florida, by statute, one who is under prosecution for any crime,[5] or one who has been convicted of bribery, forgery, perjury, larceny, "or

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[26]See Legis., 2 U. OF FLA. L. REV. 262, 272-273 (1949).

[1]This rule was borrowed from a similar rule dealing with the competency of witnesses, 9 HOLDSWORTH, HISTORY OF ENGLISH LAW 186, 191 (1938).

[2]Turnipseed v. State, 54 Ga. App. 442, 188 S.E. 260 (1936); 4 BL. COMM. **380, 381.

[3]3 BL. COMM. *364; CO. LITT. *158(a).

[4]28 U.S.C.A. §1861 (1948).

[5]FLA. STAT. §40.07(1) (1949).