Michigan Law Review

Volume 35 | Issue 7

1937

TAXATION - EXEMPTION OF FEDERAL INSTRUMENTALITY -PROPERTY OF A GOVERNMENTAL AGENCY USED FOR NON-GOVERNMENTAL PURPOSE

Virginia M. Renz
University of Michigan Law School

TAXATION — EXEMPTION OF FEDERAL INSTRUMENTALITY —PROPERTY OF A GOVERNMENTAL AGENCY USED FOR NON-GOVERNMENTAL PURPOSE — Oklahoma attempted to tax property used by the lessee of restricted Indian land in producing oil and gas. It was argued that the property was not taxable because the lessee was a federal instrumentality, and Congress had not consented to its taxation. *Held*, property is not exempt from a non-discriminatory ad valorem state tax merely because it is the property of a federal instrumentality. There should be no exemption unless the taxation imposes a direct burden upon the exertion of a federal governmental power. *Taber v. Indian Territory Illuminating Oil Co.*, (U. S. 1937) 57 S. Ct. 334.

There is no express provision of the Federal Constitution which forbids a state to tax federal instrumentalities.[1] However, Marshall's famous dictum, "the power to tax involves the power to destroy," in *McCulloch v. Maryland*[2] is a cogent reminder that this power is and should be restricted by implied limitations in the Constitution. That case is the foundation of the broad doctrine that a state cannot tax an instrumentality of the United States.[3] The evolution of this doctrine can best be shown by examining the tendencies to limit it as manifested in later decisions.[4] In *Thomson v. Union Pacific R. R.*,[5] the Court recognized the inability of a state to tax the means employed by the Federal Government for the execution of its powers. Nevertheless, it distinguished between taxation of the agency and taxation of the property of the agent and held the tax valid. In *Union Pacific Railroad Co. v. Peniston*,[6]

[1] 2 COOLEY, CONSTITUTIONAL LIMITATIONS, 8th ed., 986 et seq. (1927); 1 COOLEY, TAXATION, 4th ed., 310 et seq. (1924).

[2] 4 Wheat. (17 U. S.) 315 at 431, 4 L. Ed. 579 (1819).

[3] The converse of this doctrine was established in Collector v. Day, 11 Wall. (78 U. S.) 113, 20 L. Ed. 122 (1871).

[4] "Though the course of a century has brought no guiding principle, it has seen the doctrine relating to the immunity of governmental instrumentalities evolve from a 'total failure' of power into an inquiry of whether the exercise of the power produces 'undue interference.'" 35 MICH. L. REV. 168 at 170 (1936). See also: Powell, "Indirect Encroachment on Federal Authority by the Taxing Powers of the States," 31 HARV. L. REV. 321 (1918) and 32 HARV. L. REV. 902 (1919).

[5] 9 Wall. (76 U. S.) 579 at 591, 19 L. Ed. 792 (1870). The language used by the Court in making this distinction was, "Taxation of the agency is taxation of the means; taxation of the property of the agent is not always, or generally, taxation of the means."

[6] 18 Wall. (85 U. S.) 5, 21 L. Ed. 787 (1873). Justice Bradley wrote a strong dissenting opinion in which he argued that the power to tax extends only to subjects to which the sovereign power of the state extends. He concluded [at p. 50], "If the roadbed may be taxed, it may be seized and sold for non-payment of taxes . . . and thus the whole purpose of Congress in creating the corporation and establishing the line may be subverted and destroyed."

Other instances in which the tax was held valid because interference was too remote are: Thomas v. Gay, 169 U. S. 264, 18 S. Ct. 340 (1897), Wagoner v. Evans, 170 U. S. 588, 18 S. Ct. 730 (1897) (tax on cattle of lessees of Indian land); Western Union Telegraph Co. v. Pennsylvania R. R., 195 U. S. 540, 25 S. Ct. 133 (1904) (tax on property belonging to a telegraph company erected under an Act of Congress); Baltimore Shipbuilding & Dry Dock Co. v. Baltimore, 195 U. S. 375,

where the railroad was not only employed by the Federal Government but had been created by it, the state tax was again upheld. These cases show that although a tax may indirectly interfere with the Federal Government, there is a point where that interference becomes so remote that it does not invalidate the tax. The subject matter of the tax seems to be given great weight. It is a generally accepted doctrine that a state may not tax property owned by the United States.[7] Where all stock of a corporation was owned by the United States, a tax on the property of the corporation was held improper as amounting to a tax on the property of the United States.[8] It becomes apparent in these latter cases that if the subject matter is made the test of the power to tax, the courts will reach the desired results by ignoring the facts. The important element is the effect of the tax.[9] In the principal case the distinction is clearly made between a tax on the property of the agent and one which imposes a direct burden upon the exercise of governmental powers. The tax on the property of the agent is good because it only remotely affects the exercise of the governmental powers. Where the connection between the Government and its instrument is close and the effect on the Government is direct, the court may rule against the tax as a matter of law.[10] However, under other circumstances it is necessary for the court to consider as a matter of fact whether the

25 S. Ct. 50 (1904) (tax on property of a dry dock corporation whose dock the United States has a right to use); Choctaw, O. & G. R. R. v. Mackey, 256 U. S. 531, 41 S. Ct. 582 (1921) (tax on property of a railroad granted by Congress to develop coal lands of Choctaw Nations); Alward v. Johnson, 282 U. S. 509, 51 S. Ct. 273 (1930) (tax on property owned by automotive stage line and used in transportation of the mails); Susquehanna Power Co. v. State Tax Comm. of Md., 283 U. S. 291, 51 S. Ct. 434 (1931) (tax on property of a power company licensed by the Federal Government).

However, where a corporation is engaged in serving the United States, a state may not impose a privilege tax on such operations: McCulloch v. Maryland, 4 Wheat. (17 U. S.). 315, 4 L. Ed. 579 (1819); Choctaw, O. & G. R. R. v. Harrison, 235 U. S. 292, 35 S. Ct. 27 (1914); New Jersey Bell Tel. Co. v. State Board of Taxes & Assessments, 280 U. S. 338, 50 S. Ct. 111 (1929); Helson v. Kentucky, 279 U. S. 245, 49 S. Ct. 279 (1929).

[7] Fagan v. Chicago, 84 Ill. 227 (1876); People v. United States, 93 Ill. 30 (1879); Doyle v. Austin, 47 Cal. 353 (1874); Van Brocklin v. Tennessee, 117 U. S. 151, 6 S. Ct. 670 (1886) (the express exemption of property of the United States in the general tax acts of each state is quoted in the margin at 171).

[8] King County v. United States Shipping Board E. F. Corp., (C. C. A. 9th, 1922) 282 F. 950; Clallam County v. United States, 263 U. S. 341, 44 S. Ct. 121 (1923), noted 36 HARV. L. REV. 737 (1923).

[9] "The exemption of an instrumentality of one government from taxation by the other must be given such a practical construction as will not unduly impair the taxing power of the one or the appropriate exercise of its functions by the other." Susquehanna Power Co. v. State Tax Comm. of Md., 283 U. S. 291 at 294, 51 S. Ct. 434 (1931).

[10] Dobbins v. Commissioners of Erie County, 16 Pet. (41 U. S.) 435, 10 L. Ed. 1022 (1842); Weston v. City Council of Charleston, 2 Pet. (27 U. S.) 448, 7 L. Ed. 481 (1829); Van Brocklin v. Tennessee, 117 U. S. 151, 6 S. Ct. 670 (1886).

tax is an unreasonable interference with the Government.[11] It seems that the Court was met with the latter situation in the principal case and that the correct conclusion was reached.

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[11] Union Pacific R. R. v. Peniston, 18 Wall. (85 U. S.) 5, 21 L. Ed. 787 (1873); Thomson v. Union Pacific R. R., 9 Wall. (76 U. S.) 579, 19 L. Ed. 792 (1870); Western Union Tel. Co. v. Massachusetts, 125 U. S. 530, 8 S. Ct. 961 (1888); Baltimore Shipbuilding & Dry Dock Co. v. Baltimore, 195 U. S. 375, 25 S. Ct. 50 (1904).