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## FEDERAL INJUNCTION AGAINST DISCRIMINATORY STATE TAX

Theoretically, in the absence of statute, injunctive relief against an illegal or invalid tax is obtainable when the case can be shown to lie clearly within one of the recognized branches of equity jurisdiction,<sup>1</sup> such as avoidance of multiplicity of suits,<sup>2</sup> removal of cloud on title,<sup>3</sup> or prevention of irreparable injury.<sup>4</sup> Actually, however, for cogent reasons of public policy derived from a supposed necessity for uninterrupted revenues, supported by restrictive legislation, equitable relief against taxes, is in most jurisdictions, either limited or denied.<sup>5</sup>

Thus, injunction against federal tax is practically eliminated by Rev. Stat. 3224.<sup>6</sup> In only the most "extraordinary and exceptional circumstances" have the provisions of the section been held inapplicable,<sup>7</sup> and in only one situation—distrainment during the pendency of an appeal to the Board of Tax Appeals—is there any statutory recognition of injunction.<sup>8</sup>

contracts with their customers. It may be suggested that payees, especially merchants and credit organizations who receive a considerable number of checks might likewise protect themselves by contracts with the debtors that checks tendered in payment are taken subject to final receipt of cash or solvent credits thereon.

<sup>1</sup> 37 Cyc. 1258; 4 COOLEY, TAXATION (4th ed. 1924), §1641; (1894), 22 L. R. A. 700. See *Dowes v. Chicago*, 11 Wall. 103, 20 L. ed. 65 (1870). For helpful notes on injunction as remedy for unlawful taxation see: (1924) 22 MICH. L. R. 594; (1910) 10 COL. L. REV. 564.

<sup>2</sup> *Raymond v. Chicago Union T. Co.*, 207 U. S. 20, 28 Sup. Ct. 7, 52 L. ed. 78, 12 Ann. Cas. 757 (1907); *Porto Rico Tax Appeals*, 16 F. (2d) 545 (C. C. A. 1st, 1926); *Fairley v. Duluth*, 150 Minn. 374, 185 N. W. 390, 32 A. L. R. 1258 (1924); (1870) 22 L. R. A. 703; COOLEY, *supra* note 1, §1642.

<sup>3</sup> *Ogden City v. Armstrong*, 168 U. S. 224, 18 S. Ct. 98, 42 L. ed. 444 (1897); Note (1891) 10 L. R. A. 293; COOLEY, *supra* note 1, §1643.

<sup>4</sup> *Southern Ry. Co. v. Asheville*, 69 F. 359 (C. C., W. D., N. C., 1895); *Odlin v. Woodruff*, 31 Fla. 160, 12 So. 227, 22 L. R. A. 699 (1893).

<sup>5</sup> 4 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1919), §§1779-81; 37 Cyc. 1257; (1928) 26 MICH. L. R. 922.

<sup>6</sup> Comp. Stat. 5947, 26 U. S. C. A. 154. Statute does not prevent injunction against collection of a penalty. *Lipke v. Lederer*, 259 U. S. 557, 66 L. ed. 1061, noted: (1922) 22 COL. L. REV. 761. Stockholder may maintain suit to restrain a corporation from voluntarily paying a tax. *Brushaber v. Union Pac. Ry. Co.*, 240 U. S. 1, 60 L. ed. 493 (1916); *Stanton v. Baltic Mining Co.*, 240 U. S. 103, 60 L. ed. 493 (1916).

<sup>7</sup> *Hill v. Wallace*, 259 U. S. 44, 66 L. ed. 822 (1922); *Dodge v. Brady*, 240 U. S. 122, 60 L. ed. 560 (1916).

Illegality of the tax will not take a case out of the statute. *Snyder v. Marks*, 109 U. S. 189, 27 L. ed. 801 (1883); *Bailey v. George*, 259 U. S. 16, 60 L. ed. 818 (1922). On the same day that it refused an injunction in *Bailey v. George*, the court held in the *Child Labor Cases*, 259 U. S. 20, 66 L. ed. 818 (1922), that the "tax" in question was a penalty and unconstitutional, and a few days later it granted an injunction against the collection of a penalty! *Lipke v. Lederer*, *supra* note 6.

<sup>8</sup> Sec. 272 (a) Rev. Act 1928; 26 U. S. C. A. 1048. *Peerless Mills v. Rose*, 28 F. (2nd) 661 (C. C. A. 5th, 1928). See: (1926) 26 COL. L. REV. 493.

Many states, including North Carolina, by statute, permit tax injunctions but limit this relief to cases involving an illegal or invalid tax.<sup>9</sup> This does not mean, however, that the court will restrain a tax simply because it is irregular, erroneous or excessive.<sup>10</sup> An illegality resulting from the violation of some fundamental law is required.<sup>11</sup> Thus, relief was granted when the tax was levied under an unconstitutional statute,<sup>12</sup> when the tax was for an unlawful purpose,<sup>13</sup> and when the levy was vitiated by fraud.<sup>14</sup>

A systematic and intentional adoption of any principle of valuation contrary to the constitutional requirements of equality and uniformity is clearly discriminatory and is a basis for injunction.<sup>15</sup> Hence, relief has been granted when there was undervaluation of other taxable property in same class with complainant's;<sup>16</sup> where corporate holdings were assessed at full value according to law while valuation of non-corporate items were illegally fixed lower;<sup>17</sup> where different classes of property were assessed at different percentages

<sup>9</sup> N. C. Code (1927) 858, 7979; *Hunt v. Cooper*, 194 N. C. 265, 267, 139 S. E. 446 (1927); *Ry. v. Commissioners*, 188 N. C. 265, 266, 124 S. E. 560 (1924).

POMEROY, *supra* note 5, par. 1781, cases collected by states.

<sup>10</sup> *Wilson v. Green*, 135 N. C. 343, 47 S. E. 469 (1904); *McDonald v. Teague*, 119 N. C. 604, 26 S. E. 158 (1896); *City Ry. Co. v. Beard*, 293 F. 448 (S. D. Ohio, 1923); *Sou. Ry. v. Watts*, 260 U. S. 519, 67 L. ed. 375 (1923); *Fordson Coal Co. v. Moore*, 31 F. (2nd) 606 (E. D. Ky. 1929); *Chicago etc. Ry. v. Kendall*, 266 U. S. 94, 45 S. Ct. 55, 69 L. ed. 183 (1924).

<sup>11</sup> Tax assessed at higher rate than allowed by city charter may be enjoined. *Colquit etc. Co. v. Colquit*, 146 Ga. 519, 91 S. E. 555 (1917). But tax is not illegal because the sidewalks of the taxing municipality were not of width prescribed by charter. *Soniat v. White*, 155 La. 290, 99 So. 223 (1924). 37 Cyc. 1259.

<sup>12</sup> *Purnelle v. Page*, 133 N. C. 125, 45 S. E. 534 (1903), state tax on salary of Federal Judge; *Koonce v. Pierce Petroleum Corp.*, 3 S. W. (2d.) 9 (Ark. 1928), unauthorized franchise tax; *Greene v. Louisville etc. Co.*, 244 U. S. 499, 61 L. ed. 1280, Ann. Cas. 1917 E. 88 (1917).

<sup>13</sup> *Rigsbee v. Durham*, 94 N. C. 800 (1886); *Richardson v. Kildow*, 218 N. W. 429 (Neb. 1928), noted: (1928) 38 YALE L. J. 122; *Kan. City Sou. Ry. v. Hendricks*, 150 La. 134, 90 So. 545 (1922).

<sup>14</sup> *Johnson v. Wells Fargo & Co.*, 239 U. S. 234, 36 Sup. Ct. 62, 60 L. ed. 243, L. R. A. 1916 C. 522 (1915); *Raymond v. Traction Co.*, *supra* note 2; COOLEY, *supra* note 1, §1645.

<sup>15</sup> *Bohler v. Calloway*, 267 U. S. 479, 45 S. Ct. 431, 69 L. ed. 746 (1925); *Gammil Lumber Co. v. Board*, 274 Fed. 630 (S. D. Miss., 1921); *Elgin v. Hessen*, 282 Fed. 281 (D. C. Tenn., 1921); *Chicago etc. Ry. v. Eveland*, 13 F. (2nd) 442 (C. C. A. 8th, 1926); *G. W. Ry. v. Kendall*, 266 U. S. 94, 98, 45 S. Ct. 55, 57, 69 L. ed. 183 (1924).

<sup>16</sup> *Mayor et als. v. N. Y. Bay Ry. Co.*, 13 F. (2d) 982 (C. C. A. 3rd, 1926); *Bank of Ariz. v. Howe*, 293 Fed. 600 (D. C. Ariz., 1923); *Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350, 352, 38 S. Ct. 495, 62 L. ed. 1155 (1918).

<sup>17</sup> *Boonville Nat. Bank v. Schlotzhauer*, 298 S. W. 732, 55 A. L. R. 489 (Mo. 1927); *Magnolia Bank v. Bd. Supervisions*, 111 Miss. 857, 72 So. 697, 55 A. L. R. 1365 (1916).

of value, contrary to law;<sup>18</sup> and where complainant's property was so exorbitantly valued as to amount to spoliation.<sup>19</sup> However, there must be clear and convincing proof of intentional and systematic discrimination,<sup>20</sup> and injunctive relief has been refused when the assessment was due to error,<sup>21</sup> or to mistakes of judgment.<sup>22</sup>

Many cases involving injunction against discriminatory taxes are carried into the Federal Courts on the grounds of violation of the due process and equal protection clauses of the constitution.<sup>23</sup> Once having obtained jurisdiction, the power of the United States courts to grant equitable relief against an illegal state tax is limited only by the provision of the Judicial Code<sup>24</sup> concerning the adequacy of the remedy on the law side of the court.<sup>25</sup>

It is interesting in this connection to note that two recent Federal cases, one from North Carolina<sup>26</sup> and one from Ohio<sup>27</sup> apparently reach opposite results. In each case the complainant alleged that its own property had been assessed at, or above, its proper value while the property of others had been systematically and intentionally assessed at less than actual value. In both states, injunction against illegal tax is recognized by statute,<sup>28</sup> and in each an action at law may be brought for recovery of tax paid under protest.<sup>29</sup>

<sup>18</sup> *Chi. etc. Ry. v. Osborne*, 265 U. S. 14, 44 S. Ct. 431, 68 L. ed. 878 (1924); *Mobile & O. Ry. Co. v. Schnipper*, 31 F. (2d) 587 (E. D., Ill., 1929); *Chi. M. & St. P. Ry. v. Kendall*, 278 Fed. 298 (S. D. Iowa, 1921). But see (1910) 3 *Col. L. Rev.* 298.

<sup>19</sup> *Nevada-California Power Co. v. Hamilton*, 240 Fed. 485 (D. C. Nevada, 1917); *Sanford v. Roberts*, 193 Ky. 377, 236 S. W. 571 (1922); *City of Sweetwater v. Baird Devel. Co.*, 203 S. W. 801 (Tex. Civ. App. 1918).

<sup>20</sup> *Taylor v. L. & N. Ry. Co.*, 88 Fed. 350, 373 (C. C. A. 6th, 1898); *Louisville Trust Co. v. Stone*, 107 Fed. 305, 308 (C. C. A. 6th, 1901); *Chi. Ry. Co. v. Kendall*, 266 U. S. 94, 45 S. Ct. 55, 69 L. ed. 183 (1924). And as a necessary condition precedent to equitable relief, the complainant must pay the amount of the tax he would have to pay if the discrimination did not exist. *Raymond v. T. Co.*, *supra* note 2; *POMEROY*, *supra* note 5, §1784.

<sup>21</sup> *Siler v. Bd.*, 221 Ky. 100, 298 S. W. 189 (1927), noted: (1928) 16 *Ky. L. J.* 275.

<sup>22</sup> *Harrison v. Ry.*, 142 Ark. 118, 218 S. W. 208 (1920).

<sup>23</sup> See Powell, *Due Process Tests of State Taxation* (1926) 74 *U. PA. L. REV.* 423, 573.

<sup>24</sup> §267, 28 U. S. C. A. 384.

<sup>25</sup> Federal Courts in the exercise of equity jurisdiction not bound by state statute prohibiting tax injunction: *Standard Oil Co. v. Howe*, 257 Fed. 481 (C. C. A. 9th, 1919); *Ex parte Tyler*, 149 U. S. 164, 188, 37 L. ed. 689 (1893). <sup>26</sup> *Henrietta Mills Co. v. Rutherford County*, 32 F. (2d) 570 (C. C. A. 4th, 1929).

<sup>27</sup> *Conn v. Ringer*, 32 F. (2d.) 639 (C. C. A. 6th, 1929).

<sup>28</sup> North Carolina: N. C. Cons. Stat. Ann. (1919) §858; Ohio: Gen. Code §12075.

<sup>29</sup> North Carolina: N. C. Cons. Stat. Ann. (1919) §7979; Ohio: Gen. Code §12075.

*Held*: in the North Carolina case, adequate remedy at law, no relief; in the Ohio case, adequacy of the legal remedy doubtful, injunction granted.

The two cases are, however, distinguishable along these lines: (1) In the Ohio case, the complainants were trustees of a charitable trust, the disruption of whose functions perhaps affected the public interest sufficiently to counterbalance the state's interest in the certainty of collection of taxes; in the North Carolina case, the complainant was a manufacturing company. (2) In the Ohio case, the discrimination alleged was between real property assessments on the one hand and those of personal property on the other, each class concededly being treated uniformly within itself; in the North Carolina case, the allegation was that as to the same class of property, complainant was assessed at a figure in excess of its property's true value, while the assessed value of others' was fixed at 60 per cent of its true value. (3) In the Ohio case, the tax commission, at plaintiff's request alone, could not remedy the situation; in the North Carolina case, a similar administrative agency had actually lowered plaintiff's assessment somewhat. (4) The court in the Ohio case was not concerned with the adequacy of a suit to recover taxes paid under protest but with the efficacies of an untaken appeal to the tax commission to cause personal property to share its burden of taxes so as to prevent such burdensome taxes on realty; the court in the North Carolina case was wholly concerned with the adequacy, under the North Carolina statute, of a possible suit on the law side of the Federal Court to recover taxes to be paid under protest.

Even so, the view of the Federal Court in North Carolina seems unnecessarily restrictive. It felt that a Federal Court should be cautious about enjoining the collection of a state tax. The Ohio court expressed no such hesitancy, however, and, as the cases cited in the note<sup>30</sup> indicate, this caution has frequently yielded to the demands of meritorious facts. Moreover, the Federal law court, if and when it gets the case, will, if the allegations are found true, interfere by its judgment to as great an extent with the fiscal operations of the state. Perhaps, however, although the case was considered on the sufficiency of the allegations in the complaint, the

<sup>30</sup> Accord: *Cummings v. Nat. Bank*, 101 U. S. 153, 25 L. ed. 903 (1879); *Western Union v. Tax Com.*, 21 F. (2d) 355 (C. C. A. 6th, 1927); *Dawson v. Distilleries etc. Co.*, 255 U. S. 288, 65 L. ed. 638 (1920); *Gammil Lumber Co.*, *supra* note 15; *State Bd. v. Ry.*, 191 Ind. 282, 130 N. E. 691 (1921); *Paxton v. Ohio Fuel Co.*, 11 F. (2d) 740 (C. C. A. 6th, 1926).

court was unconsciously influenced by the fact that the District Court had expressly found that no discrimination of the sort alleged actually existed.

If discrimination between the assessment of real and personal property was enough in the Ohio case, is not the alleged discrimination between assessments of properties in the same class more deserving of equitable relief?<sup>31</sup> Moreover, the exception in the North Carolina statute, in favor of injunctive relief against illegal taxes, creates no greater right to that relief than exists in jurisdictions without any such statute.<sup>32</sup> The view that this statute, by virtue of that exception, operates to increase the remedies available in the Federal Equity Court and must therefore be ignored, is perhaps derived from the court's willingness to make the same statute, insofar as it authorizes suits to recover taxes paid under protest, the affirmative basis of a proceeding on the law side of the same tribunal.

Finally, even if a recovery at law of the difference between the tax on a legal assessment and the actual amount of the tax paid under protest, with interest, will theoretically make the complainant whole, and even if this decision would be *res judicata* as to subsequent levies pending the next quadrennial assessment (which might be doubted in view of the technical change in the issues and subject matter from year to year) the relief to be awarded at law can take no notice of the jeopardizing of the complainant's financial structure incident to the loss of those funds during the period of suit. A jury could not deal intelligently with the issue to be presented at law; a judge sitting alone will have to handle the task that a court consisting of three judges in the instant case refused to attempt. It is not believed that the remedy at law is adequate.

The North Carolina case is now before the Supreme Court of the United States on a writ of *certiorari*.

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#### TITLE TO CORPORATE PROPERTY UPON DISSOLUTION

*Smith v. Dicks*<sup>1</sup> presents a question as to property rights of stockholders where, without knowledge on the part of the corporate mem-

<sup>31</sup> See *Western Union Tel. Co. v. Tax. Com.*, *supra* note 30.

<sup>32</sup> See notes 1 to 5 *supra*. The court examined the state supreme court's construction of the statute and found it difficult to determine precisely when injunction against illegal taxes would be granted. It assumed, however, that the state court would have granted that relief in the case at bar. *Herietta Mills Co. v. Rutherford County*, *supra* note 26, at p. 573.

<sup>1</sup> 197 N. C. 355, 148 S. E. 463 (1929).