Taxation -- Exemption of State Governmental Instrumentalities from Federal Taxation

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not apply. This construction seems contrary to the intention of Congress, and it is an unreasonable and somewhat strained interpretation of the actual language of the statutes. It might lead to difficulties should the actual case for the taxation of the money itself be presented.

WILLIAM MEDFORD.

Taxation—Exemption of State Governmental Instrumentalities from Federal Taxation.

The plaintiff, a manufacturer of motorcycles in Massachusetts, sold one of its machines to a Massachusetts municipality for use in its police department. An excise tax was levied and collected from the plaintiff in conformity with Revenue Act, 1924, §600, which provides that there shall be paid upon motorcycles, etc., sold or leased by the manufacturer, producer, or importer a tax equivalent to five per cent of the price for which so sold or leased. The plaintiff sued to recover the amount of the tax. Held: The tax was on the sale alone and could not be upheld as it infringed the exemption of state governmental instrumentalities from federal taxation.

The instant case follows the language of a bare majority decision of the Supreme Court in Panhandle Oil Co. v. Mississippi, where a state excise tax levied on the distributor of gasoline, assessed on the number of gallons sold, was disallowed on a sale to a federal agency. In the intervening case of Wheeler Lumber Co. v. U. S., a united court upheld a tax on transportation charges for materials sold and shipped to state instrumentalities, on the ground that the tax was not on the materials or the sale but on a preliminary service rendered the seller. Decisions of a federal district court and of a state supreme court.

Congress, by these two acts, expressly provides for the exemption of this money from taxation. The money, in the hands of federal authorities, could not be assessed and taxed against an individual who has not received it. Therefore, this provision for tax exemption would seem superfluous in the light of the reasoning of the Kansas court.

Two cases have applied the provisions of the instant statute to money already paid the veteran. Payne v. Jordan, 152 Ga. 356, 110 S. E. 4 (1921) (money held by administrator exempt from claims of creditors of veteran); Wilson v. Sawyer, 177 Ark. 492, 6 S. W. (2d) 825 (1928), (sum paid to veteran not subject to garnishment proceedings).


court have upheld taxes on the sellers of a fire engine and gasoline, in the first case assessed on the price received, in the other on the number of gallons sold, and in each case involving a sale to governmental agencies, as being occupational excise taxes alone. The same tendency shown in all the above cases to uphold or disallow the taxes involved on the ground of verbal differences in the way the tax is imposed is recognizable in cases involving franchise taxes.

However, sporadic references to two fundamental conceptions, although surrounded by discussions of the verbal variations of the cases involved, lead to the conclusion that the real issue in each case is between an absolute rule that the principle of exemption is not affected by the extent of the resulting interference and the degree rule that immunity is given only from taxes that directly and substantially interfere with the efficient exercise of governmental functions. The degree-rule is to be preferred because the absolute-rule by its own inclusiveness overrules all taxes imposing even a remote interference, whereas the degree rule sets up a flexible standard, similar to that of the "reasonable man" test in negligence issues, under which the court may fully consider the factual situations and the economic consequences involved in such a tax. But no decision is based solely upon either rule. Only in some dissenting opinions, as of Justice Holmes in the Panhandle Oil case and of Justice Stone in the principal case is the fundamental issue clearly shown.


(1931) 9 N. C. L. Rev. 475, 477.

There is no expressed constitutional guarantee of mutual immunity of federal and state governmental instrumentalities from taxation, but the rule was implied to preserve our dual system of government. Collector v. Day, 11 Wall. 113, 125, 20 L. ed. 122 (1871). The absolute rule, regardless of resulting burdensome effect, following the "power to tax is the power to destroy" theory, was announced in McCulloch v. Maryland, 4 Wheat. 316, 430, 21 L. ed. 787, 793 (1819). It has been quoted in many cases, as in the principal case, supra note 2, at 575, 51 Sup. Ct. at 603.


Supra note 3, at 225. "The power to tax is not the power to destroy while this court sits. . . . The question of interference with government, I repeat, is
A recent decision involving the same fundamental problem was hailed as ushering in the erstwhile dissenters as a majority prone to consider somewhat expressly the actualities of the alleged interference. The present reversion to the technique of finding "verbal distinction, unfounded in economic realities" in the manner in which different taxes are levied is sharply challenged by the frank, forceful dissenting opinion.

TRAVIS BROWN.

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one of reasonableness and degree and it seems to me that the interference in this case is too remote."

12 Supra note 2, at 604.
13 Educational Films Corp. v. Ward, supra note 9.
14 Justice Stone's dissent, Justice Brandeis concurring, in principal case, supra note 2, at 605, "Even if verbal distinctions, unfounded in economic realities, must be made between the two cases (Panhandle Oil Co. and the principal case) so that both may stand as authoritative expositions of the constitution, considerations of substance rather than of form should lead us to choose that one which would restrict the doctrine of the Panhandle Oil case to the tax imposed in unqualified terms on sales to which it was applied in that case."