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## Taxation—State Occupation Tax—Validity of Imposition on Contractor with Federal Government

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TAXATION—STATE OCCUPATION TAX—VALIDITY OF IMPOSITION ON CONTRACTOR WITH FEDERAL GOVERNMENT—[United States].—A Pennsylvania corporation, admitted to do business in West Virginia, entered into four contracts with the United States for the construction of dams and locks in navigable streams in West Virginia. The latter state assessed a tax of two percent upon the gross amounts received from these contracts. This was in addition to other state taxes on the corporation, such as a license tax on foreign corporations and ad valorem taxes on real and personal property. In a suit brought by the contractor to restrain collection, *held*, that the tax was valid.<sup>1</sup>

The constitutional abracadabra on tax exemptions is that the means employed by the national and state governments to carry into operation their respective powers are exempt from taxation by the states and national government respectively.<sup>2</sup> This has been followed with relative rigidity in cases involving oil or mining leases of Indian lands,<sup>3</sup> securities and bonds issued by the respective governments,<sup>4</sup> and taxes on sales made directly to the government.<sup>5</sup>

The formalized approach adopted above, however, has frequently been abandoned by the court in favor of a particularistic analysis. A tax has been upheld, for example, where the court could find that the property of the instrumentality or agent was the subject of the tax,<sup>6</sup> or where the tax

1. *James v. Dravo Contracting Company* (1937) 82 L. ed. (adv. op.) 125. This is the first case involving a tax on the gross amount of contract in which the Supreme Court has rendered an opinion. In *Solitt & Sons Construction Co. v. Commissioner* (1934) 161 Va. 854, 172 S. E. 290, 91 A. L. R. 774, a state statute imposing a license tax for the privilege of transacting business within the state as a contractor was upheld even where it involved taxing one whose sole business within the state was the performance of a contract for the erection of a post-office. The license tax was \$250, being based on the gross amount of contracts for the year. Appeal was dismissed by the United States Supreme Court for want of a substantial federal question (1934) 292 U. S. 599, 54 S. Ct. 632, 78 L. ed. 1463.

2. *Collector v. Day* (1871) 11 Wall. 113, 20 L. ed. 122.

3. *Jaybird Mining Company v. Weir* (1926) 271 U. S. 609, 46 S. Ct. 592, 70 L. ed. 1112; *Indian Territory Illuminating Oil Company v. Oklahoma* (1916) 240 U. S. 522, 36 S. Ct. 453, 60 L. ed. 779; *Burnett v. Coronado Oil and Gas Company* (1931) 285 U. S. 393, 52 S. Ct. 443, 76 L. ed. 815; *Gillespie v. Oklahoma* (1921) 257 U. S. 501, 42 S. Ct. 171, 66 L. ed. 338; *Choctaw, Oklahoma, and Gulf R. R. v. Harrison* (1914) 235 U. S. 292, 35 S. Ct. 27, 59 L. ed. 234; cf. *Group Number One Oil Corp. v. Bass* (1930) 283 U. S. 279, 51 S. Ct. 432, 75 L. ed. 1032; *Indian Territory Illuminating Oil Co. v. Board of Equalization* (1933) 288 U. S. 325, 53 S. Ct. 388, 77 L. ed. 812; *Burnett v. Jergins Trust* (1932) 288 U. S. 508, 53 S. Ct. 439, 77 L. ed. 925.

4. *Weston v. City of Charleston* (1829) 2 Pet. 448; cf. *Wilcutts v. Bunn* (1931) 282 U. S. 216, 51 S. Ct. 125, 75 L. ed. 304.

5. *Indian Motorcycle Co. v. United States* (1931) 283 U. S. 570, 51 S. Ct. 601, 75 L. ed. 1277; *Panhandle Oil Co. v. Mississippi* (1928) 277 U. S. 218, 48 S. Ct. 451, 72 L. ed. 857.

6. *Baltimore Shipbuilding Co. v. Baltimore* (1904) 195 U. S. 375, 382, 25 S. Ct. 50, 52, 49 L. ed. 242, 245; *Thompson v. Union Pacific R. R. Co.* (1870) 9 Wall. 579, 19 L. ed. 792; *Union Pacific R. R. Co. v. Peniston*

was on the net income of an independent contractor.<sup>7</sup> But in all cases, the requirement has been, that the tax be non-discriminatory, that it not be aimed at the instrumentality as such.<sup>8</sup>

The instant case upholds a tax on *gross* income. The majority opinion admits that the validity of such a tax on objects of interstate commerce would be questionable, but states that such a comparison is of no merit here.<sup>9</sup> The rationale of the court is that the tax is not on a government contract, but that it is rather like a tax on property. It is to be remembered that taxes on property were usually said to exist when the tax imposed was in lieu of all other taxes, which is not true in the principal case.<sup>10</sup> The uncertain boundary line between the concepts of contract and of property may render this distinction tenuous and unsatisfactory. It is not altogether clear whether the confusion inheres in the subject matter or merely in the decisions, but it is to be regretted that it should exist.

Nevertheless, whatever inconsistencies may appear, it is submitted that the principal case is sound. There is no good reason why the federal government should stand in a preferred position to the individual when it engages in business as would an individual.<sup>11</sup>

F. S.

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(1874) 18 Wall. 5, 21 L. ed. 787; *Central Pacific R. R. Co. v. California* (1896) 162 U. S. 91, 16 S. Ct. 766, 40 L. ed. 903; *Thomas v. Gay* (1898) 169 U. S. 264, 18 S. Ct. 340, 42 L. ed. 740; *Alward v. Johnson* (1931) 282 U. S. 509, 51 S. Ct. 273, 75 L. ed. 496.

7. *Metcalfe and Eddy v. Mitchell* (1925) 269 U. S. 514, 46 S. Ct. 172, 70 L. ed. 384; *General Construction Co. v. Fisher* (1934) 149 Ore. 84, 39 P. (2d) 358, petition for rehearing denied (1935) 295 U. S. 768, 55 S. Ct. 828, 79 L. ed. 1709; *Roberts v. Commissioner of Internal Revenue* (1928) 13 B. T. A. 438, petition denied per curiam (C. C. A. 5, 1930) 44 F. (2d) 168; *Lucas v. Reed* (1930) 281 U. S. 699, 50 S. Ct. 352, 74 L. ed. 1125; cf. *Fidelity and Deposit Co. of Maryland v. Pennsylvania* (1916) 240 U. S. 319, 36 S. Ct. 298, 60 L. ed. 664; *Trinityfarm Construction Co. v. Grosjean* (1934) 291 U. S. 467, 54 S. Ct. 469, 78 L. ed. 918; *Graves v. Texas Co.* (1936) 298 U. S. 393, 56 S. Ct. 818, 80 L. ed. 1236; *Liggett and Myers Co. v. United States* (1936) 299 U. S. 383, 57 S. Ct. 239, 81 L. ed. 294.

8. *McCulloch v. Maryland* (1819) 4 Wheat. 316, 4 L. ed. 579.

9. Cf. *Gillespie v. Oklahoma* (1921) 257 U. S. 501, 42 S. Ct. 171, 66 L. ed. 338.

10. *Alward v. Johnson* (1931) 282 U. S. 509, 51 S. Ct. 273, 75 L. ed. 496.

11. To quote the dissenting opinion of Mr. Justice Holmes in *Panhandle Oil Company v. Mississippi* (1928) 277 U. S. 218, 48 S. Ct. 451, 72 L. ed. 857, 56 A. L. R. 583: "When the government comes into a state to purchase, I do not perceive why it should be entitled to stand any differently from any other purchaser. It avails itself of the machinery furnished by the state and I do not see why it should not contribute in the same proportion that every other purchaser contributes for the privileges it uses. I am not aware that the President, the Members of Congress, the Judiciary, or \* \* \* the Coast Guard, because they are instrumentalities of the federal government and cannot function naked and unfed, hitherto have been held entitled to have their bills for food and clothing cut down so far as their butchers and tailors have been taxed on their sales; and I had not supposed that the butchers and tailors could omit from their tax returns all receipts from the large class of customers to which I have referred."