

## Constitutional Law - Due Process - Chain Store Taxation

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versy presented is, as in this case real and substantial." *Fidelity Nat'l. Bank & Trust Co. v. Swope*, supra.

In entertaining this case, the court takes care to distinguish it from *Gordon v. United States*, 2 Wall. 561, 17 L.Ed. 921 (1865), and *Postum Cereal Co. v. California Fig Nut Co.*, 272 U.S. 693, 47 Sup. Ct. 284, 71 L.Ed. 478 (1927), where the adjudication was subject to revision by some other and more authoritative agency; *Muskrat v. United States*, 219 U.S. 361, 31 Sup. Ct. 250, 55 L.Ed. 246 (1911), where an attempt was made to secure an abstract determination by the court of the validity of a statute; or where an attempt was made to obtain advice on what the law would be on an uncertain or hypothetical state of facts, as in *Liberty Wholesale Co. v. Grannis*, 273 U.S. 70, 47 Sup. Ct. 282, 71 L.Ed. 541 (1927), and *Welling v. Chicago Auditorium Ass'n.*, 277 U.S. 274, 48 Sup. Ct. 507, 72 L.Ed. 880 (1928). The Supreme Court was interested not in form, but in substance, and showed that the difference between the case reviewed and the above cases, was the substance of the matter which was the subject of the proceeding—that in one, a case or controversy existed; and in the others, the subject matter failed to present a case or controversy, but merely asked for an opinion.

Wisconsin has long been a believer in Declaratory Judgments. At present there are two statutes on this subject, section 269.01, Wis. Stats., the "agreed case," and section 269.56, Wis. Stats., the Uniform Act. From an early date Wisconsin has, in effect, granted declaratory relief, even though no express statutory authority existed. *Milwaukee Electric Rwy. and Light Co. v. Bradley*, 108 Wis. 467, 84 N.W. 870 (1901); *Johnson v. City of Milwaukee*, 88 Wis. 383, 60 N.W. 270 (1894); *Schlitz Brewing Co. v. Superior*, 117 Wis. 297, 93 N.W. 1120 (1903). Considering this, it is not surprising that Wisconsin should be among the first to make statutory provision for declaratory judgments. In Wisconsin and other states of the Union where Declaratory Judgment Acts exist, the decision of the Supreme Court will be welcomed, as resolving doubts which have heretofore existed. With this definite pronouncement by the United States Supreme Court on the matter, it is hoped that the Declaratory Judgments Act will take its place with the Uniform Sales Act, the Negotiable Instruments Law, and similar measures, in states throughout the Union.

ARNO J. MILLER.

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CONSTITUTIONAL LAW—DUE PROCESS—CHAIN STORE TAXATION.—Action to enjoin tax officials from enforcing Florida's Anti-Chain Store Act, which provided for an increase in the tax per store with the increase in the number of stores and also with the spread of stores into different counties. The act expressly excluded gasoline filling stations. The state court found that the act was constitutional and dismissed the bill. Appeal to the United States Supreme Court. *Held*, judgment reversed. The increase in the tax, if the owner's stores are located in more than one county, is unreasonable and arbitrary and a violation of the guaranties of the Fourteenth Amendment of the Federal Constitution. *Liggett Co. v. Lee*, 53 Sup. Ct. 481, 77 L.Ed. 553 (1933); (Fla. 1932) 141 So. 153.

A Wisconsin Statute, sec. 5 of Chapt. 29, Laws of the Special Session of 1931, which provided for a tax on chains of two or more stores or mercantile establishments was considered constitutional by the Wisconsin court. Despite the fact that the act did not expressly except gasoline filling stations, the court was of the opinion that according to the common and approved usage, the

term "store" or "mercantile establishment" has never been applied to a gasoline filling station. *Wadhams Oil Co. v. State*, (Wis. 1933) 245 N.W. 646; on rehearing, 246 N.W. 687. In the instant case it was argued that to exclude gasoline filling stations was undue discrimination, but the United States court, like the Wisconsin court, held that since the operation of gasoline filling stations was already taxed, besides the fact that such establishments were not generally considered stores, it was proper to exempt them. It has long been settled that the Fourteenth Amendment does not prevent a state from imposing an excise tax upon different trades and professions or from varying the rates upon various products. *Bell's Gap R. R. Co. v. Pennsylvania*, 134 U.S. 232, 10 Sup. Ct. 533, 33 L.Ed. 892 (1887); *Southwestern Oil Co. v. Texas*, 217 U.S. 114, 30 Sup. Ct. 496, 54 L.Ed. 688 (1909).

Other courts have already upheld the idea that various chain store taxes were discriminatory on an unsound differentiation. A North Carolina statute which imposed a tax on all chains of six or more stores was declared unconstitutional, since the court could see no reason why upon the establishment of a sixth store all stores of the particular chain should be taxed, whereas otherwise the five or less stores remained un-taxed. *Great Atlantic & Pacific Tea Co. v. Doughton*, 196 N.C. 145, 144 S.E. 701 (1928). Likewise a tax imposed on five or more stores has been held unconstitutional as arbitrary and unreasonable. *F. W. Woolworth Co. v. Harrison*, (Ga. 1931) 156 S.E. 904. The court in the instant case was of a different opinion, claiming "the addition of a store to an existing chain is a privilege, and an increase of the tax on all stores for the privilege of expanding the chain cannot be condemned as arbitrary." We can conclude therefore that the United States court would not have set aside the above-mentioned acts. A North Carolina statute imposing a tax upon two or more stores was considered discrimination upon a rational basis and therefore valid. *Great Atlantic & Pacific Tea Co. v. Maxwell*, 284 U.S. 575, 52 Sup. Ct. 128, 76 L.Ed. 32 (1931); 199 N.C. 443, 154 S.E. 838 (1930); 1 Geo. Wash. U. Law Rev. 129 (1932). No reason can be discovered for the difference in the holdings in the above-mentioned cases.

The court in the instant case maintained that an "increase in the levy not only on a new store but on all the old stores, consequent upon the mere physical fact that the new one lies a few feet over a county line" is arbitrary and finds no foundation in reason or in any fact of business experience. License fees based on discriminations between businesses in municipalities and outside of them have been deemed unconstitutional. *State v. Osborne*, 171 Ia. 678, 154 N.W. 294 (1915); *Hager v. Walker*, 128 Ky. 1, 107 S.W. 254 (1908); 46 Harv. Law Rev. 155 (1932). But see *Toyato v. Territory of Hawaii*, 226 U.S. 184, 33 Sup. Ct. 47, 57 L.Ed. 180 (1912). Upon the fact, therefore, that the court could see no taxable advantages in having stores in several counties, rather than merely one, the entire law fell.

It must be conceded, as is maintained in the dissenting opinion, despite statements to the contrary by the majority, that the real basis for the tax is regulation as much as revenue. It has been considered valid for a tax both to regulate business and produce revenue. *Bradley v. City of Richmond*, 227 U.S. 477, 33 Sup. Ct. 318, 57 L.Ed. 603 (1912). There can be no doubt that greater liberality is allowed in regulatory taxes than in revenue taxes, for it is the duty of the legislature to discern and correct evils which are obstacles to a greater public welfare, and to obtain such a result by taxation involves a wider scope of authority. *Rast v. Van Daman & Lewis Co.*, 240 U.S. 342, 36 Sup. Ct. 370, 60 L.Ed. 679 (1915). The mere fact that the tax operates to suppress the business

taxed will not render the act unconstitutional. *Liggett Co. v. Amos*, (Fla. 1932) 141 So. 153; *Hiers v. Mitchell*, 95 Fla. 345, 116 So. 81 (1928). In order to eliminate the premium system in merchandising, high license fees were upheld for merchants offering trading stamps with their goods. *Rast v. Van Deman & Lewis Co.*, supra. "Taxation is regulation just as prohibition is." *Compania General De Tabacos v. Collector*, 275 U.S. 87, 48 Sup. Ct. 100, 72 L.Ed. 177 (1927).

The fact that a statute discriminates in favor of a certain class does not make it arbitrary if the discrimination is founded upon a reasonable distinction. *State Board of Tax Commissioners v. Jackson*, 283 U.S. 527, 51 Sup. Ct. 540, 75 L.Ed. 1248 (1930); *American Sugar Refining Co. v. Louisiana*, 179 U.S. 89, 21 Sup. Ct. 43, 45 L.Ed. 102 (1900); or if any state of facts can reasonably be conceived to sustain it. *State Board of Tax Commissioners v. Jackson*, supra; *Rast v. Van Deman & Lewis Co.*, supra. However, all persons similarly circumstanced shall be treated alike. *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 48 Sup. Ct. 423, 72 L.Ed. 770 (1927). But if the distinctions are genuine, the courts cannot declare them void, although they may consider them not on a sound basis. *Liggett Co. v. Amos*, supra; *Seabolt v. Commissioners of Northumberland County*, 187 Pa. 318, 41 A. 22 (1898); *Commonwealth v. Randall*, 225 Pa. 197, 73 A. 1109 (1909). It is the power of the legislature to classify; and the power and duty of the court to determine whether that classification is arbitrary and unreasonable in the light of the constitutional guaranties and not to determine whether that classification is a sound and rational policy. The presumption of constitutionality should really prevail in the absence of positive foundation on the record for overthrowing the statute. Cf. *O'Gorman & Young, Inc. v. Hartford Fire Insurance Co.*, 282 U.S. 251, 51 Sup. Ct. 130, 75 L.Ed. 324 (1930); *Lawrence v. State Tax Commission*, 286 U.S. 276, 52 Sup. Ct. 556, 76 L.Ed. 1102 (1931).

That there is a reasonable distinction between one individual store and a chain of stores under one management has already been recognized. *State Board of Tax Commissioners v. Jackson*, supra. The court in the *Jackson* case considered the differences to consist "not merely in ownership, but in organization, management, and type of business transacted." It was also the opinion of the court in the *Jackson* case that the statute graduating the tax according to the number of stores was based on a fair discrimination because the statute "treats upon a similar basis all owners of chain stores similarly situated." The state therefore has the right to promote individual proprietorship of single stores by adjusting its revenue levied so as to favor them. *State Board of Tax Commissioners v. Jackson*, supra; *Great Atlantic & Pacific Tea Co. v. Maxwell*, supra. See *Quong Wing v. Kirkendall*, 223 U.S. 59, 32 Sup. Ct. 192, 56 L.Ed. 350 (1911); *Metropolis Theater Co. v. Chicago*, 228 U.S. 61, 33 Sup. Ct. 441, 57 L.Ed. 730 (1912); *Alaska Fish Salting & By-Products Co. v. Smith*, 255 U.S. 44, 41 Sup. Ct. 219, 65 L.Ed. 489 (1920); *W. W. Cargill Co. v. Minnesota*, 180 U.S. 452, 21 Sup. Ct. 423, 45 L.Ed. 619 (1900). Yet the same court which decided the *Jackson* case, now refuses to recognize in the instant case that the Florida statute treats upon a similar basis all owners of chain stores similarly situated.

The dissenting opinion of the instant case was based on the theory that the object of the tax was the regulation of the corporate chain store, since it is to be "considered as a thing menacing the public welfare." Justice Brandeis maintained that since the State has the right to grant or withhold the corporate privilege, it might either revoke that privilege or exact high discriminatory license fees as compensation for that privilege. The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same,

whether conducted by individuals or corporations; but the tax is laid on the privilege of conducting business with the advantages which inhere in the corporate capacity of those taxed. *Flint v. Stone-Tracy Co.*, 220 U.S. 108, 31 Sup. Ct. 342, 55 L.Ed. 389 (1910). But corporations are as much entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment as are natural persons. *Southern R. Co. v. Greene*, 216 U.S. 400, 30 Sup. Ct. 287, 54 L.Ed. 536, 17 Ann. Cas. 1247 (1909); *Kentucky Finance Corp. v. Paramount Auto Exchange*, 262 U.S. 544, 43 Sup. Ct. 636, 67 L.Ed. 1112 (1922); *Power Mfg. Co. v. Saunders*, 274 U.S. 490, 47 Sup. Ct. 678, 71 L.Ed. 1165 (1926).

In the majority's opinion this case fell within that class of cases which is obnoxious to the constitutional guaranty of the equal protection of the laws, since it is a clear and hostile discrimination against a particular class. It is reasonable to assume, however, that the trend is to recognize a greater liberality in the power of the legislature to tax chain stores where they are considered public evils, as evidenced by the admission in the majority opinion that a tax merely based on the number of stores is fair and reasonable.

RALPH J. PODELL.

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CONSTITUTIONAL LAW—DUE PROCESS—DOUBLE TAXATION.—The deceased was a subject of Great Britain, a resident of Cuba, and at the time of his death he owned certain stocks and bonds of both domestic and foreign corporations which were on deposit in the United States. None of these securities was pledged for indebtedness, nor were they used in business here. The Board of Tax Appeals decided that the securities were not subject to the inheritance tax provided by the Revenue Act of 1924 (26 U.S.C.A., sec. 1092-96), and the decision was affirmed by the Circuit Court of Appeals, 60 F. (2) 890. *Held*, on certiorari, judgment reversed. There were two questions involved: (1) Were the securities taxable under the Revenue Act of 1924? (2) Did Congress have the power to levy such a tax in view of the "due process" clause of the Fifth Amendment of the Federal Constitution? Both questions were answered in the affirmative, but only the second will be considered in this article. *Burnet v. Brooks*, 53 Sup. Ct. 457 (1933).

The jurisdiction of a state to tax is limited by the "due process" clause of the Fourteenth Amendment of the Federal Constitution; in the case of tangible property, *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194 (1905) (property tax); *Frick v. Pennsylvania*, 268 U.S. 473 (1925) (succession tax), and the rule has recently been extended to succession taxes of intangible property. *Farmer's Loan & Trust Co. v. Minnesota*, 280 U.S. 204 (1930); *Baldwin v. Missouri*, 281 U.S. 586 (1930); *Beidler v. South Carolina Tax Commission*, 282 U.S. 1 (1930); *First National Bank of Boston v. Maine*, 284 U.S. 312 (1932). However, it has been held that there is no similar limitation in the "due process" clause of the Fifth Amendment which would restrict or limit the jurisdiction of the Federal Government to tax, even though the wording of the "due process" clause is identical in each Amendment. *United States v. Bennett*, 232 U.S. 299 (1914) (property tax); *Cook v. Tait*, 265 U.S. 47 (1924) (tax on the income from tangible property situated in a foreign country); and in the instant case this interpretation is extended to a succession tax of intangibles.

It is not so difficult to determine which state has jurisdiction to tax tangible property, for such property often acquires a permanent situs, in which case it