

Constitutional Law - Intergovernmental Immunity from Taxation - State Income Tax on Salary of Employee of Federal Instrumentality

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mission, but in order to avoid the pitfalls occasioned by the instant decision it should contain a complete record of the proceedings showing why each individual was selected or rejected.²⁴

W. J. B.

CONSTITUTIONAL LAW—INTERGOVERNMENTAL IMMUNITY FROM TAXATION—STATE INCOME TAX ON SALARY OF EMPLOYEE OF FEDERAL INSTRUMENTALITY—The relator paid under protest a state income tax on his salary earned as an attorney for the Home Owners' Loan Corporation which is an instrumentality of the federal government. He thereupon sued for refund of the tax on the familiar ground that state taxation of the salary of a federal employee is unconstitutional. The state court allowed the refund, but on certiorari to the Supreme Court of the United States it was held, that the tax was constitutional. *Graves v. New York ex rel. O'Keefe*, 59 S.Ct. 595, 83 L.Ed. 577 (1939).

The Court pointed out that since the United States is a government of delegated powers all its acts in the exercise of such powers are governmental. Therefore, the inquiry as to whether action is governmental or proprietary has no application to the federal government. Moreover, taxation of the salaries paid to officers or employees, whether of the state or nation, is merely the normal incident of the organization within the same territory of two governments and does not place an unconstitutional burden on either.

The present decision, together with that rendered in *Helvering v. Gerhardt*,¹ apparently completes the destruction of the reciprocal immunity of state and federal officers and employees from non-discriminatory income taxes on their salaries.² The flat ruling that the burden placed upon the government by such a tax is remote, speculative and uncertain³ obliterated any distinction

24. *State v. Green*, 43 La. Ann. 402, 9 So. 42 (1891); *State v. Love*, 106 La. 658, 31 So. 289 (1902); *State v. Gremillion*, 137 La. 291, 68 So. 615 (1915).

1. 304 U.S. 405, 58 S.Ct. 969, 82 L.Ed. 1427 (1938), noted in (1938) 1 LOUISIANA LAW REVIEW 224.

2. The very recent case of *O'Malley v. Woodrough*, 6 U.S. Law Week 1356 (1939), by holding that the salary of a federal judge was subject to the federal income tax, gave added impetus to the trend which favors making all income subject to non-discriminatory taxation. In reaching its decision the court expressly overruled *Miles v. Graham*, 268 U.S. 501, 45 S.Ct. 601, 69 L.Ed. 1067 (1925) and apparently destroyed the force of the famous decision of *Evans v. Gore*, 253 U.S. 245, 40 S.Ct. 550, 64 L.Ed. 887 (1920).

3. *Helvering v. Gerhardt*, 304 U.S. 405, 58 S.Ct. 969, 82 L.Ed. 1427 (1938), noted in (1938) 1 LOUISIANA LAW REVIEW 224.

in that regard between federal and state immunity.⁴ To be consistent, the Court was forced to overrule expressly the celebrated and long standing case of *Collector v. Day*⁵ as well as a case decided no longer than twenty-six months ago, *New York ex rel. Rogers v. Graves*.⁶

Since the exemption of salaries from income taxation has been one of the principal forms which the doctrine of intergovernmental immunity has taken, the decisions rendered in the *Gerhardt* case and in the instant *O'Keefe* case makes serious inroads into that much maligned doctrine.⁷ Built on Marshall's famous statement that "the power to tax involves the power to destroy"⁸ and the theory that the immunities were reciprocal,⁹ the doctrine of immunity "is a striking illustration of an occasional tendency to encrust unwarranted interpretations upon the Constitution."¹⁰ One of the most serious practical results of this doctrine has been the withdrawal of a considerable portion of the country's wealth from the taxing powers of the state and federal governments.¹¹ Attacked at its very inception¹² and subjected to increasingly strong dissenting opinions,¹³ the doctrine seems finally to be giving way to financial needs of the governments and to a more penetrating analysis of the legal conceptions which underlie intergovernmental tax immunity.

President Roosevelt in his message of April 25, 1938, recommended that Congress enact legislation which would authorize

4. By its decision, the Court did away with the necessity for making the troublesome classification of a governmental instrumentality as proprietary in order to refuse immunity. See Black, concurring in *Helvering v. Gerhardt*, 304 U.S. 405, 424, 58 S.Ct. 969, 82 L.Ed. 1427 (1938).

5. 78 U.S. 113, 20 L.Ed. 122 (1871).

6. 299 U.S. 401, 57 S.Ct. 269, 81 L.Ed. 306 (1937).

7. Boudin, *The Taxation of Governmental Instrumentalities* (1933) 22 *Geo. L. J.* 1, 254; Lowndes, *Taxing the Income from Tax-exempt Securities* (1938) 32 *Ill. L. Rev.* 643.

8. *M'Culloch v. Maryland*, 17 U.S. 316, 431, 4 L.Ed. 579 (1819).

9. *Collector v. Day*, 78 U.S. 113, 20 L.Ed. 122 (1871).

10. Mr. Justice Frankfurter, concurring in *Graves v. New York ex rel. O'Keefe*, 59 S.Ct. 595, 83 L.Ed. 577 (1939).

11. *South Carolina v. United States*, 199 U.S. 437, 26 S.Ct. 110, 50 L.Ed. 261 (1905). Cf. Boudin, *supra* note 7, and Lowndes, *supra* note 7.

12. Mr. Justice Bradley, dissenting in *Collector v. Day*, 78 U.S. 113, 128, 20 L.Ed. 122 (1871).

13. "The power to tax is not the power to destroy while this Court sits." Mr. Justice Holmes, dissenting in *Panhandle Oil Co. v. Mississippi*, 277 U.S. 218, 223, 48 S.Ct. 451, 72 L.Ed. 857 (1928); Mr. Justice Brandeis, dissenting in *Jaybird Mining Co. v. Weir*, 271 U.S. 609, 615, 46 S.Ct. 592, 70 L.Ed. 1112 (1926); Mr. Justice Stone, dissenting in *Indian Motorcycle Co. v. United States*, 283 U.S. 570, 580, 51 S.Ct. 601, 75 L.Ed. 1277 (1931); Mr. Justice Roberts, dissenting in *Brush v. Commissioner of Internal Revenue*, 300 U.S. 352, 374, 57 S.Ct. 495, 81 L.Ed. 691 (1937). See also Mr. Justice Black, concurring in *Helvering v. Gerhardt*, 304 U.S. 405, 424, 58 S.Ct. 969, 82 L.Ed. 1427 (1938).

state and federal governments to tax reciprocally income received either as governmental salary or as interest on governmental obligations. The instant case seems to remove any doubt of the constitutionality of this legislation as applied to salaries. In fact, however, it is notorious that the federal government anticipates comparatively little revenue from this source.¹⁴ Since Congress can withdraw the immunity of federal securities,¹⁵ the main battle over such legislation will concern federal taxation of income derived from state securities. The *Gerhardt* case and the present *O'Keefe* case are merely preliminary skirmishes; they indicate a trend in favor of the tax-collector. Recognition of this trend is expressed by Mr. Justice McReynolds, dissenting from the majority opinion in the instant case: ". . . safely it may be said that presently marked for destruction is the doctrine of reciprocal immunity that by recent decisions here has been so much impaired."¹⁶

F. S. C., Jr.

CONSTITUTIONAL LAW—STATE REGULATION OF BUSINESS—THEATERS—In order to aid independent exhibitors of motion pictures, North Dakota enacted a statute¹ designed to prohibit the operation of motion picture theaters "owned, managed or operated in whole or in part, by any producer or distributor of motion picture films or in which any such producer or distributor has any interest, direct or indirect, legal or equitable, through stock ownership or otherwise."² The plaintiffs were producers and distributors of films and through a subsidiary corporation they owned ten theaters in the state. In a suit to enjoin the enforcement of the act it was *held*, (1) that the act does not violate the Fourteenth Amendment as its policy bears a reasonable relation to a proper public purpose; it is not palpably in excess of legislative power, and the means provided for enforcement of the policy declared by the act are neither arbitrary nor unreasonable; (2) that since the act relates only to the operation of motion picture

14. Government experts estimate that the revenue from federal income tax on 2,600,000 state and municipal employees will be \$16,000,000. The taxes to be paid by the 1,200,000 government workers will depend on state taxation. Wood, High Court Permits Taxes on Salaries, State and Federal, N.Y. Times, March 28, 1939, p. 1, col. 1.

15. *Van Allen v. The Assessors*, 70 U.S. 573, 18 L.Ed. 229 (1866).

16. 59 S.Ct. 595, 604, 83 L.Ed. 577 (1939).

1. N.D. Laws 1937, c. 165.

2. *Id.* at § 3.