**Louisiana Law Review**

Volume 17 | Number 2
*The Work of the Louisiana Supreme Court for the 1955-1956 Term*
*February 1957*

# Public Law: States and Local Taxation

Charles A. Reynard

of the Commission. The wisdom of the decision is demonstrated when one reflects upon the delaying tactics possible if a full board was deemed necessary for organization and where, as here, two members were to be nominated by the industry and appointed by the Governor: the possibility of delay is present even though, failing industry nomination, the Governor has the power to appoint since there must presumably be at least an attempt to obtain nominations before such appointments.

## STATE AND LOCAL TAXATION

*Charles A. Reynard**

Four of the cases decided during the past term were concerned with varying aspects of state and local taxation.

The most significant of these cases by far was *Fontenot v. John I. Hay Company*,[1] a summary proceeding by the State Collector of Revenue to collect income taxes on that portion of the taxpayer's net income attributable to business performed in Louisiana. The taxpayer, a Delaware corporation, licensed to do business in Delaware and Illinois, but not in Louisiana, operated as a common carrier by water, transporting cargoes over the Mississippi, Ohio, and Tennessee Rivers, as well as the Intracoastal Waterway through Louisiana and Texas. Although it maintained an office and employed persons in Louisiana, the taxpayer did no intrastate business in the state. Its activities here consisted of transporting cargoes through the state, delivering cargoes here that originated outside the state or picking up cargoes in Louisiana for out of state delivery. The Collector sought payment of income taxes on that portion of the corporation's net income apportioned to Louisiana in accordance with the formula prescribed by the act. The taxpayer conceded that the apportionment was correct, but contended that Louisiana had no constitutional authority to impose its tax because of the limitations of the commerce clause in the Federal Constitution.

The litigation came as no surprise, since a number of foreign corporations in comparable situations had been asserting immunity to state taxation of apportioned net income since the 1951 decision of the United States Supreme Court in *Spector Motor*

* Professor of Law, Louisiana State University.
1. 228 La. 1031, 84 So.2d 810 (1955).

*Service, Inc. v. O'Connor.*[2] The Court, in that case, had held that Connecticut was forbidden by the commerce clause to impose a franchise tax measured by apportioned net income upon a foreign corporation for the right to engage in business within her borders where the business done was exclusively interstate in character. In the *Hay* case, the Louisiana court distinguished the *Spector* decision by pointing out that the vice of the tax in that case was found to be that Connecticut sought to condition the right of the foreign corporation to engage in interstate commerce — a right that the commerce clause was clearly designed to protect. The distinction is a real one and the Louisiana court is to be commended for its discernment in drawing it. In this field, perhaps more than any other, the cases have precipitated great confusion. In its effort to preserve to the states their traditional power of taxation while simultaneously protecting interstate commerce against forbidden transgressions, the Court has frequently had to make refined distinctions. Cognizant that interstate business must pay its way, the court has nevertheless invalidated the most modest and reasonable exactions where they have been shown to have been imposed in return for the privilege of engaging in interstate commerce.

There is nothing about a properly apportioned net income tax that threatens any of the objectionable consequences upon interstate business that are customarily posed by franchise, sales, or other forms of taxation which fail to take account of the business' ability to survive multiple impositions of similar taxes by all of the states that the commerce touches. The United States Supreme Court has consistently approved state taxation of the net incomes of corporations engaged in interstate business[3] and nothing which was said in *Spector* or other cases of recent vintage suggest that this principle will be abandoned.

The second local tax case of the term was *New Orleans v. Christian,*[4] which was one of those rare instances in which it becomes necessary to distinguish between a tax properly speaking on the one hand, and a regulation on the other. The case was a proceeding to collect an amusement tax adopted by ordinance by the City of New Orleans. The tax was measured by the

2. 340 U.S. 602 (1951).
3. Peck & Co. v. Lowe, 247 U.S. 165 (1918); United States Glue Co. v. Town of Oak Creek, 247 U.S. 321 (1918); and West Publishing Co. v. McColgan, 328 U.S. 823 (1946).
4. 229 La. 855, 87 So.2d 6 (1956).

amount of sales of admissions, refreshments, service, and merchandise, to be computed after the sales were made. The taxpayer contended that the ordinance violated the provisions of Section 8 of Article X of the State Constitution, which forbids municipalities to impose license taxes in amounts greater than that imposed by the state. Since the state itself imposes no tax of this character at all, the New Orleans tax would of necessity be invalid if it were determined to be a license.

Declaring that "a license tax strictly speaking is a tax that must be paid by the party or dealer as a condition precedent to legally engaging in business, and is usually incident to regulation under the police power,"[5] the court concluded that the tax in question here was not a license, but an excise tax for revenue and hence outside the ban of the constitutional provision. The distinction is a valid one; and while in most instances it is of academic significance, this was one case in which the validity of the measure depended upon the court's apprehending and applying the distinction. The case seems sound and accords with prior jurisprudence, both in Louisiana and elsewhere.[6]

The case of *Succession of Brower*[7] posed the issue of determining when the three-year period for the prescription of taxes begins to run in the case of inheritance taxation. In the course of the litigation, three courts arrived at three separate conclusions on the point. The proceedings were brought in 1949 by the heirs of a husband and wife who had died in 1928 and 1925 respectively, for the purpose of obtaining a declaration of the amount, if any, of inheritance taxes due. The heirs denied any liability whatsoever, contending that under the provisions of Article XIX, Section 19, of the State Constitution ("all taxes . . . shall prescribe in three years from the 31st day of December in the year in which such taxes . . . are due") any claim therefor had prescribed. It was the contention of the heirs that the taxes were due immediately upon the death of the husband and wife. The state contended that prescription could not begin to run in any event prior to the opening of the succession, or, in the alternative, not until there had been a determination of the amount of taxes due. The district court held that the constitutional pro-

5. *Id.* at 859, 87 So.2d at 6.

6. See Giamalva v. Cooper, 217 La. 979, 47 So.2d 790 (1950); Lionel's Cigar Store v. McFarland, 162 La. 956, 111 So. 341 (1927); and Dawson v. Kentucky Distilleries & Warehouse Co., 255 U.S. 288 (1921).

7. 228 La. 785, 84 So.2d 191 (1956), 16 LOUISIANA LAW REVIEW 827 (1956).

vision is to be taken as applying solely to taxes which are due on fixed and determinable dates without the necessity of court proceedings such as are involved in inheritance tax cases. The court of appeal, reversing the trial court, agreed with the heirs, and held that the taxes became due at the date of death despite the fact that they had not been fixed or determined at that time. Reviewing the matter on certiorari, the Supreme Court sustained the state's alternative argument and held that such taxes do not become due until they have been finally determined.

Another prescriptive problem was raised in *Robinson v. Mafrige*,[8] that relating to the filing of suits to set aside tax sales.

Article X, Section 11, of the State Constitution provides that:

> "No sale of property for taxes shall be set aside for any cause, except on proof of payment of the taxes for which the property was sold prior to the date of the sale, unless the proceeding to annul is instituted within six months from service of notice of sale, which notice shall not be served until the time of redemption shall have expired and within five years from the date of the recordation of the tax deed, if no notice is given."

In this case the plaintiff was one of seven co-owners of a parcel of land which had been leased to an oil company which regularly paid royalties to each of the co-owners in proportion to their ownership interests. Plaintiff paid taxes on his share for 1946 but none of the other owners did so — apparently failing to receive notice that they were due. Although advised by the Tax Collector that his co-owners had not paid their taxes, plaintiff ignored the notice and subsequently purchased his co-owners' interests at a tax sale in 1947. This suit was filed in 1952, after the expiration of the five-year period provided for in the constitutional provision quoted above, and plaintiff sought to have his title confirmed. Defendants argued in the alternative that (1) plaintiff's payment of the delinquent taxes owed by the co-owners did not divest them of their title, but constituted a payment for their joint benefit, or (2) that an invalid tax sale can be set aside despite the lapse of more than five years where the tax debtor remains in corporeal possession of the premises. The court accepted the second argument, regarded the possession of

8. 229 La. 376, 86 So.2d 72 (1956).

the lessee-oil company as the equivalent of possession by all the co-owners, and overruled the pleas of prescription.

At this term, in *Succession of Mayer*,[9] the court was also presented with the necessity of adopting a principle to govern absorption of the federal estate tax as between specific legatees and a residuary legatee, in the absence of an unambiguous expression from the testator. The court had anticipated the problem in a dictum some years ago in the course of determining that a residuary legatee could not deduct the federal estate tax before computing state inheritance tax.[10] It was there noted that the federal tax is a tax upon transfer of the net estate normally borne by the residuary legatee although proration may be directed by the testator and the Legislature may direct proration in the absence of such direction. Since there has been no such statute enacted, and in the absence of testator direction, the nature of the tax as a charge on the transfer of the estate is thought to warrant the rule that the residuary legatee must absorb the federal tax out of the residue of the estate. A direction in a will that a specific legacy "be free of taxes" is thus necessary to free a legacy of state inheritance taxes; but the legacy will be free of federal estate taxes in any event unless testator specifically directs such proration and absorption by specific legatees.