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Robert L. Roland

STATE AND LOCAL TAXATION

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CORPORATION FRANCHISE TAXES

The state's effort to redefine the incidence of its franchise tax to get around the adverse decision in *Colonial Pipe v. Mouton*[1] came to naught when the same taxpayer was able to persuade the same circuit that the amended statute was substantially the same.[2] The court found the differences in the statute after amendment "to be a distinction without a difference."[3] The writer's chief criticism with the decision lies not in the court's conclusion concerning the amended statute but in its failure to apply the United States Supreme Court decision of *Memphis National Gas Co. v. Stone*.[4] The Louisiana court determined that the Mississippi statute considered in *Stone* taxed only capital employed in the state and that Louisiana "imposes a tax upon the total corporate structure."[5] This conclusion ignores the fact that Louisiana has a most comprehensive formula designed to allocate the capital structure between Louisiana and all other states where any portion of the capital is employed.[6]

INHERITANCE TAX

One of the more interesting tax cases of the current term involved the Louisiana Inheritance Tax.[7] *Succession of Kaufman*[8] dealt with the calculation of inheritance taxes due by: (1) a surviving spouse as beneficiary of 85% of the income of a trust in which the trustees had power to invade to the extent of the disposable portion; (2) a forced heir as beneficiary of 15% of the income; and (3) three grandchildren as principal beneficiaries. The court had previously determined that the income beneficiary was taxable to the extent that the trustees could invade the corpus and that his beneficiary interest with reference to the community property was tantamount

* Special Lecturer in Law, Louisiana State University; Member, Baton Rouge Bar.

1. 228 So. 2d 718 (La. App. 1st Cir. 1969); see *The Work of the Louisiana Appellate Courts for the 1969-1970 Term—State and Local Taxation*, 31 LA. L. REV. 336, 337 (1971).

2. Colonial Pipe. Co. v. Agerton, 275 So. 2d 834 (La. App. 1st Cir. 1973).

3. *Id.* at 836.

4. 335 U.S. 80 (1948).

5. Colonial Pipe. Co. v. Agerton, 275 So. 2d 834, 837 (La. App. 1st Cir. 1973).

6. LA. R.S. 47:606 (1950).

7. LA. R.S. 47:2401-423 (1950), *as amended*.

8. 274 So. 2d 471 (La. App. 1st Cir. 1973).

to a legal usufruct and not taxable.[9] Under the terms of the trust, the court found that the surviving spouse owed tax on three things: (1) the naked ownership of the disposable two-thirds of his wife's half of the community; (2) and 85% usufruct of his wife's separate property; and (3) the naked ownership of the disposable two-thirds of his wife's separate property. The court found the forced heir to have an income interest of 15%. The right to invade the corpus for the benefit of the forced heir after the death of the surviving spouse and the successive rights of various income beneficiaries were found to be contingent and not subject to tax. The court was then faced with valuing the children's interest as principal beneficiaries. One solution might have been to calculate the value of the usufruct by reference to the life of the younger usufructuary but this would have then left open the question of what additional adjustment, if any, should be made for the right to invade.[10] However, the court simply added the taxable inheritance and the non-taxable portion of the estate, subtracted the result from the total value of the estate and distributed the result equally among the three grandchildren. The tax treatment to be accorded various interests under testamentary trusts would appear to be worthy of legislative consideration.

MOTOR VEHICLE TAXES

In *Saia North Freight Lines, Inc. v. Agerton*,[11] the supreme court found that a classification of commercial vehicles for motor vehicle licenses on a domicile-use-area basis rather than solely on a use-area basis was not unconstitutionally arbitrary. This conclusion is not surprising in view of the rather liberal attitude toward classification historically exhibited by Louisiana courts.[12]

SALES TAXES

Is the legislation[13] authorizing the City of Baton Rouge and the

9. Succession of Bellinger, 229 So. 2d 749, 750-51 (La. App. 1st Cir. 1969); see *The Work of the Louisiana Appellate Courts for the 1969-1970 Term—State and Local Taxation*, 31 LA. L. REV. 336, 338 (1971).

10. When faced with an analogous situation concerning the value to be attributed to the difference in a lifetime usufruct and one terminating on marriage, an earlier court refused to assign a value, saying, "Neither you, nor I, nor nobody [sic] knows." *Succession of Lynch*, 145 So. 42, 44 (La. App. Orl. Cir. 1932).

11. 275 So. 2d 393 (La. 1973).

12. *See, e.g.*, Great Atl. & Pac. Tea Co. v. Grosjean, 301 U.S. 412 (1937); Bel Oil Corp. v. Roland, 242 La. 498, 137 So. 2d 308 (1962); State v. Arthur Duvic's Sons, 185 La. 647, 170 So. 23 (1936); Hunter v. Wells Fargo Exp. Co., 134 La. 358, 64 So. 139 (1914).

13. LA. R.S. 33:2741 (1950), *as amended by* La. Acts 1956, No. 401 § 1; 1966, No.

Parish of East Baton Rouge to levy sales taxes without voter approval unconstitutionally discriminatory in light of general legislation requiring voter approval? The Louisiana supreme court did not reach this basic question in the case of *Jacobs v. City of Baton Rouge*[14] because it found that the proceeds of the taxes in question, while not dedicated or pledged to the payment of principal and interest on specific bonds, were *necessary* to pay the principal and interest on such bonds within the intent of R.S. 13:4452. Accordingly, it dismissed the appeal of the plaintiff taxpayers as having not been timely filed.

The other three sales tax cases reported during the current term were also disposed of on procedural points. In *Hallis v. Agerton*,[15] the plaintiff objected to the refusal of the Louisiana Collector of Revenue to refund that portion of the state sales tax paid as the result of including the federal excise tax on new automobiles (subsequently discontinued and refunded) in the sales price upon which the Louisiana sales tax was based. Feeling that if the federal government required dealers to refund to purchasers the 7% excise tax paid on vehicles purchased between August 16, 1971 (the effective date of the discontinuance), and December 10, 1971 (the date of passage of the legislation), Louisiana should refund the 3% sales tax attributable thereto, Mr. Hallis filed a mandamus action individually, and as a class representative. The Collector filed exceptions of unauthorized use of summary procedure, improper use of class action, and no cause or right of action. Although all of the exceptions appear to the writer to have been well founded, both the trial court and the appellate court concluded that no ministerial duty was involved and hence mandamus was inapplicable. The court's specific refusal to consider the other arguments advanced by the Collector[16] will possibly encourage some future litigant to question those arguments.

The First Circuit, in the companion cases of *Ortlieb Press, Inc. v. Mouton*[17] and *Musso v. Collector of Revenue*[18] recognized the existence of *Collector v. Pioneer Bank*[19] and R.S. 47:1581[20] but declined

398 § 1; 1970, No. 559 § 1.

14. 262 La. 342, 263 So. 2d 315 (1972).

15. 273 So. 2d 887 (La. App. 1st Cir. 1973).

16. "Having disposed of this matter for the above reasons, it is unnecessary to consider the other arguments made by defendant. . . ." *Id.* at 889.

17. 268 So. 2d 85 (La. App. 1st Cir. 1972).

18. 268 So. 2d 90 (La. App. 1st Cir. 1972).

19. 250 La. 446, 196 So. 2d 270 (1967).

20. "Any tax, penalty, interest, or other charges duly assessed under this Subtitle, being the equivalent of a judgment, shall not be subject to the running of any prescrip-

to give effect to either. The court construed R.S. 47:1561 to mean that the remedy of paying under protest is available to a taxpayer at any time prior to his filing of a petition with the Board of Tax Appeals for a redetermination of an assessment or prior to being sued by the Collector. In the opinion of the writer, the carefully documented dissent of Judge Tucker in *Musso* more clearly expressed the current state of Louisiana law on the subject. The Louisiana legislature effectively dealt with the point at issue in these cases by amending R.S. 47:1561 to add as a third restriction to the taxpayer's right to pay under protest instances when an assessment has become final.[21] Whether the majority opinions represent a breach in the "assessment equals judgment" wall built by the Revenue Department over the years remains to be seen.[22]

SEVERANCE TAXES

Does the City of Lake Charles owe the State of Louisiana severance tax on sand dredged from the bottom of one portion of Lake Charles and used as fill material in another portion of Lake Charles? *Agerton v. City of Lake Charles*[23] saw the Fourth Circuit concluding not, in a rather unique construction of the constitutional provisions[24] authorizing the reclamation and development of a portion of the bed of Lake Charles adjacent to the downtown section of the City of Lake Charles. Neither of the applicable constitutional provisions[25] contain any reference to a waiver or an exemption from the severance tax, but the court found that

> [i]t would be inconsistent with the intent and purpose of these constitutional provisions to hold that the city is liable for a severance tax on this sand which it was authorized to dredge from one place to another in the lake bed.[26]

The court was undoubtedly impressed by the fact that the City of Lake Charles, prior to beginning the development in question, re-

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tion other than such prescription as would run against a judgment in favor of the State of Louisiana in accordance with the Constitution and laws of this state; and the recordation of such assessment shall have the same effect as the recordation of a judgment."

21. LA. R.S. 47:1561 (1950), *as amended by* La. Acts 1972, No. 566 § 1.

22. Collector v. Pioneer Bank, 250 La. 446, 196 So. 2d 270 (1967); LA. R.S. 47:1581 (1950); LA. R.S. 47:1578(4) (1950).

23. 273 So. 2d 353 (La. App. 3d Cir. 1973).

24. LA. CONST. art. XIV, §§ 39(a), (d).

25. *Id.*

26. 273 So. 2d at 356.

ceived negative replies from the Collector of Revenue and the Department of Wildlife and Fisheries to its inquiries concerning its liability for severance taxes and royalties, and pursuant to these replies deleted any request for federal funds to pay severance taxes.

The court went on to cite the doctrine of "contemporaneous construction" to support its conclusion, but ignored the requirement that such construction must have been acted upon for a number of years and that the doctrine is not applicable unless the statute is ambiguous.[27] Similarly, while citing the rule of statutory construction that tax laws are interpreted liberally in favor of the taxpayer, the court ignored the fact that there was nothing in the severance tax law under consideration which would give the city the relief it sought and that an equally familiar rule of statutory construction is that exemptions from taxation are to be strictly construed against one claiming the exemption.[28] A more reasonable construction might have been one which concluded, as did the ruling of the Collector, that under the facts of the case, there was no *severance* within the meaning of the statute. Failing this, it seems more appropriate to require the legislature to relieve any inconvenience or hardship that resulted from following the statute as written rather than have the court substitute construction for legislation.

The other severance tax case[29] decided during the current term involved the interpretation of the phrase "in the field where produced." Humble Oil produced gas in five fields, a portion of which, after comingling, was returned to each field for fuel and gas lift purposes. Under the pertinent provision of the severance tax statute,[30] the severance tax does not accrue on gas used for such purposes *in the field where produced.* The court did not use any artificial rule of statutory construction in declining to adopt the literal application of the phrase sought by the Collector but instead concluded that construing the phrase to include returned gas, identifiable as a measured quantity which did not exceed the total field production during the taxable period, achieved the objects and purposes of the statute and hence the gas in question was not subject to the tax.

27. *See, e.g.*, State v. U-Drive It Car Co., 79 So. 2d 590 (La. App. Orl. Cir. 1955) (and cases therein cited).

28. *See, e.g.*, Mattingly v. Vail, 193 La. 1, 9, 190 So. 313, 315 (1939).

29. Humble Oil and Ref. Co. v. Traigle, 271 So. 2d 677 (La. App. 1st Cir. 1972).

30. LA. R.S. 47:633(9)(d) (1950), *as amended by* La. Acts 1956, No. 102 § 1; 1958, Ex. Sess., No. 2 § 2; 1960, No. 9 § 1; 1964, No. 33 § 1; 1970, No. 323 § 1; 1972, No. 211 § 1; 1972, Ex. Sess., No. 2 § 1.

TAX SALES

Three cases involved the application of the five year peremption period of Article X, § 11 of the Louisiana Constitution of 1921. In *Welsch v. Carmadelle*,[31] the court held that the five year period applied, despite lack of notice to the debtor and despite a minor irregularity in the description. The decision is in accord with prior jurisprudence.

In *Piper v. Bach*,[32] the same court found the sale by the state to the plaintiff to be an absolute nullity unprotected by the five year peremptive period because the property was in the public domain in the year for which the adjudication occurred. The First Circuit in *Mayo v. Stoessell*,[33] refused to add as a fourth exception to peremption, a tax sale of property for less than the taxes due or advertised thereon. In so doing, the court had to choose between the public policy expressed in R.S. 47:2186[34] and that expressed in Article X, § 11. The court wisely opted for the latter.

A tax sale of property does not cancel a pre-existing vendor's lien. This principle, which finds ample statutory and jurisprudential support, was reaffirmed by the First Circuit in *Whitfield v. Jones*,[35] which also considered two peripheral questions involving the use of executory process. One of defendant's ancestors in title had instituted foreclosure proceedings by executory process against the delinquent taxpayer to enforce his lien and special mortgage *after* the tax sale and monition proceeding. The court found that the tax sale purchaser need not be made a party to the proceedings under the express provisions of Code of Civil Procedure article 2701 and that Code of Civil Procedure article 2642 requires all defenses and procedural objections to an executory proceeding to be asserted by injunction or suspensive appeal. The court declined to consider the contention that the lack of notification of the executory proceedings to the tax purchaser-owner of record violated the due process requirements of the state and federal constitutions on the ground that the constitutional issues had not been pleaded or raised below.

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31. 264 So. 2d 341 (La. App. 4th Cir. 1972).

32. 269 So. 2d 619 (La. App. 4th Cir. 1972).

33. 277 So. 2d 520 (La. App. 1st Cir. 1973).

34. This section requires that bids accepted in tax sales be at least equal to the taxes, costs and interests.

35. 270 So. 2d 153 (La. App. 1st Cir. 1973).