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## Taxation -- Movable Tangibles -- Taxing Situs

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procedural provisions of the service insurance act, as well as of the substantive provisions, should be guided by the deceased's intent.<sup>23</sup> That intent has been held powerful enough to controvert rights established by state law;<sup>24</sup> and, as mentioned before, special procedure may obtain under particular waivers of governmental immunity.<sup>25</sup> Actually, the prior cases as well as the instant case entertain those matters essential in carrying out the serviceman's intent, but nowhere do the opinions acknowledge that intent to be controlling.

## TAXATION — MOVABLE TANGIBLES — TAXING SITUS

Plaintiff's interstate barges were registered in Ohio, but stopped there only for fuel and repairs. Ohio levied an ad valorem personal property tax on the full value of the vessels. On appeal to the Supreme Court of the United States, *held*, that the possibility of subjection to a second tax by the states in which the barges have acquired taxing sities through physical presence<sup>1</sup> precludes collection by the domiciliary state of more than its proportionate share. *Standard Oil Co. v. Peck*, 72 Sup. Ct. 309 (1952).

Since the establishment of federal supremacy over navigable waters,<sup>2</sup> in order to protect shipping against multiple taxation<sup>3</sup> the courts have had to decide what constitutes a tax situs for vessels.<sup>4</sup> A state may tax tangible personal property found within its borders,<sup>5</sup> even against a domiciliary of another state.<sup>6</sup> However, a distinguishable situation arises where the prop-

23. See *Thomas v. United States*, 189 F.2d 494 (6th Cir.), *cert. denied*, 342 U.S. 850 (1951); *Johnson v. United States*, 87 F.2d 940 (8th Cir. 1937); *Golden v. United States*, 91 F. Supp. 950 (M.D. Ala. 1950), *aff'd*, 192 F.2d 81 (5th Cir. 1951); *Jadin v. United States*, 74 F. Supp. 589 (D. Wis. 1947); *Baldwin v. United States*, 68 F. Supp. 657 (W.D. Mo. 1946).

24. *Wissner v. Wissner*, 338 U.S. 655 (1950), *reversing* 89 Cal. App. 2d 759, 201 P.2d 837 (1949).

25. See notes 10, 15 *supra*.

1. *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949).

2. *United States v. Appalachian Power Co.*, 311 U.S. 377 (1940); *Gibbons v. Ogden*, 9 Wheat, 1 (U.S. 1824).

3. U.S. CONST. AMEND. XIV, § 1; *Frick v. Pennsylvania*, 268 U.S. 473 (1925); *Delaware, L. & W. R.R. v. Pennsylvania*, 198 U.S. 341 (1905); *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194 (1905).

4. *Texas v. Florida*, 306 U.S. 398 (1939); *Frick v. Pennsylvania*, 268 U.S. 473 (1925) (not applicable to intangibles, although in *Texas v. Florida* the Supreme Court took it upon itself to determine a domicile from the evidence in the record).

5. *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U.S. 18 (1891); *Walworth v. Harris*, 129 U.S. 355 (1888).

6. *Old Dominion S.S. Co. v. Virginia*, 198 U.S. 299 (1905); *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U.S. 18 (1891); *Coe v. Errol*, 116 U.S. 517 (1886); *Brown v. Houston*, 114 U.S. 622 (1884); *The State Railroad Tax Cases*, 92 U.S. 575 (1875); *Tappan v. Merchant's Bank*, 19 Wall. 490 (U.S. 1873); *Railroad Co. v. Pennsylvania*, 15 Wall. 300 (U.S. 1868).

erty is movable in interstate<sup>7</sup> and foreign<sup>8</sup> transportation. Which state<sup>9</sup> or states<sup>10</sup> can tax, and how much? Where several states have legitimate claims their aggregate may equal only one tax.<sup>11</sup> Each is allowed a proportionate share based upon the amount of business done in that state.<sup>12</sup> In such cases, the domiciliary state is excluded to the extent that the other states have legitimate claims.<sup>13</sup> However, even if the property is not in the domiciliary state during the taxing year, so long as it has not acquired a taxing situs elsewhere, the domiciliary state may claim full taxing powers.<sup>14</sup>

What constitutes such presence in the state as to make it a taxing situs?<sup>15</sup> A state may tax railroad cars actually in the state during the taxing year in the proportion that the company's trackage within the state bears to its total trackage.<sup>16</sup> Those cars which are wholly out of the state during the taxing year are exempt,<sup>17</sup> except that the domiciliary state may tax them if they do not acquire another taxing situs.<sup>18</sup>

The cases of personal property taxes on aircraft are distinguishable from those dealing with railroad rolling stock. In *Northwest Airlines, Inc. v. Minnesota*,<sup>19</sup> it was held that aircraft which operated out of the domiciliary state could be taxed there exclusively, and no other taxing situs could be acquired. In a concurring opinion, Mr. Justice Jackson said that a state

7. *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194 (1905); *Leloup v. Mobile*, 127 U.S. 640 (1887); *Marye v. Baltimore & Ohio R.R.*, 127 U.S. 117 (1887); *Western Union Tel. Co. v. Att'y. Gen. of Mass.*, 125 U.S. 530 (1887); *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196 (1884); *Telegraph Co. v. Texas*, 105 U.S. 460 (1881); *The Delaware Railroad Tax Case*, 18 Wall. 206 (U.S. 1873); *Morgan v. Parham*, 16 Wall. 471 (U.S. 1872).

8. *Hays v. Pacific Mail S.S. Co.*, 17 How. 596 (U.S. 1854).

9. *New York Cent. & Hudson River R.R. v. Miller*, 202 U.S. 584 (1906).

10. *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U.S. 18 (1891); *Delaware Railroad Tax Case*, 18 Wall. 206 (U.S. 1873).

11. *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 301 (1944) (concurring opinion of Mr. Justice Black).

12. *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949); *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U.S. 18 (1891).

13. *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 301 (1944) (concurring opinion of Mr. Justice Black, supported in *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 [1949]).

14. *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292 (1944) (airplanes by their nature can have only one taxing situs); *New York Cent. & Hudson River R.R. v. Miller*, 202 U.S. 584, 597 (1906) (Mr. Justice Holmes said, "... the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts."); *Ayer & Lord Tie Co. v. Kentucky*, 202 U.S. 409 (1906) (this case had two points: that the domiciliary state is the taxing state where no other taxing situs is acquired, and that a ship used for inland commerce does not acquire another taxing situs—which was overruled in *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 [1949]).

15. *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 302 (1944) (concurring opinion of Mr. Justice Jackson).

16. *Johnson Oil Refining Co. v. Oklahoma*, 290 U.S. 158 (1933); *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U.S. 18 (1891); cf. *New York Cent. & Hudson River R.R. v. Miller*, 202 U.S. 584, 597 (1906).

17. *Johnson Oil Refining Co. v. Oklahoma*, 290 U.S. 158 (1933); *New York Cent. & Hudson River R.R. v. Miller*, 202 U.S. 584, 597 (1906).

18. *Texas v. Florida*, 306 U.S. 398 (1939); *New York Cent. & Hudson River R.R. v. Miller*, 202 U.S. 584 (1906).

19. 322 U.S. 292 (1944).

could not tax for the use of the air over its territory, for the same reason that it could not tax for the use of the high seas.<sup>20</sup> Consequently, he maintained, the test for computing proportionate mileage of the airline's routes, as in the railroad cases,<sup>21</sup> is not applicable. Since no taxing situs could be acquired elsewhere, aircraft are held to be taxable at the home base.

An analysis of ship-taxing cases must start with *Southern Pacific Co. v. Kentucky*.<sup>22</sup> There the Court allowed the domiciliary state to collect on the full value of ships trading on the high seas, even though they never touched the territory of Kentucky. The general rule is that merely stopping for loading or unloading, or for fuel or repairs, does not constitute a sufficient basis to make the port-state a taxing situs,<sup>23</sup> and consequently none of the ships could claim a taxing situs outside Kentucky. Distinguishing the cases, the Court found in *Old Dominion S.S. Co. v. Virginia*,<sup>24</sup> that a New York ship sailing exclusively in Virginia waters is taxable by Virginia to the exclusion of New York. On the other hand, where the ship is engaged in commerce between the domiciliary and other states, merely stopping at the others, the domiciliary remains the exclusive taxing authority.<sup>25</sup> Finally, holding *contra*, the Court here ruled that a ship in inland transportation, which actually does business in other states, can be subjected to the proportionate tax theory applied in railroad cases.<sup>26</sup> The Court thereby created a taxing situs in states which theretofore had none.<sup>27</sup>

A reading of the cases fails to indicate that the Court has ever held that the taxing power must be asserted before a taxing situs can be acquired. Collection by a state seems to be merely evidence that it is a taxing situs. The instant case is one where the property acquired other taxing sities<sup>28</sup> which had not in fact been asserted by the authorized states. Since the percentage of routage in Ohio waters was negligible, and other taxing sities had been acquired,<sup>29</sup> Ohio must then be excluded. The barges may never be subjected to taxation if none of the authorized states assert their rights. Plaintiff corporation then merely receives the benefits inherent in doing business in

20. 322 U.S. 292, 301 (1944).

21. *Pullman's Palace-Car v. Pennsylvania*, 141 U.S. 18 (1891).

22. 222 U.S. 63 (1911).

23. *Southern Pacific Co. v. Kentucky*, 222 U.S. 63 (1911); *Morgan v. Parham*, 16 Wall. 471 (U.S. 1872); *Hays v. Pacific Mail S.S. Co.*, 17 How. 596 (U.S. 1854).

24. 198 U.S. 299 (1905).

25. *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196 (1885); *Wiggins Ferry Co. v. East St. Louis*, 107 U.S. 365 (1882); *St. Louis v. Ferry Co.*, 11 Wall. 423 (U.S. 1870); *Hays v. Pacific Mail S.S. Co.*, 17 How. 596 (U.S. 1854); cf. *Morgan v. Parham*, 16 Wall. 471 (U.S. 1872) (domicile held to be taxing situs over the two states between which the ship did business as passenger carrier on regular schedule).

26. *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949), applying *Johnson Oil Refining Co. v. Oklahoma*, 290 U.S. 158 (1933); *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U.S. 118 (1891).

27. See note 25 *supra*.

28. *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949), overruling *Ayer & Lord Tie Co. v. Kentucky*, 202 U.S. 409 (1906) (denying state proportionate share of taxing authority where ships did business in state).

29. *Ibid.*

a state with favorable tax conditions. The case seems to be another step in the attempt to eliminate multiple taxation of movable tangibles, and also to eliminate payment under protest and its consequent bothersome and expensive litigation for recovery.

### TAXATION—PUBLIC POLICY—DEDUCTION OF "KICKBACKS" AS ORDINARY AND NECESSARY BUSINESS EXPENSES

Plaintiffs, opticians, deducted as ordinary and necessary business expenses "kickbacks," paid to doctors who prescribed the glasses, of one-third of the retail price. *Held*, that such deductions are not contrary to public policy unless they frustrate some national or state policy which has been defined by some governmental declaration. *Lilly v. Commissioner of Internal Revenue*, 72 Sup. Ct. 497 (1952).

The Internal Revenue Code<sup>1</sup> provides that in computing net income there shall be allowed as deductions from gross income all the ordinary<sup>2</sup> and necessary<sup>3</sup> expenses paid or incurred during the taxable year in carrying on any trade or business. Certain limitations upon this general provision, recognizing public policy, have been set forth. Criminal fines and penalties are not deductible because to do so would in effect permit the taxpayer to mitigate the punishment of the law.<sup>4</sup> Legal fees spent in behalf of defending suits for violations of state and federal statutes have been disallowed as not being "ordinary and necessary," while money spent in defending tort actions has been allowed.<sup>5</sup> Commercial bribes have been disallowed as not being "necessary" because the payor has an adequate remedy at law, and to allow such accessions would be against public policy.<sup>6</sup> Similarly, sums paid by a corporate taxpayer under contingent fee contracts are not allowed, since such sums are paid in execution of contracts which are void as against public policy.<sup>7</sup>

The instant decision,<sup>8</sup> one of first impression, demonstrates the Supreme Court's reluctance to permit lower courts to decide at their discretion what

1. INT. REV. CODE § 23 (a) (1) (A). 43 STAT. 269 (1924), 26 U.S.C. § 23(2) (1) (1940).

2. 4. MERTON, LAW OF FEDERAL INCOME TAXATION § 25.07 (Rev. ed. 1948) ("Ways of conduct and forms of speech prevailing in the business world will usually furnish a reliable guide in determining whether the particular expense is an ordinary expense of the business.").

3. *Welch v. Commissioner*, 290 U.S. 111 (1933) ("Ordinarily, an expense will be considered necessary where the expenditure is appropriate and helpful in the development of the taxpayer's business.").

4. *Burroughs Bldg. Material Co. v. Commissioner*, 47 F.2d 178 (2d Cir. 1931); *Great Northern R.R. v. Commissioner* 40 F.2d 372 (8th Cir.), *cert. denied*, 282 U.S. 855 (1930).

5. *Kornhauser v. United States*, 276 U.S. 145 (1928); *Helvering v. Hampton*, 79 F.2d 358 (9th Cir. 1935).

6. *Kelley-Dempsey & Co. v. Commissioner*, 31 B.T.A. 351, 355 (1934).

7. *Commissioner v. Textile Mills Securities Corp.* 314 U.S. 326 (1941).

8. *Lilly v. Commissioner*, 72 Sup. Ct. 497 (1952).