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Delman Hodges Eure

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THE SIGNIFICANCE OF RESIDENCE IN STATE TAXATION

Section 58-77(8) of the Virginia Code of 1950 defines "resident", for income tax purposes, as "...every person domiciled in this State on the last day of the taxable year..." There are no Virginia cases interpreting this provision, but the Virginia Department of Taxation instructs the taxpayer that a "Resident is taxable [in the tax year] on his entire [taxable year] net income, whether it came to him from sources within Virginia or from sources without Virginia".¹

Following such instruction, a taxpayer who establishes residence in Virginia in October of the taxable year would be taxed by Virginia on his entire net income. This would include income received in the state of his former residence merely because of his residence in Virginia "on the last day of the taxable year".

These are essentially the facts of *Martin v. Gage*.² Here, the Kentucky tax statute defined a resident as every person domiciled in that state on the last day of the taxable year, and the Commissioner of Revenue sought the interpretation proposed above. In finding that it was not the intention of the Kentucky Legislature to tax the income of a resident that was derived from sources without the state prior to the time he became a resident of the state, the Court of Appeals of Kentucky said:

...carrying [the Commissioner's] argument to its logical conclusion, a resident who had received the protection of Kentucky's laws for one day would be required to pay that state an income tax equivalent in amount to that which he would have been required to pay had he enjoyed the benefits of citizenship in this State for an entire year, and this, notwithstanding the fact that the taxpayer who had been a resident for only one day had been required to pay a tax in approximately the same amount to the state from which he had moved his residence.³

In a highly analogous situation, the Supreme Judicial Court of Massachusetts, holding such income not taxable, gave the income tax laws of that state a

... construction [which] avoids highly difficult constitutional questions which would be encountered if the sec-

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1. "Instructions for Preparing Return on Form 760 and Other Official Information," Commonwealth of Virginia, Department of Taxation.
 2. 281 Ky. 95, 134 S.W.2d 966, 126 A.L.R. 449 (1939). Taxpayer became a resident of Louisville, Kentucky on October 15, 1937, having been at all times previously a resident of Braintree, Massachusetts.
 3. 281 Ky. 95, —, 134 S.W.2d 966, 968, 126 A.L.R. 449, 452.

tions were interpreted to subject a person removing to the Commonwealth in the latter part of any year to taxation on income received in a foreign jurisdiction while an inhabitant thereof. . . .⁴

The "constitutional question" is commented on thus in 61 C. J. at page 1561:

It is competent for a state to impose a tax upon the income of a resident thereof. . . whether such income be derived from sources within or without the state, *except that it cannot tax a resident upon income received by him from sources outside the state at a time when he was not a resident thereof.*⁵ [Italics supplied]

At the time of *Hart v. Tax Commissioner*,⁶ the Massachusetts Income Tax Laws made taxable the income received during the calendar year prior to that of assessment by anyone an inhabitant of the state at the time of the assessment. Taxpayer became a resident of Massachusetts in January, and in that year an assessment was made by Massachusetts on the income received during the prior year while he resided in New York. The highest court of Massachusetts found such a levy invalid because the state did not have jurisdiction of either the taxpayer or his source of income at the time such income was received.

A possible dissenting note is found in *Wood v. Tawes*.⁷ In this case, one of the taxpayers had moved into Maryland from Washington, D. C. in March and was taxed for that year on his entire net income including that received while a resident of Washington, D. C. Recognizing authority for a different conclusion, the Court of Appeals of Maryland upheld the levy, pointing out that if a tax had been paid the other jurisdiction on that portion of the income received while a resident there it would not be taxable again under the Maryland laws. However, the decision of the court rested primarily on the definition of a resident as "every individual who, for more than six months of the taxable year, maintained a place of abode within the state", rather than the "domiciled on the last day of the taxable year" provision which was also available.⁸

4. *Kennedy v. Commissioner of Corporations and Taxation*, 256 Mass. 426, —, 152 N.E. 747, 749 (1926). Cf. *Greene v. Wisconsin Tax Commission*, 221 Wis. 531, 266 N.W. 270 (1936); *Newport Co. v. Wisconsin Tax Commission*, 219 Wis. 293, 261 N.W. 884 (1935); *Commonwealth of Massachusetts v. Davis*, —, Tex. —, 160 S.W.2d 543 (1942); *Old Colony Trust Co. v. Commissioner of Corporations and Taxation*, 245 Mass. 155, 139 N.E. 441 (1923); *Shaffer v. Carter*, 252 U.S. 37, 40 Sup.Ct. 221, 64 L.Ed. 445 (1920).
5. Cf. *Prentice-Hall State and Local Tax Service*, vol. 1, §§ 91, 150.
6. 240 Mass. 37, 132 N.E. 621 (1921).
7. 181 Md. 155, 28 A.2d 850 (1942), *cert. denied* 318 U.S. 788, 63 Sup.Ct. 982 (1943).
8. Laws 1939, c. 277; Md. Code, Art. 81, §§230, 222(i).

Generally, the taxing power of a state is coextensive with its sovereignty, and in order to tax the income of an individual the state must have jurisdiction of either the taxpayer or the source of such income at the time it is received. It is possible, in the case of an individual who becomes a resident of Virginia during the latter part of the taxable year, that the state would be found not to have the power to tax that part of his income received from sources outside Virginia before becoming a resident of Virginia.

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