1958

Taxation

Joseph Curtis

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JOSEPH CURTIS*

Tax cases and legislation produced several changes in the law of some importance and general interest. There was the usual multitude of clarifying and minor substantive changes in the tax legislation of the 1958 Regular Session. However, the following comments are directed only to those enactments of more general concern.[1]

LEGISLATION

A. *Income Tax*

The 1958 amendment undoubtedly affecting the greatest number of taxpayers is that which eliminates the election to pay the income tax in installments.[2] Probably most Virginians are now well aware that begin-

45. If, for example, two counties desire to establish a recreation area according to the example given in the text, may they proceed under the cooperation act rather than the Park Authorities Act, VA. CODE ANN. §§ 15-714.1 -714.11 (Repl. Vol. 1956), and so create their own legal entity? Presumably, such an entity could not issue bonds. But what contractual authority may it have? May it sue and be sued? If it is subject to suit, would an entity created jointly by a city and county share the county's immunity in a personal injury action, or would it be liable as a city, or would a direct action lie against the city as a joint tortfeasor?

46. See VA. CODE ANN. § 5-24 (Repl. Vol. 1956), § 5-24.1 (Supp. 1958) (joint airport operation).

* Professor of Law, William and Mary. Member, Virginia and New York bars. B.S., 1934, LL.B., 1937, LL.M., 1948, New York University.

1. No attempt is made here to treat revisions and innovations of relatively limited interest, such as license, public service, and motor fuel tax amendments.

2. VA. CODE ANN. § 58-117 (Supp. 1958).

ning with the 1958 income tax, due in 1959, a penalty will be incurred unless the entire tax is paid on or before the due date of the return.[3]

Second in scope, perhaps, is the amendment excluding from gross income interest on obligations of a political subdivision of the state.[4] Formerly, the interest exclusion was applicable only to federal and Virginia obligations. The amended provision now conforms to the federal income tax exclusion which also exempts obligations of state political subdivisions.

Other income tax enactments of significance permit public school teachers to deduct expenses incurred for summer college work to improve their professional qualifications or standing,[5] and deny deductibility of contributions to persons supporting litigation in which they have no direct interest.[6] The summer school expense deduction authority apparently goes further than the much publicized *Hill v. Commissioner*,[7] where the Fourth Circuit upheld a federal tax deduction for such expenses incurred to maintain *current* status.

B. *Corporate Entrance Fee*

Code section 58-448, providing that a foreign corporation had no right to transact business in Virginia until it had paid its entrance fee and had been issued a certificate, was repealed.[8] Repeal does not, of course, eliminate the tax or affect the procedure for its collection, but it may possibly be construed to eliminate the payment of the tax as a condition precedent to conducting operations of any character within the state.

C. *Tangible Personal Property Tax*

In tax years beginning after 1958, household goods and personal effects incidental to maintaining an abode may be exempted by the local governing body.[9] With the exception of automobiles, business equipment, and property held solely for investment, the tangible personal property tax thus becomes wholly optional with the local governing body.

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3. The penalty is five per cent of the unpaid tax unless it was assessed by the Commissioner upon a return filed in good faith and without fault. This is in addition to interest of one-half of one per cent monthly, irrespective of good faith and no fault.

4. VA. CODE ANN. § 58-78(b)(5) (Supp. 1958).

5. VA. CODE ANN. § 58-81(r) (Supp. 1958).

6. VA. CODE ANN. § 58-84.1 (Supp. 1958).

7. 181 F.2d 906 (4th Cir. 1950).

8. Va. Acts 1958, c. 562.

9. VA. CODE ANN. § 58-829.1 (Supp. 1958). In addition to the comprehensive description, "All other tangible personal property used by an individual or a family or household incident to maintaining an abode," the section enumerates seven classes of items, including luxuries, which might adorn the home or the person.

D. *Erroneous Assessments*

Pursuant to section 58-1141, application may be made to the local commissioner of revenue for correction of an erroneous assessment of local license taxes and local levies on tangible personalty, merchants' capital, and (if it was the commissioner's error) realty, within five years following the year of assessment. While this section remains substantially unchanged, a new provision has been inserted into section 58-1142 limiting the refunds of a *paid* tax to a period of two years following the year of assessment, or to three years "since" the assessment if, under new section 58-1152.1, the local governing body has provided by ordinance for refund procedure. These periods apply only to refunds and not to exoneration from unpaid erroneous assessments, and apparently have no application where, under section 58-1145, within one year following the assessment year relief is sought in the courts rather than with the local commissioner.

JUDICIAL DECISIONS

A. *Privilege Tax on Business of Selling*

Virginia ceded exclusive jurisdiction of the Washington National Airport to the United States, reserving the right to levy a tax on the sale of motor fuels for use in over-the-road vehicles.[10] The state retail merchants license tax,[11] and Arlington County's business privilege license tax,[12] both measured by the amount of sales, were assessed against a seller of oil and gasoline at the airport as being within the reservation, in addition to the state tax of six cents per gallon on all gasoline sold for motor vehicle use. Conceding that the six cents per gallon tax was proper, the seller sought relief from the license taxes. Holding in *Floyd v. Fischer*[13] that the business privilege tax and retail merchants tax were not taxes on the *sale* of motor fuels, even though measured thereby, the Supreme Court of Appeals reversed the circuit court, which had dismissed the petition, and granted relief. The Court, speaking through Justice Whittle, said the intention to reserve the right to assess privilege taxes, which it termed regulatory measures, was not spelled out in plain language, and that substantial doubts whether tax legislation includes within its scope certain subject matter must be resolved in favor of the taxpayer.

The Court did not specifically refer to the distinction between the subject and measure of a tax, so frequently made since *Flint v. Stone Tracy Co.*[14]

10. VA. CODE ANN. § 7-9 (1950).

11. VA. CODE ANN. §§ 58-320 to -335 (1950).

12. Arlington County Business Privilege Tax Ordinance, art. 67.

13. 199 Va. 363, 99 S.E.2d 612 (1957).

14. 220 U.S. 107 (1911). In this case, the 1909 federal tax on corporations, measured by net income, was held not to be a then forbidden income tax.

This distinction has more often served to sustain a tax, which would otherwise have been invalid if held to be upon the subject of commerce itself, rather than upon commerce as only the measure of the amount of tax liability. However, these propositions have by no means only a one-way application for the convenience of the taxing jurisdiction. The distinction between subject and measure clearly underlies the result reached here, and its application to invalidate an indirect tax, which would have been sustained had it been imposed directly, has some support.[15]

B. *Apportioned Gross Receipts of Interstate Business*

Virginia now levies a "franchise" tax upon express companies doing business in the state, measured by the gross receipts derived from the transportation within the state of express transported through, into, or out of the state.[16] The former statutory provisions imposing this tax termed it an annual license tax for the privilege of doing business in the state, stating that it was in addition to the usual property taxes. In 1953 the Supreme Court of Appeals sustained the constitutionality of the old tax as applied to the Railway Express Agency, a Delaware corporation doing only interstate business in Virginia.[17] The Court found that the tax was essentially an intangible property tax on good will or going concern value, and, therefore, not invalid as a state tax on the privilege of doing interstate business. However, five members of the United States Supreme Court agreed that the practical effect of the tax conformed more to the statutory description of a business privilege tax than to the Virginia Court's classification, and held the tax invalid.[18] Mr. Justice Jackson, writing for the majority, indulged in some mathematics to find that as an intangible property tax, using the prescribed Virginia rate of 50 cents per $100, the intangible assemblage value of the Railway Express' tangible property exceeded more than 100 times its cost. This might not overtax the express company, but did overtax the Court's credulity.[19] Mr. Justice Clark, joined by Justices Black, Douglas, and Chief Justice Warren, were prepared to accept the Virginia Court's classification.

15. See McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944) (sales tax measured by selling price invalid although use tax using same measure would have been proper).

16. VA. CODE ANN. § 58-547 (Supp. 1958).

17. Railway Express Agency, Inc. v. Commonwealth, 194 Va. 757, 75 S.E.2d 61 (1953).

18. 347 U.S. 359 (1954).

19. Apparently Mr. Justice Jackson's mathematics were directed at examining the relation between the subject and measure of the tax. The lack of such relation has sometimes proved fatal to a state tax on a separable local aspect of an interstate activity, where the measure used was found to reach more than was fairly allocable to the local incident. See Norton Co. v. Department of Revenue, 340 U.S. 534 (1951); McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176 (1940).

In 1956 the Virginia legislature revised the Code sections taxing express companies so as to term the tax a franchise tax, removing the unpalatable (as applied to wholly interstate business) language "for the privilege of doing business," and providing specifically that the tax was in lieu of other taxes on intangibles and rolling stock.[20] The 1956 tax assessment against Railway Express was upheld by the Supreme Court of Appeals in *Railway Express Agency, Inc. v. Commonwealth*,[21] the Court once more finding that the tax was on the separate and otherwise untaxed value of the property's assemblage as a going business. The language impediment to validity seemingly well overcome, the mathematics may take on less significance.[22]

C. *Assessment of Unique Property*

The problem of evaluating properties which are adaptable only for special uses is a most difficult one for assessors, particularly where, as in Virginia, the criterion of "fair market value" is set forth by the constitution.[23] Unique properties rarely have a determinable market, and ascertaining how much the property would sell for under normal selling conditions is largely guesswork, more or less depending upon the size of the class of potential buyers who could make use of it. In *Tuckahoe Woman's Club v. City of Richmond*[24] the Supreme Court of Appeals reversed a lower court order and set aside an assessment of $105,000 based upon depreciated reproduction cost, as excessive in relation to the property's fair market value. The property was subject to a restrictive covenant that it could be used only as a woman's club, and furthermore, its rooms were suitable only for club use. Taking the view that there was no general market for such property, the assessor had considered the depreciated reproduction cost as the best evidence of the value of the property to the present owners. Justice Buchanan's opinion acknowledged that depreciated reproduction cost is a factor which may well be considered, but only as it might affect the market value, and not as the sole measure for ascertaining value to a particular owner.

Perhaps underlying this result was a finding that the property was not so unique that it did not have a market, and therefore, the price for which it would be likely to sell, as agreed by all the witnesses,[25] was conclusive

20. VA. CODE ANN. §§ 58-546, -547 (Supp. 1958).

21. 199 Va. 589, 100 S.E.2d 785 (1957).

22. The United States Supreme Court has noted probable jurisdiction, 356 U.S. 929 (1958). Of the five forming the majority in the 1954 decision, Justices Reed, Jackson, and Minton have left the Court.

23. VA. CONST. art. XIII, § 169.

24. 199 Va. 734, 101 S.E.2d 571 (1958).

25. An expert for the taxpayer-plaintiff admitted that there was no fair market value for clubs, lodges, churches, or things of that nature, that they do not enjoy a market like other types of property, and that when asked for their fair market value, " 'you more or less pull it out of the air.' " *Id.* at 736, 101 S.E.2d at 572.

of the assessed valuation. It would certainly be more comforting, at least to the taxing authorities, to regard the result in that light rather than to suppose that the Court would so favor the test of what others might pay for property, regardless of its marketability, as to uphold a contention whereby a taxpayer would pay less tax on property with a building on it than if the land were unimproved.[26]

D. *Dissolved Corporation Resurrected*

The Federal Housing Administration had insured mortgages of the mortgagor Virginia corporations. Subsequently it acquired title to the mortgaged properties upon surrender by the mortgagors to the mortgagee, and in turn, by the mortgagee to FHA. The mortgagor corporations were then dissolved, distributing their assets in liquidation to their two non-resident stockholders, and certificates of dissolution were issued by the State Corporation Commission. Twelve years later, the FHA realized an excess of $255,000 from the management or sale of the properties. Pursuant to the National Housing Act, prior to its 1948 amendment, such excess was required to be paid to the mortgagors.[27] In 1956 a receiver was appointed for the mortgagor corporations and the $255,000 was paid to him. Upon the State Tax Commissioner's assessment of income taxes arising out of the $255,000, the receiver filed a petition alleging that the taxes were erroneously assessed because the Commissioner was without authority to assess corporations which had dissolved and distributed their assets twelve years earlier.

In *Ashburn v. Commonwealth*[28] the Supreme Court of Appeals, affirming the dismissal of the petition by the lower court, found that the corporations were resurrected under the provisions of former Code section 13-73, and that Code section 58-128 gives the Tax Commissioner authority to impose the income tax upon every domestic corporation, whether dissolved, continuing, or resurrected.[29] While title 13 of the Code was repealed and replaced by title 13.1, effective January 1, 1957, the same result might con-

26. *Cf.* People *ex rel.* New York Stock Exch. Bldg. Co. v. Cantor, 221 App. Div. 193, 223 N.Y. Supp. 64 (1st Dep't 1927), *aff'd mem.*, 248 N.Y. 533, 162 N.E. 514 (1928). In this case, the New York Stock Exchange unsuccessfully contended that its Wall Street building, costing more than $4,000,000 to reproduce, should escape taxation because no one else could make any use of the building whatsoever.

27. 52 Stat. 19 (1938).

28. 199 Va. 747, 102 S.E.2d 281 (1958).

29. No reference is made in the decision on this point to § 58-129, which deals specifically with the assessment and collection of income taxes of dissolved corporations, perhaps because it was thought irrelevant in view of the "resurrection"; also, the term "such taxable year" used in the section may be construed to apply only to the taxable year of dissolution.

ceivably be reached today by coupling with section 58-128 present section 13.1-94(f), which gives any court with general equity jurisdiction full power to liquidate the remaining assets and business of a dissolved corporation upon application of any person for good cause.[30]

30. Section 13.1-101, survival of remedy after dissolution, would seem to be confined to liabilities incurred prior to dissolution, and of course the tax liability here in issue does not arise until the receipt of the funds, twelve years thereafter.