**William & Mary Law Review**

Volume 10 | Issue 3 Article 19

# Armed Services - Taxation - Immunity of Non-Resident Service Man From the States Sales and Use Tax - United States v. Sullivan, 398 F.2d 672 (2d Cir. 1968)

Fred K. Morrison

*Dennison v. State* falls into the category of decisions contrary to the general tendency of the law. The court appears to have restricted the applicability of the decision by emphasizing the uniqueness of the tract of land in question,[12] and therefore it is unlikely that this case will prove determinative of the allowability of noise damage in all cases where there has been a partial taking.

HALDANE ROBERT MAYER

**Taxation**—ARMED SERVICES—SOLDIERS' AND SAILORS' CIVIL RELIEF ACT—IMMUNITY OF NONRESIDENT SERVICEMAN FROM STATE SALES AND USE TAXES. As a result of many incidents of sales and use taxation of nonresident servicemen,[1] the United States[2] brought suit against vari-

---

stroyed by the construction placed on the part taken the owner suffers damages for which compensation must be paid. 68 Cal. Rptr. at 243.

Some states have decided the question both ways. *Compare* Tidewater Ry. v. Shartzer, 107 Va. 562, 59 S.E. 407 (1907), *with* Lynchburg v. Peters, 156 Va. 40, 157 S.E. 769 (1931); *compare* Fox v. Baltimore & O.R.R. 34 W.Va. 466, 12 S.E. 757 (1890), *with* Gardner v. Baily, 128 W.Va. 331, 36 S.E.2d 215 (1945). The more recently decided cases in each state sited here have disallowed noise damages.

The courts exhibit an inability to commit themselves to any general rule. For two recent decisions manifesting this indecisiveness, *see* Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962); Martin v. Port of Seattle, 64 Wash. 2nd 324, 391 P.2d 540 (1964), *cert. denied* 379 U.S. 989 (1965). Oregon follows the federal "rule" for awarding damages, and Washington follows the "taken or damaged" criteria. In both of these decisions the courts completely ignored their previous rulings to the contrary and allowed compensation for noise damage where there had been no partial taking. Compare these two aviation cases with McQuaid v. Portland & V. Ry., 18 Ore. 237, 22 P. 899 (1889); and Taylor v. Chicago, Milwaukee & St. Paul Ry., 85 Wash. 592, 148 P. 887 (1915); DeKay v. North Yakima & Valley Ry., 71 Wash. 648, 129 P. 574 (1913); Smith v. St. Paul, Minneapolis R.R., 39 Wash. 355, 81 P. 840 (1905). *See generally* Spater, *Noise and the Law*, 63 MICH. L. REV. 1373, 1404 (1965) for an interesting discussion of these cases.

12. The holding written by Judge Keating accomplished this restriction by implication. The concurring opinion written by Chief Judge Fuld makes it clear that the peacefulness of this particular tract was a unique quality of the land. The emphasis was on the tranquility and privacy which would affect the market value of the property.

This decision is in general keeping with others of similar kind in New York. *Cf.* Zaremba v. State 29 N.Y. App. Div. 2d 723, 286 N.Y.S.2d 379 (1968); South Buffalo Ry. Co. v. Kirkover, 176 N.Y. 301, 68 N.E. 366 (1903). However, the restrictive wording in *Dennison* should be emphasized.

1. Lieutenant Stanley D. Schuman of Nebraska and Commander Kent J. Carroll of Michigan both purchased used motorboats in Connecticut from nondealers. Schuman paid the use tax under protest; Carroll refused to pay. Commander Clyde H. Shaffer of Pennsylvania purchased a new car from a Connecticut dealer who collected the sales tax. Commander Jerome W. Roloff of Wisconsin bought a used car in Florida, and

ous Connecticut officials to determine if such servicemen are subject to Connecticut sales and use taxes. The lower court granted the Government's motion for summary judgment and Connecticut appealed.[3]

The Court of Appeals for the Second Circuit in affirming,[4] held that the collection of Connecticut's sales and use taxes[5] from nonresident servicemen present in the state solely pursuant to military orders was in violation of section 514 of the Soldiers' and Sailors' Civil Relief Act.[6]

---

paid a sales tax there. When he subsequently registered the car in Connecticut, he was required to pay the difference between the Florida sales tax and the Connecticut use tax. Commander William L. Foster purchased a new car from a Connecticut dealer and at the same time registered it in Texas, his home state, paying a Texas sales tax. Nevertheless, the dealer collected a full Connecticut tax.

2. Lieutenant Schuman was also a plaintiff in the lower court, having brought a class action pursuant to FED. R. CIV. P. 23 on behalf of himself and all other servicemen similarly situated. The district court dismissed this complaint for lack of jurisdiction and no appeal has been taken.

3. United States v. Sullivan, 270 F. Supp. 236 (D. Conn. 1967).

4. United States v. Sullivan, 398 F.2d 672 (2d Cir. 1968).

5. CONN. GEN. STATS. §§ 12-406 to 12-432a (1958).

6. 50 U.S.C.A. § 574 (1964) states in relevant part:

> (1) For the purposes of taxation in respect of any person, or of his personal property, income, or gross income, by any State . . . such person shall not be deemed to have lost a residence or domicile in any State . . . solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in, or to have become resident in or a resident of, any other State . . . while, and solely by reason of being, so absent. For the purposes of taxation in respect of the personal property, income or gross income of any such person by any State . . . of which such person is not a resident or in which he is not domiciled, compensation for military or naval services performed within, or from sources within, such State . . . and personal property shall not be deemed to be located or present in or to have a situs for taxation in such State . . . . Where the owner of personal property is absent from his residence or domicile solely by reason of compliance with military or naval orders, this section applies with respect to personal property, or the use thereof, within any tax jurisdiction other than such place of residence or domicile, regardless of where the owner may be serving in compliance with such orders: *Provided*, That nothing contained in this section shall prevent taxation by any State . . . in respect of personal property used in or arising from a trade or business, if it otherwise has jurisdiction. . . .
>
> (2) When used in this section, (a) the term "personal property" shall include tangible and intangible property (including motor vehicles), and (b) the term "taxation" shall include but not be limited to licenses, fees, or excises imposed in respect to motor vehicles or the use thereof: Provided, That the license, fee, or excise required by the State . . . of which the person is a resident or in which he is domiciled has been paid. (Hereinafter cited as section 514.)

The plain wording of the statute, coupled with the absence of cases to the contrary,[7] indicates that, since its enactment, section 514 has been clearly understood to apply to income tax and the conventional recurring tax on personal property. However, two areas of contention have developed concerning the interpretation of section 514: first, the question of the validity of personal property taxation by a host state, when the serviceman's state of residence has not levied a tax on his personal property;[8] and, second, the problem of the expansion of section 514's protection to include the so-called privilege taxes.[9]

In *Dameron v. Brodhead*,[10] the Supreme Court upheld the constitutionality of section 514 and concluded that the personal property of a nonresident serviceman was not liable to taxation even though it has not been taxed by the state of original residence. In *California v. Buzard*,[11] the Court was concerned with the types of taxes to be included within the protection of section 514. The Court stated that the purpose of the Civil Relief Act in freeing the nonresident serviceman from paying personal property and income tax to the state in which he is present solely by reason of military orders, is to relieve him of the burden of supporting the government of that state. From the foregoing, the Court concluded that an *ad valorem* tax on motor vehicles which serves primarily to produce revenue, is precisely the type of tax burden that section 514 was designed to eliminate.[12]

From the *Buzard* decision, it was a logical step for the court in the instant case to hold that any general revenue-producing tax levied "in respect of . . . personal property" [13] is within the scope of the protection afforded by section 514. The court of appeals had two grounds for its decision. First, it adopted a literal interpretation of the phrase "in respect of . . . personal property" [14] which was consistent with the

7. The dearth of cases on this point may be due to the fact that the amount of tax involved is usually not worth the price of litigation. This fact may account for the Government's bringing the action in the instant case.

8. Dameron v. Brodhead, 345 U.S. 322 (1953).

9. California v. Buzard, 382 U.S. 386 (1966).

10. 345 U.S. 322, 326 (1953).

11. 382 U.S. 386, 395 (1966).

12. The Court clarified the phrase, "licenses, fees, or excises" as used in section 514(2), by saying that this phrase refers only to charges essential to the functioning of the host state's licensing and registration laws. *See* Stephenson v. Curtis, 238 A.2d 613 (Me. 1968). *See generally* 19 ALA. L. REV. 215 (1966) and 8 WM. & MARY L. REV. 310 (1967).

13. 50 U.S.C.A. § 574 (1964).

14. *Id.* The court had no difficulty in dismissing the argument that the sales and

Supreme Court's instruction, in *Le Maistre v. Leffers*,[15] to read the Act "with an eye friendly to those who dropped their affairs to answer their country's call." Secondly, the court followed the precedent established in *California v. Buzard*[16] that a serviceman will not be required to pay revenue-producing taxes to a state of which he is not a resident.

This decision, if affirmed by the Supreme Court,[17] will greatly expand the protection afforded by the Civil Relief Act. To the extent that state governments are supported by taxes "in respect of . personal property," [18] the nonresident serviceman will be relieved of the burden of supporting any state government.[19] However, the states will not be relieved of the responsibility of providing the nonresident serviceman with all the facilities and services that it provides to its tax-paying citizens.

FRED K. MORRISON

---

use taxes were a tax upon the seller and not the purchaser. The court stated that while the tax is in terms based on the privilege of sale, what must be sold is "tangible personal property," and that the tax is in reality assessed against the buyer of such property. The Connecticut Supreme Court reached the same conclusion in Avco Mfg. Corp. v. Connelly, 145 Conn. 161, 140 A.2d 479 (1958).

15. 333 U.S. 1, 6 (1948).

16. 382 U.S. 386 (1966).

17. The State of Connecticut filed an appeal with the U.S. Supreme Court on Oct. 7, 1968, (Docket No. 610).

18. 50 U.S.C.A. § 574 (1964).

19. The serviceman is required by the Act to pay a state income tax, if applicable, to the state of his domicile. While it is lawful for the states to tax the personal property of their absent resident servicemen, it is impractical and seldom done. *See generally* Lilly, *State Power to Tax the Service Member: An Examination of Section 514 of the Soldiers' and Sailors' Civil Relief Act*, 36 MIL. L. REV. 123 (1967). *California v. Buzard* can be interpreted to require the serviceman to pay, in either his home state or the host state, that portion of a vehicle license fee which is used to directly support the states' licensing and registration procedures. *See* Whiting v. Portsmouth, 202 Va. 609, 118 S.E. 2d 505 (1961) (decided before the decision in California v. Buzard) and the present policy enunciated in a letter from the Attorney General of Virginia to the Honorable Joseph E. Spruill, April 14, 1966, in which the Attorney General states that "license fees levied on nonresident servicemen are no longer supportable." However, community property states may still have the right to tax the serviceman's dependents' share of their property *See generally* Flick, *State Tax Liability of Servicemen and Their Dependents*, 21 WASH. & LEE L. REV. 22, 39 (1964).