

CONSTITUTIONAL LAW—INTERGOVERNMENTAL TAX IMMUNITY—PRIVILEGE TAX MEASURED BY SALES—[North Dakota].—Plaintiff, federal land bank, bought gasoline subject to a North Dakota license tax measured by three cents per gallon sold. Plaintiff instituted action for a declaratory judgment on validity of inclusion of the tax in the price of sale. *Held*, the tax may be included since its imposition is not a state interference with a federal function.¹

The instant case is the second state decision² within the last two years refusing to follow *Panhandle Oil Co. v. Mississippi*.³ The *Panhandle* case held by a five to four decision that inclusion of a privilege tax, measured by sales, in the price of gasoline sold to the coast guard and a veteran's hospital retarded and impeded exertion of national power and was therefore invalid. It relied heavily on the strictness of the application of the doctrine of *M'Culloch v. Maryland*⁴ in *Gillespie v. Oklahoma*,⁵ but the *Gillespie* case has since been expressly overruled.⁶ This, together with recent decisions repudiating the immunity of governmental employees from income taxes,⁷ is used in the instant case as the basis for considering the *Panhandle* case overruled in effect. A practical burden rationale is invoked: the tax is found to be incidental to the activities of the land bank, and to be no attempt to "retard, impede, burden, or in any manner control the operation of" the federal land bank.

The other state validation of a privilege tax on sale of personal property to a federal land bank arose in California.⁸ It relied on the construction of the tax, as not imposed on the sale, but as a property or excise tax payable by an independent contractor on a sale to the government, and so controlled by *James v. Dravo Contracting Co.*⁹

It may be questioned whether the problem can be side-stepped by refusing to acknowledge that the tax, whether on unit of merchandise sold or gross receipts, is levied on the sale. The issue of whether a sales tax, short of a discriminatory one, creates a burden on the purchaser government goes to

1. Federal Land Bank of St. Paul v. De Rochford (N. D. 1939) 287 N. W. 522.

2. The first was *Western Lithograph Co. v. Board of Equalization* (1938) 11 Cal. (2d) 156, 78 P. (2d) 731.

3. *Panhandle Oil Co. v. Mississippi* (1928) 277 U. S. 218. In *Western Union Telegraph Co. v. Texas* (1882) 105 U. S. 460, a Texas occupation tax, measured by messages sent by a telegraph company, was held invalid as state regulation of interstate commerce; as to government messages it was held a tax on means employed by the government. As to the effect of basing measure of tax on tax-exempt sources, cf. *Educational Films Corp. v. Ward* (1931) 282 U. S. 379.

4. *M'Culloch v. Maryland* (U. S. 1819) 4 Wheat. 316.

5. (1922) 257 U. S. 501.

6. *Helvering v. Mountain Producers Corp.* (1938) 303 U. S. 376.

7. *Helvering v. Gerhardt* (1938) 304 U. S. 405; *Graves v. New York ex rel. O'Keefe* (1939) 306 U. S. 466.

8. *Western Lithograph Co. v. Board of Equalization* (1938) 11 Cal. (2d) 156, 78 P. (2d) 731. This case overruled a previous decision of a California district court. *West Co. v. Johnson* (1937) 20 Cal. App. (2d) 95, 66 P. (2d) 1211.

9. (1937) 302 U. S. 134.

the heart of the problem. Conceptually, the mere incidence of a tax on the other government may be a burden on it, and this was the view of the earlier cases. Realistically, there would seem to be no burden unless the amount of the tax is unduly onerous.¹⁰ Through the incidence¹¹ on the federal government of the taxes in question may be clear, their impeding and retarding effect on it is not as evident because it creates no onerous financial burden.¹² Therefore, the taxes in the instant case and the *Western Lithograph Co.* case¹³ are to be invalidated, the decisions must rest on the basis of their incidence.¹⁴

V. K.

FEDERAL PROCEDURE—FOREIGN CORPORATIONS—WAIVER OF VENUE BY CONSENT—[United States].—Citizens of New Jersey brought suit in a federal court in New York to restrain a Delaware corporation there doing business from carrying out a contract. Service was had upon an agent which the corporation had appointed according to a New York statute. Defendant appeared specially and moved to quash service because it was not a resident of the district. Plaintiffs appealed to the Supreme Court of the United States. *Held*,¹ judgment reversed. The appointment by a corporation of an agent as required by the New York statute constituted waiver of the venue provision of the Judicial Code.²

The history of foreign corporations in federal courts has been marked by changing attitudes. In 1789,³ the original Judiciary Act was passed requiring suit to be brought in the district where defendant was an inhabitant or in which he could be found. In order to permit a corporation to sue, it was necessary for the Supreme Court in 1809⁴ to decide that citizen-

10. This is the reasoning behind Mr. Justice Holmes's classic statement in *Panhandle Oil Co. v. Mississippi* (1938) 277 U. S. 218, 223, that "The power to tax is not the power to destroy while this court sits." See also Mr. Justice Frankfurter's concurring opinion in *Graves v. New York ex rel. O'Keefe* (1939) 306 U. S. 466, 487.

11. "The settlement of the burden on the ultimate taxbearer is spoken of as the incidence of the tax." Lutz, *Public Finance* (2d ed. 1929) 317.

12. The lack of an actual financial burden may have been the basis for the decision in *Graves v. New York ex rel. O'Keefe* (1939) 306 U. S. 466. "In no case is there basis for the assumption that any such tangible or certain economic burden is imposed on the government." 306 U. S. at 486, 487. See also *Helvering v. Gerhardt* (1938) 304 U. S. 405, 421, "When immunity is claimed from a tax laid on private persons, it must clearly appear that the burden upon the state function is actual and substantial, not conjectural."

13. *Western Lithograph Co. v. Board of Equalization* (1938) 11 Cal. (2d) 156, 78 P. (2d) 731, cited supra, note 8.

14. Lack of incidence might have been the controlling consideration in the *Graves* case. "That the economic burden of a tax on salaries is passed on to the employer or that employees will accept a lower governmental salary because of its tax immunity, are formulas which have not won acceptance by economists and cannot be judicially assumed." 306 U. S. 466, 484, n. 4.

1. *Neibro Co. v. Bethlehem Shipbuilding Corp.* (1939) 60 S. Ct. 153.

2. Judicial Code (1888) 25 Stat. 433, 28 U. S. C. A. sec. 112.

3. (1789) 1 Stat. 78, c. 20, sec. 11.

4. *Bank of the United States v. Deveaux* (U. S. 1809) 5 Cranch 61.