ST. LOUIS
LAW REVIEW

Vol. XIII Published Quarterly During the University Year by the Undergraduates of Washington University School of Law No. 3

MISSOURI INCOME TAX LAW AS RETROSPECTIVE LEGISLATION

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A question has been raised as to whether there was a ·y law of the State of Missouri providing for the levy, assessment, and collection of a tax upon income earned, or accruing, during the period from January 1, 1927, to July 3, 1927.[1]

The contention that there was not any law applicable to such period may be briefly stated thus:

The General Assembly, at its 1927 session, repealed certain sections of the income tax law,[2] then in effect, and enacted nine new sections in lieu thereof.[3] The new law did not (and could not under the Missouri Constitution) become effective until July 3, 1927. Inasmuch as the repealed sections of the old law were repealed as of January 1, 1927, there was no income tax law applicable to the part of 1927 prior to July 3rd.

The Attorney General, in an opinion to the State Auditor,[4] has held that Sec. 13106 of the new law became effective July 3, 1927, and that Secs. 13106 and 13107 R. S. Mo. 1919, as amended by Laws of Missouri, First Extra Session 1921, p. 187, were in force until that date. It will be noted, however, that Sec. 1 of the new law expressly repeals Secs. 13106 and 13107 R. S. Mo. 1919, as amended by Laws of Missouri, First Extra Session 1921, p. 187, except in their relation to, and effect upon, income accrued prior to January 1, 1927.

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[1] St. Louis Globe Democrat, March 16, 1928; Corporation Trust Company's Corporation Tax Service, State and Local, Report No. 30, March 23, 1928.

[2] Secs. 13106 to 13114, R. S. Mo. 1919, as amended by Laws of Missouri, First Extra Session 1921, p. 187.

[3] Laws of Missouri 1927, p. 475.

[4] Letter of December 6, 1927, from Hon. North T. Gentry, Attorney General

An examination of the authorities generally, and of the cases decided by the Supreme Court of Missouri involving the construction of laws expressly repealing existing laws and simultaneously re-enacting substantially the same statutory provisions, would seem to indicate that the new law is to be construed, not as a repeal of the pre-existing statutes, but as a continuation thereof, and that, therefore, insofar as the income tax act enacted at the 1927 session of the General Assembly is a re-enactment of the provisions of the old law expressly repealed thereby, it is applicable to income for the whole of the calendar year 1927.

EFFECTIVE DATE OF NEW LAW

The Missouri Constitution[5] provides that:

> No law passed by the General Assembly, except the General Appropriation Act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless, in case of an emergency (which emergency must be expressed in the preamble or in the body of the Act) the General Assembly shall, by a vote of two-thirds of all the members elected to each House, otherwise direct, said vote to be taken by yeas and nays and entered upon the journal.

The new law does not contain any such emergency clause and, even though it did, it would not have had the effect of putting the act into effect from the time of its approval, because, as has been held by the Supreme Court of Missouri, an income tax law is not one of those laws excepted from the operation of the referendum, as provided by the State Constitution, and, therefore, an emergency clause in the preamble or body of such an act would not make it effective from the date of its approval.[6]

The 54th General Assembly, at which the act was passed, adjourned Monday, April 4, 1927, and, under the Constitutional provision quoted above, the act could not take effect, or go into force, until ninety days after such date of adjournment.

As before stated, the Attorney General has declared the effective date of the act as July 3, 1927, and state and county officials charged with administering the act are said to have signified their intention to follow the Attorney General's opinion, insofar as concerns any provisions of the new law, not contained in the old law.

Sec. 13106 of the new law prescribing the rate of tax to be levied and

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of Missouri, to Hon. L. D. Thompson, State Auditor of Missouri.

[5] Art. IV, Sec. 36.

[6] State v. Southwestern Bell Telephone Company, 292 S. W. 1037, l. c. 1038.

what shall constitute net income subject to tax under the law is as follows:

> **Sec. 13106. Rate to be levied—When.**—There shall, except as otherwise hereinafter provided, be levied, assessed, and collected for the calendar year 1927 and annually thereafter, and paid by every individual, resident or non-resident, by every administrator, executor, or other such legal representative, and by every corporation, joint stock company or association, other than partnerships, whether organized, authorized, or existing under the laws of this State, or otherwise, an annual tax of one per cent. upon the taxpayer's entire net income from all sources within this State, including a reasonable proportion apportioned to this State of net income derived from business partially within and partially without the State, which cannot be definitely allocated.

It will be noted that the new law does not make any change in the rate of the tax, but continues the rate at one per cent. as it was in the old law. An examination of the new law reveals that it is, also, largely a re-enactment of the provisions of the old law, and that any modifications made therein are, for the most part, beneficial to the taxpayer.

The principal change of benefit to the taxpayer is the provision contained in Sec. 13106, set out above, levying an annual tax "upon the taxpayer's net income from all sources within this State." Under the old law, a taxpayer, resident of this State, was assessed upon his entire net income from all sources whatsoever.

It has been held by the Supreme Court of Missouri that an act of the General Assembly purporting to repeal existing laws which simultaneously re-enacts, with modifications, the laws purported to be repealed, is simply an amendment of the pre-existing law,[7] and is but a continuation of the latter as so amended, and, furthermore, that the law dates from the passage of the first law and not the latter.[8] This also seems to be a general rule of statutory construction.[9]

It would seem, therefore, that such of the provisions of the new law, as are merely a re-enactment of the old law, especially those provisions relating to the rate of tax and modifying the provisions of the old law relating to what shall constitute net income subject to tax, insofar as such modifying provisions are beneficial to the taxpayer, should be considered as having been in effect during the whole of the calendar year 1927. The effective date of those provisions of the new law which impose new or additional burdens or obligations on the taxpayer, should, however,

[7] Brown v. Marshall, 241 Mo. 707, 145 S. W. 810, l. c. 815.
[8] State v. Bradford, 285 S. W. 496, l. c. 500.
[9] 36 Cyc. 1084, note 76.

for reasons hereinafter adverted to, be considered as having become effective on July 3, 1927, the effective date of the Act.

RETROSPECTIVE OPERATION OF NEW LAW

The Missouri Constitution[10] provides:

> That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be passed by the General Assembly.

The old law having been repealed as of January 1, 1927, and the new law not being effective until July 3, 1927, in view of the fact that laws retrospective in their operation are expressly prohibited by the section of the Constitution quoted above, the question of the validity of the new law becomes pertinent.

The Supreme Court, in the case of *Reed v. Swan*,[11] and *Smith v. Dirckx*,[12] has quoted with approval the following definition by Mr. Justice Story of a retrospective law:

> Every statute which takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty or attaches a new disability in respect to transactions or considerations already passed, must be deemed retrospective.[13]

The principal provisions of the new law of general application, which may be construed as placing a new or additional burden on the taxpayer, are those contained in Sec. 13112 with regard to the credit allowed for dividends received from a corporation paying a Missouri income tax on the portion of its net income derived from sources within the State of Missouri, and in Sec. 13110(4) exempting from the provisions of the Act interest upon state and municipal bonds.

Under paragraph 9, Sec. 13110 of the old law, the income embraced in a personal return was allowed to be credited with the amount received as dividends upon the stock, or from the net earnings of any corporation, joint stock company, or association, trustee, or insurance company, which was taxable upon its net income under its provisions. Under this provision of the old law, a taxpayer was not required to include in his taxable income any part of the amount of dividends received on the capital stock of corporations paying a Missouri income tax. Under Sec. 13112 of the new law, however, the income returned is al-

[10] Sec. 15, Art. II.
[11] 133 Mo. 100, l. c. 108, 34 S. W. 483.
[12] 314 Mo. 684, 223 S. W. 104, l. c. 106.
[13] Society for Propagation of the Gospel v. Wheeler, 2 Gallison 105, l. c. 139.

lowed to be credited with only such proportion of the amount received as dividends upon the capital stock, or from the net earnings, of any corporation as such corporation's income taxed in this State during the preceding taxable year bears to its total net income for the same period. Thus, under the old law, a taxpayer was not taxed upon any dividends received from a corporation paying a Missouri income tax upon its net income from sources within this State, whereas, under the new law, the excess of the amount of such dividends over and above the proportion which the net income of such corporation subject to tax under the Act bears to its total net income, is now subject to tax.

Under Sec. 13109 of the old law, interest upon the obligations of any state, or any political subdivision thereof, was exempt, whereas, under Sec. 13110(4) of the new law, only interest upon obligations of the State of Missouri, or any of its political subdivisions, is exempt.

These are probably the only important provisions of general application of the new law which can be construed as placing a new or additional burden upon the taxpayer with respect to past transactions. As before stated, however, in administering these provisions of the new law, the state and county taxing officials are construing them as being applicable only after July 3, 1927, the effective date of the new law. It is a cardinal rule of statutory construction that, if a statute is susceptible of two constructions, one constitutional and one unconstitutional, that construction which is constitutional will be placed upon it. It would, therefore, seem that the foregoing construction of the law is proper, and that being so it would appear that it cannot be said the new provisions of the act are retrospective in operation and effect within the prohibition of the Constitution of Missouri.

Insofar as the new law is a re-enactment of the provisions of the old law, it would seem clear that it is not to be considered as retrospective in its operation and effect within the meaning of the Constitutional inhibition. This has been expressly held to be so by the Supreme Court of Missouri in the case of *Smith v. Dirckx*. That case involved the construction and validity of the income tax act enacted at the 1919 special session of the General Assembly.[14] Prior to such act, the rate of tax was one-half of one per cent. and such rate was increased to one and one-half per cent. by the act. The Act of 1919, like the act under consideration herein, expressly repealed the sections of the statutes relating to the levy, assessment and collection of income tax, and enacted six new sections in lieu thereof. The 1919 act attempted to levy a tax at

[14] Laws of Missouri, 1919, p. 718.

the increased rate upon the entire net income of taxpayers received in the calendar year 1919, although the act did not become effective until August 7th of that year.

The Court held that, insofar as the Act of 1919 undertook to assess an additional one per cent. upon that portion of the net income for the calendar year 1919 which was received by the taxpayer prior to the going into effect of said act, it was invalid. It did "create a new obligation or impose a new duty," and the act to that extent did operate retrospectively in violation of the above quoted Constitutional inhibition against retrospective laws.

The Court further held, however, that this fact should not operate to prevent the collection of a tax not exceeding one-half of one per cent. for the period prior to the effective date of the act. This for the reason that since the old law imposed a tax of one-half of one per cent. upon that portion of his income which the taxpayer received prior to the taking effect of the 1919 act, *that portion of the new rate which did not exceed the old rate did not create a new duty or impose a new obligation.*

Smith v. Dirckx would, therefore, seem to be authority for the proposition that, to the extent that the Act of 1927 does not impose new duties or create new obligations, it is not retrospective in operation and effect.

Bearing in mind that, as pointed out above, the new law is largely a reenactment of the old law, that any modifications made in the old law are, for the most part, beneficial to the taxpayer; and that such as are not, are not being given a retroactive effect in their administration, it would seem that the Act of 1927 does not create new obligations or impose new duties upon the taxpayer and is, therefore, not retrospective within the meaning of the Constitutional inhibition, even though it levies a tax on income earned, or accruing, prior to July 3, 1927, the date of its going into effect.

Although the Income Tax Act of 1919, *supra,* purported to expressly repeal certain sections of the income tax law then in effect, and to enact six new sections in lieu thereof, the Supreme Court throughout its opinion in *Smith v. Dirckx, supra,* refers to the act as "the amendment of 1919," and does not advert to the fact that the old law was expressly repealed and the Act of 1919 enacted in lieu thereof, but, rather, confines itself to a consideration of the retrospective features of the act, holding that it was retrospective insofar as it attempted to assess an additional one per cent. upon that portion of the net income for 1919,

which was received by the taxpayer prior to the going into effect of said "amendment." But, as also pointed out above, such opinion further held this should not operate to prevent the collection of a tax not exceeding one-half of one per cent. for such period, "for the reason that, since the old law imposed a tax of one-half of one per cent., which appellant received prior to the taking effect of the 1919 amendment, that portion of the amended rate which did not exceed the old rate did not create a new obligation or impose a new duty."

This manner of construing the 1919 Act as an amendment of the law existing at the date of its going into effect, rather than as a repeal of such law and its re-enactment with a modification as to the rate of tax, can be supported by the rule of statutory construction referring to the construction of statutes expressly repealing existing laws and simultaneously re-enacting substantially the provisions of such repealed laws, with modifications, hereinbefore alluded to. Such construction of the 1919 Act as an amendment of the then existing law was, it is submitted, a giving effect to its substance, rather than its form, and was a proper method of construction under such rule. The case was heard before the Supreme Court *en banc* and all of the judges concurred in the decision except Judge Woodson, who was absent, and Judge Graves, who dissented on the ground that the law was not retrospective even though it did increase the rate of tax applicable to income for the whole of the calendar year 1919.

Judge Graves, in his dissenting opinion, does, however, expressly refer to the fact that the Act of 1919, in effect, was a repeal of the then existing law and the enactment of a new law. That the Legislature could have repealed the old law and subsequently, at the same session, passed a new income tax law, he states there can be no question. He further states that this is, in effect, what was done; that the question of the retrospective action of the Act of 1919 was not an element in the case further than determining the fact whether the Legislature can, in the middle of the year, pass a law providing for an income tax on the income of the whole year; and that to his mind "the real answer to all contentions is that the income of the year does not and cannot come into, or have an existence, until the end of the year, and the law, being in force prior to that time, is in no sense retrospective in action."

The Act of 1919 was not, however, a repeal of the existing law and the enactment immediately thereafter of a new law substantially the same, except as to rate of tax, but was rather a repeal of the existing law and a simultaneous re-enactment of the repealed law, with modifica-

tions. Under the rule of construction mentioned above, this procedure was tantamount to an amendment and resulted in carrying forward the re-enacted provisions of the old law.

In the subsequent case of *Stouffer v. Crawford*[15] before Division 1 of the Supreme Court, the Dirckx case is cited for authority for the proposition that the Act of 1919, insofar as it carried forward the provisions of the former act, was not retrospective, nor was it to that extent new matter at all.

In view of the above decisions, it would seem quite probable that, if the question is presented to the Supreme Court, it will be held that those provisions of the income tax act of 1927, providing for the taxation of incomes for the whole of the year 1927, to the extent that they are carried forward from the old law, are not invalid as retrospective in operation and effect.

St. Louis, Missouri.

[15] 248 S. W. 581, l. c. 584.