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Occupation Taxes and the Employee

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or to terminate the trust altogether;¹² or where the settlor is found to be using the device of a trust to continue operations in substantially the same manner as before, the trust being only a sham to reduce the settlor's tax liability.¹³

The term of the present trust was ten years, or less if the trustee died before the term expired; the right to receive the income at the end of ten years would revert to petitioner. "Giving up the right to the income of a trust for a relatively short term while retaining a reversionary interest is not a cession of rights of ownership sufficient to avoid taxation. * * * It is the very fact of reversion, coupled with a relatively short term, that permits the conclusion that the grantor has not divested himself of income for tax purposes."¹⁴ Just how long a term must be to make the settlor not liable for income taxes when he has retained no control has not been conclusively decided.¹⁵ Where a settlor had parted with both title and control and was not under an obligation to support the beneficiary, the court refused to extend the concept of a short term trust to a trust of ten years at the expiration of which or upon the prior death of the beneficiary the principal with any accumulated income was to revert to the settlor.¹⁶

As the Farkas trust was for a goodly part of the life expectancy of the petitioner, was irrevocable by him, prohibited him from obtaining any of the income, gave the trustee absolute discretion and control of the disposition of the income among the beneficiaries, was not used to relieve petitioner of any duty of support of members of his family, and retained in him no characteristics of ownership, the transfer was a substantial disposition of property. "The fact that the thing assigned could revert to the settlor upon the death of the trustee, standing alone, would not . . . render the income from the trust taxable to the settlor."¹⁷

The decision reached by the court here recognizes the fact that, though a case involves taxation of income of a short-term trust, and the *Clifford* case involved the same question, the two are not necessarily congruent; the *Clifford* rule is not one that can be indiscriminately imposed on all cases bearing the label of short-term trust. Instead, each trust must be examined individually to determine whether its resemblance or dissimilarity to a *Clifford* trust is predominate.

J. E. MACINNIS

OCCUPATION TAXES AND THE EMPLOYEE

The Board of Aldermen of Louisville, Kentucky, passed an ordinance imposing an annual tax or license fee for the privilege of engaging in any business, occupation, calling, profession or labor within the city. The ordinance contained

12. *Ibid*, par. 15,321-D.

13. *Ibid*, pars. 15-321-C, 15,322; Magill, What Shall Be Done With the Clifford Case, 45 Col. L. Rev. 111 (1944).

14. Note, The Treasury Interpretation of the Clifford Rule, 46 Col. L. Rev. 602, 606 (1946).

15. *Ibid*, 606.

16. *Comm. v. Jonas*, 122 F. (2d) 169 (C. C. A. 2d 1941).

17. *Farkas v. Comm.*, instant case.

two broad classifications for the measurement of the tax, which was computed upon: "(a) all salaries, wages, commissions, and other compensation earned by every person in the city for work done or services performed in the city; and (b) the net profits of all business, professions or other activities conducted in the city". A representative class suit was brought by Sebree, who contended that the ordinance was invalid because the measure of the tax was the earnings from the exercise of privileges of engaging in various activities, and that it imposed an income tax in fact, although it was called a license fee. The court *held*, that the tax was not an income tax, but was an occupation tax, and as such, was within the city's power as authorized by statute¹ permitting first class cities to raise revenue from ad valorem taxes based on income, licenses and franchises pursuant to constitutional authority.² *City of Louisville et al v. Sebree et al*, 308 Ky. 420, 214 S. W. (2d) 248 (1948).

This ordinance was closely patterned after a Philadelphia ordinance, which was intended, and held to be, an income tax.³ It was also similar to an income tax imposed by a St. Louis ordinance, which was held invalid because the city did not have the power to impose such a tax.⁴ In both of these cases, the ordinances imposed a withholding tax on earnings or income derived from labor, services or business performed within the city, and their validity depended upon the construction of the city charters.⁵

The terms "license" and "license fee" have definite and distinct meanings, although they are often used indiscriminately without being distinguished from related exactions on occupations and privileges.⁶ It has been held that a license tax is based on the police power to regulate or prohibit a particular business, and not for the purpose of raising revenue, while the purpose of an occupation tax is primarily for the raising of revenue.⁷ The Supreme Court of Wyoming, in *Sheridan v. Litman*,⁸ held that it was immaterial that the term "license" was used

1. Ky. Acts 1948, S. B. Nos. 14, 16; Ky. Rev. Stat. 1946, c. 91, sec. 260.

2. Ky. Const. sec. 181.

3. *Dole v. Philadelphia*, 337 Pa. 375, 11 A. (2d) 163 (1940); *Butcher v. Philadelphia*, 333 Pa. 497, 6 A. (2d) 298 (1938).

4. *Carter Carburetor Corp. v. St. Louis*, 356 Mo. 646, 203 S. W. (2d) 438 (1947). Held, that the tax was an income or excise tax, and was not within the city's power, which was limited to imposing property taxes and true licenses. The taxing power is exercised solely by the legislature, except when it grants the power to municipalities; accord *Kans. City v. Fogge*, 352 Mo. 233, 176 S. W. (2d) 498 (1944) in which the court said that the power to tax is an extraordinary one, which doesn't inhere in municipal corporations, and it will not be implied unless the implication is necessary and the grant is unmistakable. Compare *State ex rel Zielonka v. Carrel*, 99 Ohio St. 220, 124 N. E. 134 (1919), which held that all presumptions are in favor of municipalities, and they can impose any tax not prohibited by the general law, or pre-empted by a similar state tax.

Since the decision in the *Carter Carburetor* case, the Missouri legislature has authorized the city of St. Louis to collect an earnings tax. (Mo. Laws 1947, vol. II, p. 308.)

5. *City of Louisville v. Sebree*, 308 Ky. 420, 214 S. W. (2d) 248 (1948).

6. *Solberg v. Davenport*, 211 Iowa 612, 232 N. W. 477 (1930).

7. *Reif v. Barrett*, 355 Ill. 104, 188 N. E. 889 (1933); *McMillan v. Knoxville*, 139 Tenn. 319, 202 S. W. 65 (1918); *Hurt v. Cooper*, 130 Tex. 433, 110 S. W. (2d) 896 (1937); *Provo v. Provo Meat and Packing Co.*, 49 Utah 528, 165 Pac. 477 (1917).

8. 32 Wyo. 14, 228 Pac. 628 (1924); accord *Tharp v. Clovis*, 34 N. M. 161, 279 Pac. 69 (1929); *Hurt v. Cooper*, supra note 7.

instead of the term "occupation tax" when reference was made to a statute authorizing, and to an ordinance imposing, an occupation tax.

The instant case presents a perplexing, and apparently novel problem, which is not entirely clarified by the majority opinion. The problem arises as to whether there should be a distinction between a tax imposed upon a business or occupation, and a tax upon the right to work as an employee. The view expressed by the majority was that this tax was not on the right to work or do things, but a tax on the doing of them in fact, citing *James v. Kentucky Refining Co.*⁹

In the dissenting opinion, Siler, J., stated that a distinction should be made between an occupation tax based on the theory of "doing business" and the activity of a person merely making a living by the "sweat of the face". The dissent further pointed out that occupation taxes should be reserved exclusively for enterprises, professions, shops, and individual activities performed in an unsupervised manner, and that the earning of one's bread in a servile way should not be subjected to any privilege tax.¹⁰

The instant case appears to be unique in that it holds that a mere employee may be subjected to an occupation tax. The validity of occupation taxes seem universally to be upheld. It should be noted, however, that in the cases which have been concerned with the validity of such a tax, only a business, profession, or occupation carried on in an unsupervised manner were involved.¹² The question arose in *Derrick v. Commonwealth*¹³ whether a civil engineer, employed full time by a railroad, was subject to a license tax imposed upon persons engaged in the business of civil engineering. The Supreme Court of Virginia held that one must be engaged in business, and not a mere servant or ordinary employee, to be subject to the tax.¹⁴ No matter how lowly or undignified the pursuit, whether a person is an operator of a shoe shine parlor,¹⁵ a junk dealer,¹⁶ or a scavenger,¹⁷ the basis of distinction seems to be that he is engaged in a business or occupation which he conducts in an unsupervised manner.

The state of the law as it exists in Wyoming at the present time does not appear to be broad enough to permit the imposing of an occupation tax which is as

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9. 132 Ky. 353, 113 S. W. 468 (1908). Held, that a franchise tax imposed on persons engaged in the transportation business was not an occupation tax, nor a tax on a mere privilege of engaging in business, but a tax on the business. The court said, "the franchise spoken of by this statute is not the right to do the thing, but the doing of it. The state does not seek by this section to tax the right to do it. It fixes a value upon the privilege which has been enjoyed, and taxes that value as property of the person who has exercised the privilege . . .".
 10. *City of Louisville v. Sebree*, supra note 5.
 11. See cases cited in 53 C. J. S. Licenses, secs. 6, 10, 26, 27, 30, 31; 33 Am. Jur. Licenses, sec. 9.
 12. See note 11 supra.
 13. 122 Va. 906, 95 S. E. 392, L. R. A. 1918D 284 (1918).
 14. *Derrick v. Commonwealth*, supra note 13. The court said, "the mere doing of work of one's profession . . . doesn't, in all cases, constitute such work the business of the person doing it".
 15. *Barlin v. Knox County*, 136 Tenn. 238, 188 S. W. 795, 2 A. L. R. 112 (1916).
 16. *State v. Shapiro*, 131 Md. 168, 101 Atl. 703 (1917).
 17. *In re Lowe*, 54 Kan. 757, 39 Pac. 710, 27 L. R. A. 545 (1895); *State ex rel Moriarity v. McMahan*, 69 Minn. 265, 72 N. W. 79, 38 L. R. A. 675 (1897); *State v. Hill*, 126 N. C. 1139, 36 S. E. 326, 50 L. R. A. 473 (1900).

all inclusive as the Louisville ordinance. The Wyoming constitution provides that no tax may be levied, except in pursuance of law.¹⁸ Section 29-107, Wyo. Comp. Stat. 1945, authorizes cities and towns to levy and collect license taxes, for the purpose of raising revenue, on any business conducted or carried on within the city or town.¹⁹ These provisions seem clearly to indicate that an occupation tax can only be imposed upon a person who engages in a business, and not upon a mere employee.

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ESTATE TAX REVISION

The United States Supreme Court has again changed the estate tax picture. In two cases decided January 17, 1949, the court held first, that the retention of a life estate in a trust makes the entire value of the trust corpus includable in the gross estate regardless of when the trust was formed¹ and second, that the entire value of a trust is includable in the gross estate of the grantor if there is any possibility of reversion by the terms of the instrument or by operation of law even if the value of the reversion is de minimis.²

These decisions are based upon construction of sec. 811c of the Internal Revenue Code,³ which reads as follows:

"To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer by trust or otherwise under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of or the right to the income from, the property, or (2) the right, either alone or in conjunction with any other person, to designate the persons who shall possess or enjoy the property or the income therefrom. . . ."⁴

The first leading case construing the similar sec. 402c of the Revenue Act of 1921, c. 1365 is *Reinecke v. Northern Trust Co.* (1929)⁶ which held that two trusts in which the grantor retained a life estate were taxable because the grantor also retained the sole power to revoke or modify, and that five trusts in which the

18. Wyo. Const. Art. XV, sec. 13.

19. Wyo. Comp. Stat. 1945 sec. 29-107. "For the purpose of raising revenue, any city or town, incorporated under special or general laws of the state of Wyoming, is hereby authorized to levy and collect a license tax on any business whatsoever conducted, carried on, or trafficked in within the limits of such city or town and the city or town council is hereby authorized to enact an ordinance carrying into effect the provisions of this section. . . ."

1. *Commissioner v. Church's Estate*, 335 U. S. 632, 69 Sup. Ct. 322, 93 L. Ed. 310 (1949).

2. *Spiegel's Estate v. Commissioner*, 335 U. S. 701, 69 Sup. Ct. 301, 93 L. Ed. 327 (1949).

3. 26 U. S. C. A. 811c.

4. 56 Yale L. J. 176 (1946). The origin of the phrase, "Intended to take effect in possession or enjoyment at or after . . . death" was the Penn. Act of 1925-6, c. 72. Construed in *Reish, Admr. v. Commonwealth*, 106 Pa. 521 (1884).

5. Revenue Act of 1921, c. 136, 41 Stat. 1359.

6. 278 U. S. 339, 49 Sup. Ct. 123, 73 L. Ed. 410, 66 A. L. R. 397 (1929).