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TAXATION — PUBLIC UTILITIES — IMPLIED CONDITION IN UTILITY FRANCHISE OF TAX EXEMPTION — In 1917 the city of New York and the New York Municipal Railway Corporation, predecessor in interest of the appellant, the New York Rapid Transit Corporation, entered into a contract for the operation of part of the city's transit system. The Transit Corporation was thereby obligated to furnish its services for a five cent fare, which by city charter provision could not be changed without the approval on referendum of a majority of the qualified voters. Other relevant portions of the contract provided that the corporation should pay all taxes upon its property and taxes incurred in connection with the operation of the railways, and for the disposition and allocation of the gross receipts from the enterprise between the contracting parties. Subsequently the city imposed a franchise tax upon the corporation measured by a percentage of the gross receipts. The corporation contended that this impaired the obligation of the contract with the city. *Held*, that since no express provision exempted the corporation from taxation, the contract was not impaired. *New York Rapid Transit Corp. v. City of New York*, 303 U. S. 573, 58 S. Ct. 721 (1938).

It is clear that no constructive condition of tax immunity will be read into a contract between a private party and the government upon merely speculative grounds.[1] Innumerable decisions insist upon an absolute rule of strict construction of alleged grants of tax exemption:[2] such grants can never be presumed,[3] nor can they be made out by mere inference or implication, but must be beyond a reasonable doubt.[4] The courts emphasize that the exemption is to be expressly and explicitly stated, and is not to be implied.[5] Yet dicta in these same cases

[1] See notes 2, 3, 4, and 5, infra.

[2] Hale v. Iowa State Board of Assessment & Review, 302 U. S. 95, 58 S. Ct. 102 (1937); see quotations and cases cited in Vicksburg, S. & P. R. R. v. Lennis, 116 U. S. 665 at 666, 6 S. Ct. 625 (1886). Chesapeake & Ohio Ry. v. Miller, 114 U. S. 176, 5 S. Ct. 813 (1885), decided that an immunity enjoyed by one railroad company did not pass to the purchaser under the foreclosure of a mortgage, although the act provided that the purchaser should forthwith become a corporation, "and succeed to all such franchises, rights and privileges as would have been had by the original company but for such sale and conveyance" on the ground that "franchises, rights and privileges" under strict interpretation did not necessarily include grant of exemption from taxation! But see Louisville & Nashville R. R. v. Gaines, (C. C. Tenn. 1880) 3 F. 266, in which franchises, rights and privileges was held to include grant of tax immunity.

[3] 2 COOLEY, TAXATION, 4th ed., § 672 (1924); Philadelphia, W. & B. R. R. v. Maryland, 10 How. (51 U. S.) 376 (1850); Providence Bank v. Billings, 4 Pet. (29 U. S.) 514 (1830).

[4] Puget Sound Power & Light Co. v. Seattle, 291 U. S. 619, 54 S. Ct. 542 (1933); Henderson Bridge Co. v. City of Henderson, 173 U. S. 592, 19 S. Ct. 553 (1898); Bank of Commerce v. Tennessee, 163 U. S. 416, 16 S. Ct. 1113 (1895); Ohio Life Insurance & Trust Co. v. Debolt, 16 How. (57 U. S.) 416 (1853); Phipps v. Commr. of Internal Revenue, (C. C. A. 10th, 1937) 91 F. (2d) 627; United States Trust Co. v. Anderson, (C. C. A. 2d, 1933) 65 F. (2d) 575; Bank of Hawaii v. Wilder, (C. C. A. 9th, 1925) 8 F. (2d) 845. And see cases cited in the instant case, New York Rapid Transit Corp. v. City of New York, 303 U. S. 573 at 590 ff., 58 S. Ct. 721 (1938).

[5] New York ex rel. Metropolitan Street Ry. v. State Board of Commissioners,

indicate that if the intention of the parties is clear and unambiguous, then an immunity may be implied.[6] The writer knows, however, of no federal decision finding an immunity that was not actually expressed and explicit in the language of the contract or statute.[7] In the case at bar, appellant's ingenious contention that the provision for sharing the gross receipts necessarily raised an implied exemption on the theory that the tax gave the city more than its contractual share of the receipts and therefore violated the provision for sharing was denied by the Court.[8] Language used indicated that no implied exemption could be read into the contract; that an exemption could only be express and explicit.[9] Just how strict the court should be in refusing to find an exemption where the language does not in terms provide for it, but where the intent of the parties appears from other circumstances, is difficult to formulate.[10] It would, however,

199 U. S. 1, 25 S. Ct. 705 (1905); and cases cited in note 4, supra.

[6] Providence Bank v. Billings, 4 Pet. (29 U. S.) 514 at 560 (1830): "No words have been found in the charter, which, in themselves, would justify the opinion, that the power of taxation was in the view of either of the parties; and that an exemption of it was intended, *though not expressed.* The plaintiffs find great difficulty in showing that the charter contains a promise, *either express or implied,* not to tax the bank." (Italics inserted.) In Erie Ry. v. Pennsylvania, 21 Wall. (88 U. S.) 492 (1874), the Court stated that its decision was not hostile to that of New York & Erie R. R. v. Sabin, 26 Pa. St. 242 (1856), in which it was held, that since the state had imposed a tax on the stock of the company to the extent of the cost of construction in that state, this implied an exemption from the ordinary taxation for state and county purposes. Here evidently the exemption, or "language in which the surrender is made" was clear and unmistakable though not expressed or explicit at all, but merely implicit from the fact that to hold otherwise would be to subject the same property to double taxation, "which cannot be supposed was intended." See also Phoenix Fire & Marine Ins. Co. v. Tennessee, 161 U. S. 174, 16 S. Ct. 471 (1896).

[7] But see WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION, c. 7 at p. 182 ff. (1938), in which the author cites cases which he contends depart from the strict construction rule. But in none of these did the Court imply an exemption that was not otherwise, by reasonable construction of the language used, expressed in terms. As to a state decision implying immunity, see New York & Erie R. R. v. Sabin, 26 Pa. St. 242 (1856).

[8] 303 U. S. 573 at 588 ff., 58 S. Ct. 721 (1938).

[9] "We search in vain for any provision in the contract which expressly exempts the Corporation from payment of this tax. Yet this is what is required before support can be obtained from the contracts clause." 303 U. S. 573 at 590, 58 S. Ct. 721 (1938).

[10] It would seem that by the use of the rule of strict construction, the Court has often done violence to the contract between parties. See Chicago Theological Seminary v. Illinois, 188 U. S. 662, 23 S. Ct. 386 (1903). Here the act incorporating the plaintiffs provided, "That the property, *of whatever kind or description belonging or appertaining to said seminary* shall be free and exempt from all taxation for all purposes whatever," and also provided that the act "be deemed a public act, and shall be construed liberally in all courts for the purposes therein expressed." (Italics inserted.) The Illinois Supreme Court construed the statute as meaning that the exemption was limited to property used in immediate connection with the seminary only, and did not refer to other property held for such purposes as investment even though the income was used solely for school purposes. This despite the fact that plaintiff was a charitable

seem that where it appears clearly and unmistakably from the surrounding circumstances that a grant of exemption must have been the intent of the parties, or where the necessary implication of the language used is such,[11] a grant should be implied despite the lack of express and explicit language to that effect.[12] Since the corporation in the instant case was restricted to a five cent fare, any extra taxes other than those to which the corporation was subjected at the time of the making of the contract (especially if, as here, the additional taxes were on gross, rather than net, receipts) would cause great disparity in the economic structure of the corporation,[13] and put it at the city's mercy. It is, therefore, highly probable that both parties to the contract assumed and intended a restriction of the power to tax of such nature as to limit the city to those taxes already burdening the corporation. A just and politic rule would seem to dictate in such circumstances a tax immunity necessarily implied as a condition of the contract.

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institution, and despite the liberal construction clause of the act! The United States Supreme Court upheld the decision on the ground that an exemption must be plainly and unmistakably granted; it cannot exist by implication only; a doubt is fatal to the claim. The Illinois court was approvingly quoted to the effect that the exemption was to be derived by taking the express words of the act, and without extending their meaning by implication in any manner. It is difficult to see in what more emphatic manner the parties could have described the intended exemption, without the help of hindsight.

[11] See "necessary implication of the language" as part of the rule laid down by Cooley in 2 COOLEY, TAXATION, 4th ed., § 672, p. 1403 (1924). See Louisville & Nashville R. R. v. Gaines, (C. C. Tenn. 1880) 3 F. 266, and compare with result in Chesapeake & Ohio Ry. v. Miller, 114 U. S. 176, 5 S. Ct. 813 (1885).

[12] The rule of strict construction is not to be extended so far as to defeat the legislative purpose. Webb Academy v. Grand Rapids, 209 Mich. 523, 177 N. W. 290 (1920). Again, "this principle [of strict construction] has never been carried so far as to require courts to be governed by the strict letter of the grant, ignoring its manifest import, or so far as to justify bad faith in the making of such contracts." Nichols v. New Haven & Northampton Co., 42 Conn. 103 at 125 (1875). See New York & Erie R. R. v. Sabin, 26 Pa. St. 242 (1856).

[13] See Norman v. B. & O. R. R., 294 U. S. 240, 55 S. Ct. 407 (1935), the gold clause case, in which the Court stressed the seriousness of consequences, i. e., the dislocation of domestic economy caused by the disparity of conditions if railroads, public utilities, and the like, receiving all their income in the devalued currency, were obliged to pay their gold clause obligations in an amount of currency determined upon the basis of the former gold standard. Although in that case it was said that the seriousness of the consequences could not excuse an invasion of a constitutional right, yet in the instant case it would seem that serious consequences might make the intent of the contracting parties so clear and unmistakable as to allow an implied condition of tax exemption.