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TAXATION - EXEMPTIONS - MUNICIPALLY-OWNED PROPERTY

TAXATION — EXEMPTIONS — MUNICIPALLY-OWNED PROPERTY — In settlement for collateral notes given to secure its deposits in a bank which became insolvent, a municipality had conveyed to it an office building, located in a county other than the one in which said municipality was situated. The city thereafter rented the offices to tenants operating private businesses. The county in which the building was located subjected it to an ad valorem tax. Contesting the right to its collection, the city failed to pay the assessed taxes, for a period of four years. *Held*, the property, although municipally-owned, not being held or used for any governmental or necessary public purpose, but for purely business purposes, was not exempt from the tax. *Board of Financial Control of Buncombe County v. Henderson County*, 208 N. C. 569, 181 S. E. 636, 101 A. L. R. 783 at 787 (1935).

As a general rule, the property owned by a municipality and devoted to a public use is exempt from taxation by the state or county in which it is situated, whether its location be within or without the municipality owning it.[1] A minority of jurisdictions permit the taxation of such property unless there be an express constitution or statutory exemption thereof.[2] Some states exempt such property merely on the basis of municipal ownership, and regardless of use.[3] Others require, in addition, that the property be devoted to a public use. This raises the question of what use will amount to a public one. As satisfying the requirement of public use in those jurisdictions making it, the courts have sustained, among others, ownership of a poor farm,[4] utilities such as waterworks,[5]

[1] Traverse City v. Township of Blair, 190 Mich. 313, 157 N. W. 81, Ann. Cas. 1918E 81 (1916), where the court cites numerous authorities; City of Eugene v. Keeney, 134 Ore. 393, 293 P. 924 (1930). Collections of cases may be found in 81 A. L. R. 1518 (1932), supplemented by 99 A. L. R. 1143 (1935). The reason for the rule is given by Rugg, C. J., in Collector of Taxes of Milton v. City of Boston, 278 Mass. 274 at 277, 180 N. E. 116 (1932): "property held and used for the benefit of the public ought not to be made to share the burden of paying the public expenses. That exemption does not rest on any provision of statute, but is founded on general principles of expediency and justice."

[2] Sanitary District v. Martin, 173 Ill. 243, 50 N. E. 201, 64 Am. St. Rep. 110 (1898); Providence v. Hall, 49 R. I. 230, 142 A. 156 (1928).

[3] City and County of San Francisco v. McGovern, 28 Cal. App. 491, 152 P. 980 (1915); Stewart v. City and County of Denver, 70 Colo. 514, 202 P. 1085 (1922); Alvis v. Hicks, 150 Miss. 306, 116 So. 612 (1928); City of Newark v. Inhabitants of Township of Belleville, 61 N. J. L. 455, 39 A. 658 (1898). A list of characteristic expressions leading to this conclusion is to be found in 3 A. L. R. 1439, 1440 (1919). See Church of the Holy Faith v. State Tax Comm., 39 N. M. 403, 48 P. (2d) 777 (1935), finding "of" synonymous with "belonging to." But a later North Carolina case, Town of Benson v. Johnston County, 209 N. C. 751, 185 S. E. 6 (1936), continues to adhere to the requirement of devotion to a public purpose laid down in the principal case, although recognizing that the North Carolina constitution, Art. 5, § 5, says, "property belonging to" shall be exempt, which expression might seem to point to the "ownership" test.

[4] Town of Hamden v. City of New Haven, 91 Conn. 589, 101 A. 11, 3 A. L. R. 1435 at 1439 (1917).

[5] Sumner County v. Wellington, 66 Kan. 590, 72 P. 216 (1903); and see 60 L. R. A. 850 (1903) for a collection of cases.

and electric light plants,[6] public parks,[7] and a public theatre.[8] That a revenue is acquired incidentally to the public use does not negative the right to the exemption on this theory.[9] Clearly, the yielding of profits would have no effect on the exemption in jurisdictions making ownership the sole test.[10] Where, however, in states applying the use test, the property is used primarily for producing revenue, it is subject to taxation.[11] It was this consideration which fortified the court's conclusion that the office building was taxable in the instant case. The mere fact that the funds find their way to the public coffers is not enough to exempt their generating source from taxation where the use to which the latter is devoted is not a public one.[12] This result would also follow despite the principle of statutory construction, liberally treating exemptions in the case of municipally-owned property.[13] The problem of the principal case is somewhat related to the one raised in connection with the amenability to sales taxes of the sales of municipally-owned utilities.[14] Here, a possibility of taxation despite an admitted exemption of the "property" of municipalities has been recognized.[15] Looked upon as an excise on the privilege of engaging in the business, rather than as a tax on property, the "property" exemption has been circumvented.[16] Additional emphasis on the ordinary incident and practice

[6] Village of Swanton v. Town of Highgate, 81 Vt. 152, 69 A. 667, 16 L. R. A. (N. S.) 867 (1908).

[7] City of Owensboro v. Commonwealth, 105 Ky. 344, 49 S. W. 320 (1899).

[8] State v. City of Columbia, 115 S. C. 108, 104 S. E. 337 (1920). For other examples of judicially declared public uses, see 2 COOLEY, TAXATION, 4th ed., § 638 (1924).

[9] Town of Hamden v. City of New Haven, 91 Conn. 589, 101 A. 11, 3 A. L. R. 1435 at 1439 (1917); Town of North Haven v. Borough of Wallingford, 95 Conn. 544, 111 A. 904 (1920); City of Traverse City v. Township of Blair, 190 Mich. 313, 157 N. W. 81 (1916); Board of Supervisors of Nansemond County v. City of Norfolk, 153 Va. 768, 151 S. E. 143 (1930).

[10] State ex rel. City of Tulsa v. Mayes, 174 Okla. 286, 51 P. (2d) 266 (1935).

[11] People ex rel. Davis v. City of Chicago, 124 Ill. 636, 17 N. E. 56 (1888); Inhabitants of Essex County v. City of Salem, 153 Mass. 141, 26 N. E. 431 (1890); Newark v. Township of Clinton, 49 N. J. L. 370, 8 A. 296 (1887); People's Nat. Bank of Greenville v. Greenville County, 174 S. C. 256, 177 S. E. 369 (1934).

[12] City of Cincinnati v. Lewis, 66 Ohio St. 49, 63 N. E. 588 (1902); Piper v. Town of Meredith, 83 N. H. 107, 139 A. 294 (1927).

[13] 2 COOLEY, TAXATION, 4th ed., § 673 (1924). Cf. the rule of strict construction where a private person claims the benefit of an exemption from taxation. 2 COOLEY, TAXATION, 4th ed., § 672 (1924).

[14] Opinion of the Attorney General of Michigan, No. 113 (Oct. 10, 1935). The opinion finds that such utilities are subject to the tax. See HAIG and SHOUP, THE SALES TAX IN AMERICAN STATES 656 (1934), for a resumé of the various state provisions on the problem of exemption of sales by or to the state or its departments.

[15] Independent School District v. Pfost, 51 Idaho 240, 4 P. (2d) 893 (1931); City of Portland v. Kozer, 108 Ore. 375, 217 P. 833 (1923); 4 COOLEY, TAXATION, 4th ed., § 1712 (1924).

[16] City of West Palm Beach v. Amos, 100 Fla. 891, 130 So. 710 (1930); City of Covington v. State Tax Comm., 257 Ky. 84, 77 S. W. (2d) 386 (1934). But cf. dissent of Millard, J., in City of Tacoma v. Tax Comm., 177 Wash. 604 at 618, 33 P. (2d) 899 (1934), where the contention is made that since a direct tax cannot be laid upon such property the right to use the property should not be taxed.

of shifting the burden of the tax onto the consumer strengthens such a conclusion.[17] Whether or not such sales are exempt will depend upon a minute analysis of the nature of the tax. Furthermore, close scrutiny of the statutory language will be necessary to determine whether such transactions as power sales fall within its pale.[18] It is submitted that simplicity would likely be served in the main type of case by a holding that mere ownership of the property by the municipality makes it non-taxable.[19]

J. A. R.

[17] Opinion of the Attorney General of Michigan, No. 113 (Oct. 10, 1935); City of Covington v. State Tax Comm., 257 Ky. 84, 77 S. W. (2d) 386 (1934). But cf. BUEHLER, GENERAL SALES TAXATION 203 (1932), pointing out the difficulty of tax shifting. See also NATIONAL INDUSTRIAL CONFERENCE BOARD, SALES TAXES: GENERAL, SELECTIVE, AND RETAIL 6 (1932).

[18] The Michigan act expressly makes electricity and gas tangible personal property for purposes of taxation under the act. Mich. Pub. Acts (1933), No. 167, § 1 (b) (2).

[19] This thesis has been proposed by Doddridge, "Distinction Between Governmental and Proprietary Functions of Municipal Corporations," 23 MICH. L. REV. 325 at 330 (1925). The author there points out that the objection most frequently raised is that it would be unfair to remove such property from assessment lists when it would have been taxable if privately owned. He argues, however, that the only result of making the distinction is to remove funds from one governmental agency to another without any real economic benefit. Since the amount of property withdrawn from taxation by his proposal is negligible, anyway, he favors abolishing the distinction and thus avoiding unnecessary litigation in the taxation cases.