

Michigan Law Review

Volume 35 | Issue 6

1937

TAXATION - SITUS OF INTANGIBLES - BUSINESS SITUS

Michigan Law Review

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Recommended Citation

Michigan Law Review, *TAXATION - SITUS OF INTANGIBLES - BUSINESS SITUS*, 35 MICH. L. REV. 1032 (1937).

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TAXATION — SITUS OF INTANGIBLES — BUSINESS SITUS — A manufacturing corporation incorporated in Delaware and maintained a nominal office there, but had branch offices and factories in several states. Its principal office was in West Virginia. All contracts made by the branch offices were subject to approval by the home office and withdrawals from the bank deposits in the several states were under the control of the home office. A West Virginia statute¹ placed an ad valorem property tax on corporations whose bank deposits and accounts receivable were "liable to taxation." The state court² applied the statute to the bank deposits in banks outside the state and to accounts receivable carried on the books of branch offices. *Held*, the due process clause did not prevent West Virginia from levying this tax. *Wheeling Steel Corporation v. Fox*, 298 U. S. 193, 56 S. Ct. 773 (1936).

The decision in this case involves the proper use of three more or less separate and distinct doctrines applicable to the taxation of intangibles. The first doctrine is that, normally, intangibles are taxable at the domicile on the basis of the maxim *mobilia sequuntur personam*;³ the second, that if such intangibles are used in a business in another state, that state may tax on the basis of business situs;⁴ the third, that in the case of the business of a corpora-

¹ The statutes cited in argument were W. Va. Code (1931), §§ 11-3-12, 11-3-13, 11-3-15, 11-5-1, 11-6-2, 11-12-71, 31-1-79.

² The litigation arose in a proceeding by the corporation to review a county assessment. The judgment of the circuit court reducing the assessment was reversed by the Supreme Court of Appeals of West Virginia, in *Re Wheeling Steel Corporation Assessment*, 115 W. Va. 553, 177 S. E. 535 (1934), whereupon the circuit court entered final judgment which the supreme court of appeals refused to review. The corporation then took this appeal to the Supreme Court of the United States. See 4 *FORDHAM L. REV.* 352 (1936) and 41 *W. VA. L. Q.* 412 (1935), for comments on the case in the state court.

³ For instances of the application of this rule to intangibles, see *Farmers' Loan & Trust Co. v. Minnesota*, 280 U. S. 204, 50 S. Ct. 98 (1930), overruling *Blackstone v. Miller*, 188 U. S. 189, 23 S. Ct. 277 (1902); *Baldwin v. Missouri*, 281 U. S. 586, 50 S. Ct. 436 (1930); *First Nat. Bank v. Maine*, 284 U. S. 312, 52 S. Ct. 174 (1931); and see 2 *COOLEY, TAXATION*, 4th ed., § 440 (1924). The rule no longer applies to tangibles. *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 26 S. Ct. 36 (1905).

⁴ Primarily this exception was developed in order to allow the non-domiciliary state where the intangibles have become an integral part of a business to tax on the basis of the benefit and protection conferred by the state. See 2 *COOLEY, TAXATION*, 4th ed., §§ 465-466 (1924); Merrill, "Jurisdiction to Tax," 44 *YALE L. J.* 582 (1935); Rottschaeffer, "State Jurisdiction to Impose Taxes," 42 *YALE L. J.* 305 (1933); annotation in 76 *A. L. R.* 806 (1932).

tion localized as to control and management, though reaching into two or more states, there may be for tax purposes a "commercial domicile" sufficient to permit the state of control to tax all intangibles.⁵ Since the corporation in this case was created in Delaware, the first principle would seem to carry intangibles to that state for taxation. The second principle would divide the intangibles between the state of locus and perhaps the state of domicile, but the application of the third principle permits the substantial domicile to prevail over a paper domicile created in a state where corporate regulation and taxation might be at a comparative minimum and probably also over business situs possibilities of the other state.⁶ On a basis of elementary fairness then, it seems that the Supreme Court has held that the due process clause is not an obstacle to property taxation of intangibles by the state that is furnishing the bulk of the protection to the corporation. In such a case it seems to be the better view to ignore the form of domicile of a corporation created by technical compliance with the incorporation statute of a state, i.e., technical domicile, and to regard as the essential for tax purposes the fact of domicile based on the actual commercial practice of the particular corporation. While the question of the power of the state of incorporation also to tax this corporation is not decided in this case, it seems possible to infer from the decision that the due process clause would prevent such multiple taxation.⁷ What effect such a doctrine will have on the at present controverted question of the constitutionality of multiple taxation by the domiciliary state and the state where the business situs exists is not clear.⁸

⁵ This principle, so far as the writer is able to trace, is set out for the first time by this Court in the present case, although it has been expressed by several state courts in a more limited form. *State v. Tennessee Coal, Iron & R. R.*, 188 Ala. 514, 66 So. 178 (1914); *Commonwealth v. United Cigarette Machinery Co.*, 119 Va. 447, 89 S. E. 935 (1916); *Re Wheeling Steel Corp. Assessment*, 115 W. Va. 553, 177 S. E. 535 (1934). *Contra* (on basis that a corporation can have only one domicile): *Foster-Cherry Com. Co. v. Caskey*, 66 Kan. 600, 72 P. 268 (1903); *Commonwealth v. Consolidated Casualty Co.*, 170 Ky. 103, 185 S. W. 508 (1916); *American Barge Line Co. v. Jefferson County*, 246 Ky. 573, 55 S. W. (2d) 416 (1932); *Chestnut Securities Co. v. Oklahoma Tax Comm.*, 173 Okla. 369, 48 P. (2d) 817 (1935); and see annotation in 104 A. L. R. 806 (1936).

⁶ *C. F. Mecklenburg County v. Sterchi Bros. Stores, Inc.*, 210 N. C. 79, 185 S. E. 454 (1936), where on somewhat similar facts the principal case was cited in support of the existence of taxing power in the state where a branch office existed.

⁷ The dicta in this case would seem to support this inference—see the report of the principal case in 298 U. S. 193, 56 S. Ct. 773 at 777. Also the trend to limit the benefit basis for jurisdiction to tax, by the due process clause, thus preventing multiple taxation of intangibles as well as tangibles, would seem to find logical fruition in this case. See cases cited in note 3, *supra*, and *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83, 50 S. Ct. 59 (1929). Cf. *Cream of Wheat Co. v. County of Grand Forks*, 253 U. S. 325, 40 S. Ct. 558 (1919).

⁸ This point has not yet been directly decided by the Supreme Court. The state courts are in conflict. See 79 A. L. R. 344 (1932).