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TAXATION — ESTATE TAXATION OF PROPERTY OF CITIZENS LOCATED ABROAD — An American citizen and resident died while temporarily in England leaving property in the United States, which was disposed of by an American will, and property consisting of tangible and intangible personalty in England, which was disposed of by an English will. The executors of the English will paid the English death duties. The United States claimed that the English property should be included in the whole estate subject to the United States estate tax; this the executors of the American will denied, claiming that the United States had no jurisdiction to tax this property. *Held*, that the language of the statute clearly included this property and that the fact of the decedent's being a citizen and resident of the United States was a sufficient jurisdictional basis for the tax. *Guaranty Trust Co. of New York v. Commissioner of Internal Revenue*, (C. C. A. 2d, 1935) 79 F. (2d) 245.

It seems to be definitely established that the United States may tax property without its territorial jurisdiction upon the basis of the citizenship of the owner in the form of income taxes,[1] excise taxes [2] and estate taxes.[3] This is based upon

[1] Cook v. Tait, 265 U. S. 47, 44 S. Ct. 444 (1923), income tax collected from nonresident United States citizen for income derived from property located in Mexico.

[2] United States v. Bennett, 232 U. S. 299, 34 S. Ct. 433 (1913), excise tax based upon citizenship imposed upon operation by United States citizen of foreign built yacht in foreign waters. In the case of United States v. Goelet, 232 U. S. 293, 34 S. Ct. 431 (1913), involving the same tax, the tax was not imposed upon the theory that this person was not within the meaning of the statute, and the question of the *power* of the United States to tax a nonresident citizen was expressly left undecided.

[3] Guaranty Trust Co. of New York v. Commissioner of Internal Revenue, (C. C. A. 2d, 1935) 79 F. (2d) 245.

a theory of its power as a sovereign nation over its citizens wherever they may be in return for the protection it gives to them and their property wherever in the world they or their property may be.[4] This sort of reasoning does, however, impose a double taxation and one may wonder whether, conceding the constitutional difference,[5] it is consistent with the doctrines of the court as to policy in regard to state taxation. In the early cases involving inheritance taxation of property situated in a state other than the state of domicile of the decedent owner, it was held that both states had benefited the owner in regard to this property and that, therefore, both states had a right to impose a tax.[6] Later, however, the Supreme Court completely reversed its position and held that, because double taxation caused public resentment, state discord, and had generally worked injustice, it should be avoided by the adoption of rules which allow only one state to tax property in an estate.[7] In pursuance of this, the Court has

[4] 1 COOLEY, TAXATION, 4th ed., 260 (1924), citing United States v. Billings, (C. C. N. Y. 1911) 190 F. 359: "So it has been held in a lower federal court that the principles which prevent extraterritorial state taxation do not apply in the same degree to federal taxation on the theory that while a state cannot furnish protection to property outside the state, yet the United States has power to afford protection to the person and property of its citizens abroad."

United States v. Bennett, 232 U. S. 299, 34 S. Ct. 433 (1913).

[5] Burnet v. Brooks, 288 U. S. 378, 53 S. Ct. 457 (1932). In showing that the Fifth Amendment does not deny extraterritorial taxation based upon citizenship to the United States as the Fourteenth Amendment does to the states, it is said (page 405):

> "The decisive point is that the criterion of state taxing power by virtue of the relation of the States to each other under the Constitution is not the criterion of the taxing power of the United States in relation to the property of nonresidents. The Constitution creates no such relation between the United States and foreign countries as it creates between the States themselves."

The limitation upon the states which does not affect the United States is described in United States v. Bennett, 232 U. S. 299 at 306, 34 S. Ct. 433 (1913), in the following language:

> "The appplication to the States of the rule of due process . . . comes from the fact that their spheres of activity are enforced and protected by the Constitution and therefore it is impossible for one State to reach out and tax property in another without violating the Constitution, for where the power of one ends the authority of the other begins."

On the other hand the taxing power of the United States "is given in the Constitution with only one exception and two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity." License Tax Cases, 5 Wall. (72 U. S.) 462 at 471, 18 L. Ed. 497 (1866). To these limitations it is added in 1 COOLEY, TAXATION, 4th ed., 247, note 23 (1924), that "the tax must be for a public purpose, i.e., to pay a debt or provide for the common defense or general welfare." The implication of both of these sources is that otherwise the taxing power is unrestricted.

[6] Blackstone v. Miller, 188 U. S. 189, 23 S. Ct. 277 (1902).

[7] Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 at 209, 212, 50 S. Ct. 98 (1930). "The inevitable tendency of that view is to disturb good relations among the States and produce the kind of discontent expected to subside after establishment of

held that tangible property may in general be taxed only by the state wherein it is physically located,[8] and intangible property may be taxed only by the state of domicile of the decedent.[9] The Court does not, however, atttempt to apply these rules to the international field; in the instant case, while the intangible property was taxed according to the rule imposed upon the states, namely, by the place of domicile of the decedent, the tangible property was not taxed according to the corresponding rule, since the taxing jurisdiction, the United States, was not the jurisdiction in which the property was physically located. Since in the instant case England also taxed the whole of the property concerned, both of these classes of property were subjected to a double tax. Inasmuch as double taxation is no less onerous when imposed by two nations than when imposed by two states,[10] it is submitted that consistently with the reasons for establishing the present rule of jurisdiction for state inheritance and estate taxation, the United States should work out some similar means of avoiding double taxation by it and other nations.[11] It may, however, be conceded that this may be a task better done by Congress or by treaty than by the Court.[12]

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the Union. . . . The practical effect has been bad. . . ." "Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences."

See comment in 40 YALE L. J. 99 at 101 (1930), which in discussing extrajudicial opinion of the condition of inheritance tax law with reference to double taxation points out, "Such taxation was declared inequitable, uneconomic, impractical and inconvenient, and of doubtful financial advantage to the state assessing it."

[8] Frick v. Pennsylvania, 268 U. S. 473, 45 S. Ct. 603 (1925); City Bank Farmers' Trust Co. v. Schnader, 293 U. S. 112, 55 S. Ct. 29 (1934); Johnson Oil Refining Co. v. Oklahoma, 290 U. S. 158, 54 S. Ct. 152 (1933).

[9] Baldwin v. Missouri, 281 U. S. 586, 50 S. Ct. 436 (1930). Harrow, "Relation of Jurisdictional Limitation on Power to Tax to Conflict of Laws in Decedents' Estates," 20 A. B. A. J. 116 (1934).

[10] The injustices of double taxation which prompted the United States Supreme Court to allow but one state to tax property in an estate, are not removed from the corresponding international situation merely by upholding the *power* of the United States to levy and collect such a tax (supra, note 5); and the taxpayer so burdened is not comforted either by knowledge of the constitutional distinction which denies extraterritorial taxing power to the states but permits it to the United States or by the analysis which treats an estate or inheritance tax as an excise tax rather than a property tax.

[11] See note on Burnet v. Brooks, 288 U. S. 378, 53 S. Ct. 457 (1932), in 47 HARV. L. REV. 307 (1933). In discussing this case, wherein a tax upon intangible property owned by a nonresident alien but kept within the United States was upheld, the writer expresses the feeling that here the Court disregarded its apparent former desire to avoid multiple taxation as evidenced by the argument in Baldwin v. Missouri, 281 U. S. 586, 50 S. Ct. 436 (1930), and suggests that the case emphasizes the need for international action and agreement upon such taxation.

[12] While the desire for international harmony may impress the Court as strongly as did the desire for interstate harmony (supra, note 7), still "it takes two states to make a double tax, and to attempt to eliminate multiple taxation with jurisdiction over only

one of them might appear too difficult. This is a problem which can better be disposed of by treaty than by adjudication, at least in the absence of a tribunal having jurisdiction over all the parties." Lowndes, "The Passing of Situs—Jurisdiction to Tax Shares of Stock," 45 HARV. L. REV. 777 at 792 (1932).