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Constitutional Law - Federal Immunity from State Taxation - Validity of State Sales Tax Upon Purchases and Sales by National Banks

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CONSTITUTIONAL LAW — FEDERAL IMMUNITY FROM STATE TAXATION — VALIDITY OF STATE SALES TAX UPON PURCHASES AND SALES BY NATIONAL BANKS—The 1949 revision of the Michigan Sales Tax Act[1] changed the federal exemption provision[2] so as to permit taxation of sales to corporations acting as agents or instrumentalities of the federal government but not wholly owned by the United States. Accordingly, defendant department of revenue took the position that sales to plaintiff, a national banking institution organized under the National Banking Act,[3] are taxable. In the course of its operations, plaintiff purchases office equipment and other tangible personal property from Michigan retailers. It also sells food and services to employees through its cafeteria, and sells repossessed merchandise to other parties. Contending that the imposition of the sales tax violates the bank's statutory and constitutional immunity, plaintiff sought a declaratory decree that (1) retail sales to plaintiff are not taxable, and (2) retail sales by plaintiff are not taxable. The trial court denied that the asserted immunity exempts plaintiff from the economic burden of taxes on its purchases, but ruled that sales by the plaintiff are immune from the sales tax. On appeal, *held*, affirmed. The Michigan sales tax is imposed upon the retailer and he is in legal contemplation the taxpayer. Therefore, as to its purchases, plaintiff's immunity is not violated even though the economic burden may be shifted to it. Plaintiff's immunity does prevent taxation of its sales because as to these transactions the legal incidence of the tax rests upon it. *National Bank of Detroit v. Department of Revenue*, 340 Mich. 573, 66 N.W. (2d) 237 (1954), appeal dismissed (U.S. 1955) 75 S.Ct. 781.

Because of plaintiff's dual capacity as both buyer and seller, this case uniquely illustrates the technical distinctions which determine the extent to which federal immunity from state sales taxes is still recognized. Apart from such distinctions, the decision appears exactly contrary to authority on both points decided. For example, the Supreme Court has held invalid a sales tax on purchases by federal land banks,[4] and has approved a state statute obligating a national bank to collect from its customers a tax imposed upon safe-deposit box service.[5] However, in both of these instances, the tax involved was by state interpretation levied upon the ultimate user of the goods and services, so that the legal incidence and the economic burden coincided.[6] The Michigan sales tax on the other hand has been consistently construed as a levy upon the seller, not the consumer.[7] This interpretation conveniently suits the Supreme Court's

[1] Mich. Comp. Laws (1948; Supp. 1952) §205.51 et seq.; Mich. Stat. Ann. (1950; Supp. 1953) §7.521 et seq.

[2] Mich. Comp. Laws (Supp. 1952) §205.54; Mich. Stat. Ann. (1950) §7.524.

[3] 13 Stat. L. 99 (1864) as amended, 12 U.S.C. (1952) §21 et seq.

[4] Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95, 62 S.Ct. 1 (1941).

[5] Colorado Nat. Bank of Denver v. Bedford, 310 U.S. 41, 60 S.Ct. 800 (1940).

[6] Jewel Tea Co. v. State Tax Commissioner, 70 N.D. 229, 293 N.W. 386 (1940); Bedford v. Colorado Nat. Bank, 104 Colo. 311, 91 P. (2d) 469 (1939).

[7] C. F. Smith Co. v. Fitzgerald, 270 Mich. 659 at 686, 259 N.W. 352 (1935); Nat. Bank of Detroit v. Department of Revenue, 334 Mich. 132, 54 N.W. (2d) 278 (1952).

treatment of the federal immunity issue. It has ruled that federal immunity does not invalidate a state sales tax even when the economic burden is directly shifted to the federal government.[8] Instead the legal incidence is designated as the controlling factor in determining the validity of a state tax.[9] Yet it should be noted that the Supreme Court spoke of the legal incidence as separable from the economic burden with respect to a contractor paying taxes on his purchases and the federal government reimbursing his costs. When the Michigan court applied the same analysis to a different fact situation involving the retailer paying taxes on his sales and a purchaser to whom the expense was shifted, it went a step farther. Moreover, the Michigan court concedes that if a sales tax statute expressly requires the seller to collect the tax from the purchaser, the legal incidence falls on the latter.[10] That the Michigan statute expressly permits the seller to pass on the amount of the tax and forbids him to hold out to the purchaser that it is not considered as an element in the sales price[11] is thought to be sufficiently different from an explicit collection requirement to warrant the difference in result.[12] Statutes imposing taxes upon sellers but making no mention of any obligation with respect to inclusion of the amount in the sales price apparently have been approved in respect to sales to the United States.[13] But the language of the Michigan law is somewhere in between the complete silence of the approved statutes and the express collection requirement of the statutes under which taxes on sales to the United States have been disapproved.[14] Meanwhile, the majority of the United States Supreme Court has reaffirmed its prerogative to review a state court's determination of the legal incidence of a tax where the result is determinative of the federal immunity issue.[15] However, by dismissing the appeal in the present case the Supreme Court left intact the state court's interpretation of the Michigan statute as imposing the legal inci-

[8] Alabama v. King and Boozer, 314 U.S. 1, 62 S.Ct. 43 (1941), upholding a sales tax imposed upon purchases of a contractor under a cost-plus contract with the federal government.

[9] In Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 at 122, 74 S.Ct. 403 (1954), holding that a state sales tax could not be imposed upon purchases made by the United States through a private contractor acting as purchasing agent, Alabama v. King and Boozer, note 8 supra, was distinguished as follows: ". . . though the government also bore the economic burden of the State tax in that case, the legal incidence of that tax was held to fall on the independent contractor, and not upon the United States."

[10] Federal Reserve Bank of Chicago v. Department of Revenue, 339 Mich. 587 at 595, 64 N.W. (2d) 639 (1954), holding that sales by Michigan retailers to a federal reserve bank are taxable. The decision was considered largely determinative of the principal case.

[11] Mich. Comp. Laws (Supp. 1952) §205.73; Mich. Stat. Ann. (1950) §7.544.

[12] Federal Reserve Bank of Chicago v. Department of Revenue, note 10 supra, at 600.

[13] Such approval was indicated in Alabama v. King and Boozer, note 8 supra, by expressly overruling decisions upholding federal immunity in Panhandle Oil Co. v. Mississippi, 277 U.S. 218, 48 S.Ct. 451 (1928), and Graves v. Texas Co., 298 U.S. 393, 56 S.Ct. 818 (1936). Both cases involved statutes of the type described.

[14] Federal Land Bank of St. Paul v. Bismarck Lumber Co., note 4 supra.

[15] Kern-Limerick, Inc. v. Scurlock, note 9 supra, at 121. But cf. the dissent by Justice Douglas, two justices concurring, at 127. See also Colorado Nat. Bank of Denver v. Bedford, note 5 supra, at 52.

dence upon the seller. The result is that even though the intended result is identical to that of prohibited levies, the carefully chosen language of the Michigan Sales Tax Act[16] avoids a violation of the buyer's sovereign immunity.

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[16] Mich. Comp. Laws (1948; Supp. 1952) §205.51 et seq.; Mich. Stat. Ann. (1950; Supp. 1953) §7.521 et seq.