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Court should have held there was no fraud as a matter of law. It appears, however, that the legislative intent was contra to the Court's decision. If persons not of record have standing in the courts to attack these orders issuing tax deeds, defense of frivolous suits would be a constant peril. The 1951 amendment sought to make these titles marketable. To be marketable they must be free from totally unanticipated and frivolous suits.

*Irving Rosenfeld*

## TAXATION—APPLICATION OF POSSESSORY INTEREST TAX TO POSSESSOR OF FEDERAL PROPERTY

The Ford Motor Company, a manufacturer engaged in the performance of government contracts, sought to enjoin the State of Illinois from collecting personal property taxes upon property built by the manufacturer or acquired by it from nongovernmental sources in the performance of government contracts.<sup>1</sup> The United States government intervened as a party plaintiff and all pertinent facts were stipulated. From a decree of the Circuit Court of Cook County, holding the property in question exempt from taxation, the County Treasurer, Bernard J. Korzen, appealed. In affirming the decree and a prohibitory injunction awarded by the Circuit Court, the Supreme Court of Illinois ruled that the property, in which the United States held title under the government contracts, was exempt from taxation notwithstanding provisions of the contract giving the manufacturer certain possessory interests, including scrap disposition rights, and laying upon the manufacturer the risk of loss, destruction and damage. *Ford Motor Company and United States of America v. Korzen*, 30 Ill. 2d 314, 196 N.E.2d 656 (1964).

The controversy arose when the Cook County assessor, Bernard J. Korzen, sent a notice to all firms possessing government property demanding that all taxpayers possessing government property report the value of such property on their annual personal property schedule for 1958. The assessor contended that the United States holds mere legal title to the property in question, and that such title does not warrant exemption under Section 19 of the Revenue Act.<sup>2</sup> He further asserted that Ford, rather than the United States, had sufficient ownership in the property to support a valid tax by Cook County without invading the constitutional rights and im-

<sup>1</sup> The tax amounted to \$1,911,811.95 for the year 1958.

<sup>2</sup> ILL. REV. STAT. ch. 120, § 500 (1963).  
*Accord*, *People v. United States of America*, 93 Ill. 30 (1879); *Price Flavoring Co., v. Lindheimer*, 368 Ill. 450, 14 N.E.2d 476 (1938).

munities of the United States. His argument was based on the fact that Ford was owner of the property since Ford was in possession of the material until acceptance of the finished items by the Air Force and bore the risk of loss, destruction or damage of all materials. In addition, Ford had the right to dispose of the scrap, without prior approval or knowledge of the Air Force, by methods and at prices determined by Ford, provided that credit was given the Air Force for the amount. The Air Force has the right to accept or reject any completed item and Ford is entitled to any material remaining after completion of all deliveries required by the contracts.

Korzen based his original contention in the Circuit Court on three recent Michigan cases<sup>3</sup> which have opened the door to taxation of firms and corporations possessing interests in property the title of which is vested in the United States government. A close scrutiny of these cases reveals that the Supreme Court of the United States upheld Michigan's Public Act 189 of 1953<sup>4</sup> to tax possessory interests in government-owned real property, which was in issue in the first two cases, and projected the same reasoning to the possessors of federal personal property in the *Murray* case,<sup>5</sup> the third remaining case, in spite of the absence of any language in the state law to support its conclusion.

The *Murray* case is of particular interest. Here, a firm had possession of government machinery and material to be used in fulfilling a defense contract. The city of Detroit, the taxing authority, sought to assess a tax upon the contractual right of possession of the property. In the lower courts the tax was disallowed and the case ultimately reached the Supreme Court of the United States. In a five to four decision, the Court held that, as the Court interpreted the relevant Michigan taxing statute, the state law authorized taxation of a party's possessory interest, and that such an interest was constitutionally within the reach of a state's taxing power.<sup>6</sup>

In the instant case, Ford's original action was based upon the theory that the property was owned by the United States and therefore was exempt from taxation. Ford insisted that the United States was the actual owner of the property, that the possessory interest of Ford as a bailee was not sub-

<sup>3</sup> *United States v. City of Detroit*, 355 U.S. 466 (1958); *United States v. Township of Muskegon*, 355 U.S. 484 (1958); *City of Detroit v. Murray Corp.*, 355 U.S. 489 (1958).

<sup>4</sup> Now, as amended, MICH. STAT. ANN., § 7.7(5) (Supp. 1963), which provides that when tax-exempt real property is leased, loaned or bailed to and used by a firm for profit, it shall be subject to taxation as if the user were the owner.

<sup>5</sup> *City of Detroit v. Murray Corp.*, 355 U.S. 489 (1958).

<sup>6</sup> *Id.* at 493; the Court stated: ". . . [T]he taxes involved here imposed a levy on a private party possessing government property which it was using or processing in the course of its own business. It is not disputed that Michigan law authorizes the taxation of the party in possession under such circumstances."

ject to tax under Illinois law,<sup>7</sup> and that the property was immune from tax under the federal constitution. The property was used by Ford, not as a mortgagee or vendee for its own private purposes, but for the benefit of the United States military establishment. Of the four types of defense contracts involved, the first was conceded by the assessor to be a simple bailment; the other three which are in dispute pertained to the production of engines, spare parts, special tooling, and the acquisition of facilities. These three contracts provided that property to which title is held by the United States government will be used by or put in the care, custody or possession of Ford in connection with the performance of the contract.<sup>8</sup>

After trial, the Circuit Court concluded that the true owner of the property in question was the United States government. The property was therefore exempt from taxation by virtue of the Constitution of the United States and Section 19 of the Revenue Act.<sup>9</sup> A decree granting injunctive relief was entered, and the assessor appealed directly to the Illinois Supreme Court.<sup>10</sup>

Prior to review of the matter by the Illinois' high court, on December 28, 1961, the Michigan Supreme Court decided in the *Continental Motors* case,<sup>11</sup> that the Supreme Court of the United States erroneously construed the Michigan law in the *Murray* case and declared invalid a Muskegon Township ad valorem tax levied against the corporation.<sup>12</sup> The tax against

<sup>7</sup> ILL. CONST. of 1870, art. IX, § 1; ILL. REV. STAT. ch. 120, §§ 499, 500, 509 (1963).

<sup>8</sup> See Kurth, *Murray and Michigan, Martin and Maryland, and Possessory Interest Taxes*, 22 FED. B.J. 39 (1962); "It should be noted that a Government contractor's right to possess and use the materials, work in process and finished products under the terms of a Government contract are incidental to the performance of the contract only and of doubtful value. The contractor buys the material or is furnished them by the Government, he fashions them into the products which the Government has contracted for, and then delivers them at once or stores them temporarily until delivery is due. His possessory interest in such property could hardly be described as a thing of value—he has the responsibility of caring for and preserving the property and no corresponding benefits. His use interest is that of converting the raw materials into finished products. This is less a valuable right, in the property sense, than it is a responsibility, for he must do the work in a particular way to achieve a particular end. If he does he shall be paid for his work. If he does not, he shall not be paid; indeed, he may even suffer penalties." See also, *The Aftermath of the Michigan Tax Decisions: State Taxation of Federal Property and Activities Today*, MIL. L. REV., July, 1961 (Dept. of the Army Pamphlet 27-100-13, 1 July 1961), p. 167.

<sup>9</sup> *Supra* note 2; See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

<sup>10</sup> This appeal is brought directly to this Court: because this proceeding presents questions which arise under the Federal Constitution and which relate to revenue. See ILL. REV. STAT., ch. 110, § 75(1)(a), § 75(1)(b) (1953).

<sup>11</sup> *Continental Motors v. Township of Muskegon*, 365 Mich. 191, 112 N.W.2d 429 (1961).

<sup>12</sup> *Ibid. Accord*, *General Motors Corp. v. City of Detroit*, 372 Mich. 234, 126 N.W.2d 108 (1964).

Continental as a possessor and user of materials and other property, title to which was in the federal government, was struck down because its incidence fell upon the owner rather than the possessor.<sup>13</sup>

Since Korzen's reliance on the *Murray* case in the Circuit Court of Cook County was now inapplicable,<sup>14</sup> and after its subsequent repudiation by the Michigan Supreme Court, he abandoned the *Murray* case and advocated instead the case of *American Motors Corp. v. City of Kenosha*<sup>15</sup> in his appeal to the Illinois Supreme Court. In the *American Motors* case, personal property belonging to the federal government, but in the possession of American Motors under government contract, was to be taxed by the local taxing authority on the basis of a Wisconsin statute<sup>16</sup> which authorized taxation of possessory interests in personal property. However, the Wisconsin Court construed the language of the contract between American Motors and the United States government to vest ownership of the property in American Motors, not the federal government, stating:

In our opinion, the unrestricted right of the Company under the contract to acquire and dispose of the property and the risk of loss are elements of ownership inconsistent with the vesting of such title in the Government as would render the property immune from taxation. Conceding that title was transferred, there was, however, no true transfer of ownership.<sup>17</sup>

Thus, the *American Motors* case was decided upon ownership as a basis of taxation, and not possessory interests in property. The case was affirmed by the United States Supreme Court "on the authority of the *Murray* case,"<sup>18</sup> and the same four Justices dissented specifically on the grounds of their dissent in the *Murray* case.<sup>19</sup> But it should be remembered that the *Murray* case did not involve the issue of ownership and was decided specifically upon taxation of possessory interests in personal property, acknowledged to be owned by the federal government but held and used by another party for the benefit of the government.

<sup>13</sup> By passing amendatory legislation, sec. 1, Public Act No. 266 of 1959, which amends sec. 14, Public Act No. 206 of 1893; § 7.14, MICH. STAT. ANN. (Supp. 1963), Michigan now authorizes taxation of possessory interests in personal property, where it did not expressly provide for such.

<sup>14</sup> *Supra* note 2.

<sup>15</sup> 356 U.S. 21 (1958), *affirming* 274 Wis. 315, 80 N.W.2d 363 (1957).

<sup>16</sup> WIS. STAT. ANN., § 70.18(1) (as amended, Supp. 1964), providing, "Personal property shall be assessed to the owner thereof, except that when it is in the charge or possession of some person other than the owner or person beneficially entitled thereto . . . it may be assessed to the person so in charge or possession of the same."

<sup>17</sup> 274 Wis. at 322, 80 N.W.2d at 367; *but see, infra* note 20.

<sup>18</sup> *Supra* note 15.

<sup>19</sup> *Supra* note 5; the Justices dissent on the grounds that the tax is on the property itself.

The question of ownership of property in federal contracts has been examined in several cases where the language of the contracts between the contractor and the United States government has vested property rights in the contractor that could be interpreted as indicia of ownership.<sup>20</sup> In all these cases, true ownership by the federal government was recognized. The transferring of property to a contractor by the federal government is for the benefit of the government, and buttresses Ford's contention that the transaction was a bailment only, and that the formal language of the contract did not vest actual ownership in Ford. In agreeing with Ford, the Illinois Supreme Court stated:

We consider the ownership of the federal government to be real and substantial, although it has given to the contractor some of the bundle of rights of ownership for a specific purpose. \* \* \* there can be no doubt that *McCulloch v. Maryland* still retains sufficient vitality to prevent a state from levying a direct tax upon the property of the United States without the consent of Congress. It is our conclusion that the present tax is such a direct tax upon the property of the United States.<sup>21</sup>

It is obvious that when the government undertakes a public venture, it cannot always accomplish the objectives alone. The possession of government property is usually in someone who acts in the government's behalf, but that possessor is not the owner merely because the terms of the contractual relationship place the risks of loss, destruction or damage with the contractor and the right of acceptance or rejection of the finished product with the government.

Several states, faced with the rising costs of public improvements, have found it necessary to raise additional revenues through taxation of possessory interests of parties possessing otherwise tax exempt property acquired through bailment.<sup>22</sup> The Supreme Court of the United States held in the *Murray* case that these rights to possess personal property can be subjected to taxation, as the tax is not on the property per se but upon the right to possess the property. The *Murray* case is the only affirmative decision that upholds the taxation of possessory interests in personal property not

<sup>20</sup> *United States v. Allegheny County*, 322 U.S. 174 (1944); *Avco Mfg. Corp. v. Connelly*, 145 Conn. 161, 140 A.2d 479 (1958); *General Dynamics Corp. v. County of Los Angeles*, 51 Cal. 2d 59, 330 P.2d 794 (1958); *General Motors Corp. v. State Commission of Rev. and Tax*, 182 Kans. 237, 320 P.2d 807 (1958); *Martin Co. v. State Tax Commission*, 225 Md. 404, 171 A.2d 479 (1961); *Craig v. Ingalls Shipbuilding Corp.*, 192 Miss. 254, 5 So. 2d 676 (1942); *Rohr Corp. v. San Diego County*, 362 U.S. 628 (1960); *United States v. Annsionia Brass and Copper Co.*, 218 U.S. 452 (1910); *In Re American Boiler Works*, 220 F.2d 319 (C.A.3, 1955). *Contra*, *New Brunswick v. United States*, 276 U.S. 547 (1928); *Northern Pacific Ry. Co. v. Myers*, 172 U.S. 589 (1899).

<sup>21</sup> *Ford Motor Co. v. Korzen*, 30 Ill. 2d 314, 321-323, 196 N.E.2d 656 660-661 (1964); *supra* note 9.

<sup>22</sup> *Supra* note 12.

expressly authorized by statute. The *American Motors* case is the only affirmative decision that has been upheld "on the authority of Murray," even though the issue involved pertained to ownership and not possessory interests. These two unique cases were relied on in an unsuccessful attempt to sustain an ad valorem tax imposed upon a possessor of government personal property in Illinois. They undoubtedly will be utilized heavily by other states in future litigation designed to raise desperately needed revenues.

It is foreseeable that legislative proponents of *Murray and American Motors* will stress adoption of either or both of the doctrines of these cases in statutory form. Whether a discernible trend toward this result has taken place in other states remains to be seen.<sup>23</sup> Firms engaged in defense work will stress exemption of United States government property in order to remain competitive in bidding for government contracts with other firms in other states that do not sanction or adhere to the holdings of either *Murray* or *American Motors*. State legislatures will be devoting considerable attention to these cases and the revenue they can produce.

*Harold Sachrison*

<sup>23</sup> See generally FLA. STATS. § 192.62 (1963); Florida has declared to be exempt property owned by the federal government and used by a defense contractor in the fulfillment of a federal government contract. MD. CODE ANN. art. 81, § 8(8)(e) (Supp. 1964). Maryland has exempted property built or manufactured for national defense purposes. MINN. STAT. § 272.01, subd. 3 (Supp. 1963), exempts government personal property made available and used by private individuals or corporations for production of goods for the United States Government. ORE. REV. STAT. ch. 433 § 307.060 (1961), does not exempt contractors performing Government projects as to the taxation of real and personal property. VA. CODE ch. 239, § 58-831.2 (Supp. 1964). Virginia taxes personal property leased from the Government by firms conducted for a profit. Laws of Utah Special Session 1959, ch. 5, § 1, provides for taxation of beneficial interests in real and personal property.