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Article 16

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because the fee had been devised in a prior section of the will, the executors possessed a mere naked discretionary power, and as a result, equitable conversion was not involved.

The instant case does not change any law, for the requirement of a duty to effect an equitable conversion is very basic to this concept.[16] In any event, the case is of interest because the power was to last for five years, and this bill was filed during that period. The court used the thought expressed in the *Vierieg* case that filing a bill for partition suspends a discretionary power and granting the bill terminates it, notwithstanding the fact that in the *Vierieg* case it was held that the power lapsed by passage of an unreasonable time.

Apparently there is another facet in the nature of these powers which the court did not deem necessary to discuss. A testator who creates a discretionary power to last a specified period of time might have his intention defeated. This power might be terminated by a devisee obtaining partition before the power lapses. The only limitation on this right is that the suit may not be filed so soon after the opening of the estate that the executor has not had a reasonable time to act.[17] Thus, it appears that the effect of attaching a period of time onto these powers is not to make them indefeasible for that period, but merely to effect an automatic cessation of the right that the executor possessed to execute the power, if that right has not already been terminated before the expiration of the period.

TAXATION–STATE UNABLE TO FORCE NON-RESIDENT SELLER TO COLLECT USE TAX

Maryland enacted a tax on the use, storage, or consumption of tangible personal property purchased within the state. The vendor is given the task of collecting the tax, and for said collection and remittance to the state of Maryland is compensated on the basis of three per cent of the gross tax.[1] Because plaintiff, a Delaware corporation doing business in Delaware, had not collected and remitted the tax, Maryland attached a delivery truck of the plaintiff while the truck was in that state making a routine delivery. In reversing the Maryland Court of Appeals, the United States Supreme Court, in a five to four decision, held that while the tax created a liability on the inhabitants of Maryland, the Delaware corporation could not be made a collector of the tax due to an absence of jurisdiction over the plaintiff. *Miller Bros. v. Maryland*, 347 U.S. 340 (1954).

[16] 4 Pomeroy, Equity Jurisprudence, § 1160 (5th ed., Symons, 1941).

[17] Sartain v. Davis, 323 Ill. 269, 154 N.E. 101 (1926); Fischer v. Butz, 224 Ill. 379, 79 N.E. 659 (1906).

[1] Md. Ann. Code (Flacks, 1951) Art. 81, § 369.

The use tax is a protective-tariff-type tax in that it protects the state's sales tax revenue, and it also protects the resident merchants from excessive competition from merchants in foreign states which charge no sales tax. Because of this protection many states have enacted such a tax,[2] and its constitutionality has consistently been upheld.[3] The theory of validity of the use tax is that it is not a burden on interstate commerce. Rather, it is an assessment on the property after it has left the channels of commerce and has come to rest in the state.

The issue in the instant case did not concern the validity of the tax, but instead involved the right of Maryland to force the nonresident plaintiff to collect the tax. Before a state may exercise any power over a person, there must be an establishment of jurisdiction.[4] At what point jurisdiction attaches is the subject of this and other litigation.

In *Felt and Tarrant Co. v. Gallagher*[5] the vendor, an Illinois corporation, contracted with agents in California to demonstrate merchandise and solicit orders which were approved and filled in Illinois. The office rent of the agents was paid by the corporation. It was held that California could validly make the vendor a collector of its use tax, justification for so holding being that the corporation maintained a place of business in the state. The activities of the corporation's agents were relied on by the court to establish that the corporation was doing "business" within the state.

A more controversial set of facts presented itself in *Nelson v. Sears, Roebuck Co.*,[6] and *Nelson v. Montgomery Ward Co.*[7] both of which were decided by the same court on the same day. The appellants in those cases maintained retail department stores in Iowa and collected the Iowa sales tax on sales made in those stores. The mail order divisions of the two stores were outside the state of Iowa. Thus, mail orders of Iowa residents were solicited, accepted, and filled outside the state. Because the sales tax and use tax are complementary, it was held that the appellants having submitted themselves to the jurisdiction of Iowa for the collection of the sales tax likewise submitted themselves to the state's jurisdiction for the purposes of the use tax. The decision is justified on the premise that the appellants' mail order businesses cannot be separated from their local

[2] Alabama, Arkansas, California, Illinois, Iowa, Kansas, Michigan, Mississippi, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Utah, Washington, Wyoming, and the City of New York.

[3] Henneford v. Silas Mason Co., 300 U.S. 577 (1937); Monamotor Oil Co. v. Johnson, 292 U.S. 86 (1934). The Illinois Cigarette Use Tax Act has been upheld in *Johnson v. Halpin*, 413 Ill. 257,108 N.E. 2d 429 (1952). However, the Motor Vehicle Use Tax Act has been found to be unconstitutional because of vagueness. People v. Carpentier, 2 Ill. 2d 468, 118 N.E. 2d 319 (1954).

[4] E.g., New York, L.E. & W. R.R. v. Pennsylvania, 153 U.S. 628 (1894).

[5] 306 U.S. 62 (1939).

[6] 312 U.S. 359 (1941).

[7] 312 U.S. 373 (1941).

businesses and thus should be included in the benefits of doing business in the state.

The importance of the reasoning in the last mentioned cases is emphasized in *J. B. Simpson v. Gundry*[8] where the vendor maintained a mail order business from Illinois, and merely shipped the merchandise into Michigan, title passing on delivery to the carrier. Because the mail order house had not subjected itself to the jurisdiction of Michigan by maintaining a retail store there, the state could not force the vendor to collect the use tax. Jurisdiction of the merchant is the key to these cases, yet the dissent in the *Simpson* case seems to ignore it.

Maryland in the instant case relies upon *General Trading Co. v. State Tax Commission of Iowa.*[9] There, the corporation was found to be doing business in the state because its salesmen solicited orders in the taxing state followed by the delivery of the goods to the purchaser. The only non-local phase of the transaction was the routine acceptance of the orders in Minnesota. Even though the sales arrangements were not elaborate, jurisdiction over the seller was found to be present.

In attempting to use the *General Trading Co.* case as an authority in the instant case, Maryland advanced four activities of the plaintiff on which jurisdiction in the taxing state might rest: 1) the vendor's advertising with Delaware papers and radio stations, though not especially directed to Maryland inhabitants, reached, and was known to reach, their notice; 2) its occasional sales circulars mailed to all former customers included customers in Maryland; 3) it delivered some purchases to common carriers consigned to Maryland addresses; 4) it delivered purchases by its own vehicles to Maryland addresses. The late Mr. Justice Jackson, who had dissented in the *General Trading Co.* case, wrote the court's opinion to the effect that these activities were only incidental effects of general advertising, and none of these were sufficient to establish jurisdiction.

The four dissenting justices could not see why this case did not come under the principles announced in the *General Trading Co.* case. The fact that all the sales were not made on a cash and carry basis was said to be the uniting factor between the two cases. When the sales clerks took addresses for delivery in Maryland, they could have added the use tax at a slight burden, this burden being compensated by the fee provided by the statute. Also, it was submitted that jurisdiction was obtained when the delivery truck ventured into Maryland.

The majority opinion in the instant case seems to be the better reasoned since the necessity of jurisdiction over an intended taxpayer is a very fundamental principle of taxation. This case illustrates that the activity which causes jurisdiction to attach must be more than solicitation through

[8] 297 Mich. 403, 298 N.W. 81 (1941). [9] 322 U.S. 335 (1944).

general advertising or an occasional presence of a delivery truck in the taxing state. It must be admitted, however, that the activities described, especially the entrance of the delivery truck into the taxing state, present a borderline situation. That fact, plus the ratio between the majority and minority of the court, leads to the observation that perhaps little more activity in the taxing state was necessary to give Maryland jurisdiction. However, due to the great emphasis on factual situations, future cases concerning the collection of use taxes from nonresident merchants might be easily distinguished.

TAXATION–STOCK OPTION GIVEN AS COMPENSATION HELD INCOME UPON GRANTING

Petitioner entered into a two-year employment contract and was granted a stock option as part of the contract, to be exercised within the two-year period. Although the option was exercised in part the first year, and the remainder the second year, both the petitioner and his employer treated the option as "compensation" for services rendered the first year, using the difference between the fair market value of the stock at the time the option was granted and the option price as the basis for their income tax return. The Tax Court agreed that the option was intended as additional "compensation" but held that the dates of exercise determined the income to be reported. On review, the Court of Appeals reversed the lower court, holding that the option was intended as additional compensation for services for the year in which the option was granted and thus it was taxable in that year only. *McNamara v. Commissioner of Internal Revenue*, 210 F. 2d 505 (C.A. 7th, 1954).

The petitioner, on August 24, 1945, entered into an employment contract with the National Tea Company for a term of two years beginning March 21, 1945, which, among other things, contained a provision to the effect that he was to receive a stated salary of $27,500 with additional annual compensation of two per cent of the net profits over $300,000. In addition the petitioner was granted the following option by National on August 24, 1945:

> . . . this certifies that an option is hereby extended to said HARLEY V. MCNAMARA, his heirs, . . . and assigns, to expire on August 24, 1947, to purchase 12,500 shares of the common stock of this corporation, . . . at such times prior to August 24, 1947, as he or they shall elect, upon the payment to this corporation of the cash sum of $16.00 for each share so purchased. . . .

On the same day the board of directors of National, at a special meeting, adopted the following resolution:

> WHEREAS, the Executive Committee of this corporation has recommended that, in addition to the stated cash payments on account of salary and such