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Internal Revenue - Nature and Extent of Taxing Power - Power to Tax and Regulate

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which anyone has been ordered, by an interlocutory decree, to purchase either intangible personal property or services. The lack of precedent coupled with the caution with which most courts grant interlocutory mandatory injunctions would seem to render this case questionable as authority for future decisions.

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INTERNAL REVENUE — NATURE AND EXTENT OF TAXING POWER—POWER TO TAX AND REGULATE—Defendants were convicted for failure to pay a gamblers' occupational tax imposed by an act of Congress.[1] The act levied a special tax of $50 per year on every person engaged in receiving wagers for or on behalf of any person liable to a tax on wagers. In addition the act required every person subject to the tax to register with the appropriate Collector of Internal Revenue and in connection with his registration to furnish certain information specified in the act. Defendants challenged the validity of the act contending that it was not designed as a revenue measure but that its true purpose was to obtain information concerning gambling activities and thereby assist the states in enforcing the criminal law against gamblers. On appeal it was *held* that the judiciary is without power to scrutinize the motives and purposes of the legislative branch of the government, and since the government was in fact deriving an income from the tax, it was a valid exercise of Congress' power to tax. *United States v. Robinson*, 107 F. Supp. 38 (E.D. Mich. 1952).

The power to tax granted Congress by the Constitution is extremely broad.[2] This power is not restricted by either the Fifth[3] or Tenth Amendment.[4] It is not outside the ambit of Congressional power to levy taxes which possess some incidental regulatory, suppressive or restrictive effect.[5] Nor is a primarily regulatory statute which in fact raises revenue invalid so long as the act falls within the scope of powers delegated to Congress.[6] But where the primary purpose of the act, obviously hidden under the cloak of the taxing power, has infringed upon the residual powers of the states, the decisions have not been in complete accord. A recent Supreme Court decision upheld an act of Congress in which the

860 (D. Minn. 1949) (defendant ordered to furnish refrigerator cars); Marks v. Golden Horn Realty Co., 92 N.Y.S.2d 92 (1949) (provide doorman service).

1. 26 U.S.C. §3290.

2. U.S. Const. Art. 1, §8; *see* License Tax Cases, 5 Wall. 462, 471 (U.S. 1866) taxing power limited only by rule of apportionment of direct taxes, rule of uniformity of indirect taxes, and prohibition against export taxes).

3. Brushaber v. Union Pac. R.R., 240 U.S. 1, 24 (1915); *see* Magnano Co. v. Hamilton, 282 U.S. 40, 44 (1934) (upheld state oleomargerine tax).

4. Fernandez v. Wiener, 326 U.S. 340, 362 (1945) (upheld federal estate tax); *see* United States v. Darby, 312 U.S. 100, 123 (1940).

5. Fernandez v. Wiener, 326 U.S. 340, 362 (1945) "Undoubtedly every tax which lays its burdens on some and not others may have an incidental regulatory effect."; Sonzinsky v. United States, 300 U.S. 506, 513 (1937) "An act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed."; Veazie Bank v. Fenno, 8 Wall. 533 (U.S. 1869).

6. Sunshine Coal Co. v. Adkins, 310 U.S. 381, 393 (1940) (power of taxation used as a sanction for exercise of commerce power); Head Money Cases, 112 U.S. 580, 596 (1884) (tax not void because used as expedient regulation of commerce); *see* Child Labor Tax Case, 259 U.S. 20, 38 (1922).

revenue purpose was secondary and where the activity regulated was one which Congress could not otherwise regulate.[7] Many earlier decisions had refused to sanction such usurpation of state powers.[8] In fact the statute under consideration in the instant case was declared unconstitutional by one federal court[9] as an invasion of state police powers.

The court in the instant case relies on four landmark cases[10] in upholding the validity of the act under scrutiny. Chief Justice Taft, in the *Child Labor Tax Case*,[11] distinguished three of these cases from a case where the object of a tax is manifestly a regulation of a state concern. The fourth of these cases is predicated upon the principle that inquiry into statutory motivation is outside the competency of the courts.[12] This doctrine has received support from any decisions[13] but is difficult to reconcile with other decisions where the true regulatory character of the act is ascribed to it regardless of denomination imposed by the legislative branch.[14] In addition to the instant case, the act under consideration has been upheld in two Federal District Court decisions in California[15] Those decisions were based on the concept that Congress may affect local activities or occupations by imposing a tax or license fee.[16]

The fine line of distinction where a taxing act exceeds the powers entrusted to Congress and treads upon those reserved to the states presents a situation where reasonable minds may differ. But in view of the three to one majority of Federal District Courts upholding the act, and the liberal tendency of present day courts, it is likely that the act under consideration would be declared valid if considered by the Supreme Court.

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7. United States v. Sanchez, 340 U.S. 42, 44 (1950) (upheld marijuana transfer tax).

8. *E.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 295 (1936) (attempted regulation of bituminous coal industry through tax power invaded states' rights); United States v. Constantine, 296 U.S. 287 (1935) (Congress cannot impose penalty for violation of state law); Child Labor Tax Case, 259 U.S. 20, 38 (1922).

9. United States v. Kahriger, 105 F.Supp. 322 (E.D. Pa. 1952) (recognized the subject matter as within the scope of federal authority, but held that the act went far beyond mere taxation).

10. Sonzinsky v. United States, 300 U.S. 506 (1937); United States v. Doremus, 249 U.S. 86 (1919); McCray v. United States, 195 U.S. 27 (1904); Veazie Bank v. Fenno, 8 Wall. 533 (U.S. 1869).

11. 259 U.S. 20, 40 (1922) (in discussing the Veazie case, he stated "what was charged to be the object of the excessive tax was within the Congressional authority.") (in reference to the McCray case, ". . . the law objected to does not show on its face as does the law before us the detailed specifications of a regulation of a state concern . . .") (concerning the Doremus case, ". . . the court, there, made manifest its view that the . . . act must be naturally and reasonably adapted to the collection of the tax and not solely to the achievement of some other purpose plainly within state power.").

12. See Sonzinsky v. United States, 300 U.S. 506, 513 (1937).

13. *E.g.*, Fernandez v. Wiener, 326 U.S. 340, 362 (1945) (where tax purports to be a revenue measure, it is not within province of courts to inquire into Congressional motives); United States v. Doremus, 249 U.S. 86, 93 (1919) (reasonable relation to tax power sufficient); McCray v. United States, 195 U.S. 27 (1904).

14. United States v. Constantine, 296 U.S. 287, 294 (1935) "A penalty cannot be converted into a tax by so naming it . . ."; United States v. LaFranca, 282 U.S. 568 (1931) (liquor regulation); *cf.* McCulloch v. Maryland, 4 Wheat. 315 (U.S. 1819).

15. United States v. Smith, 106 F.Supp. 9 (S.D. Cal. 1952); United States v. Nadler, 105 F.Supp. 918 (N.D. Cal. 1952).

16. *Cf.* Sunshine Coal Co. v. Adkins, 310 U.S. 381 (1940) (upheld tax levied as a sanction to enforce The Bituminous Coal Conservation Act).