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Taxation - Governmental Instrumentalities State Sales Tax

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LAW SCHOOL NOTES

The University of North Dakota School of Law completed its forty-third year of continuous operation. The total enrollment for the school year 1941-1942 was fifty-five. The following third year students were awarded the Juris Doctor degree:

1. Harold Joe Dale (B.A. 1938) of Chicago, Ill.
2. Lowell A. O'Grady (B.A. 1940), Watford City, N. D.

The degree of Bachelor of Laws were awarded to the following students:

3. *Oliver E. Austinson, Fertile, Minn.
4. William H. Black (B.A. 1940), Grand Forks, N. D.
5. Kenneth W. Brown (Ph. B. 1942), Grand Forks, N. D.
6. Betty C. Calnan, Valley City, N. D.
7. Tobias D. Casey, Dickinson, N. D.
8. Scotty Gladstone, Dupree, S. D.
9. Kenneth M. Knutson, Maxbass, N. D.
10. Norbert J. Muggli, Richardton, N. D.
11. Ralph S. Oliver (B.S.C. 1938), Hankinson, N. D.
12. Richard P. Rausch, Raleigh, N. D.
13. Robert W. Rovelstad (B.A. 1940), Grand Forks, N. D.
14. Gilbert E. Saxowsky (B.S.C. 1940), Dickinson, N. D.
15. Daniel J. Scully, Watertown, S. D.
16. Marvin E. Steffen (B.S.C. 1940), Parshall, N. D.
17. F. Lorene Whitesides (B.A. 1941), Lakota, N. D.

John A. Anderson of St. Thomas, N. D., will complete his requirements for the law degree by August 1, 1942.

The University of North Dakota Chapter of The Order of the Coif elected three law seniors and one honorary candidate at its annual meeting. Elected were Norbert J. Muggli, Richardton, Tobias D. Casey, Dickinson, and Lowell A. O'Grady, Watford City. The honorary selection was given to Howard G. Fuller of the Fargo Bar.

Many of the members of the Class of 1942 will be called into the service of the United States Army or the Navy immediately after taking the bar examination in June.

*Oliver E. Austinson of Fertile, Minn., is a son of Attorney Joseph B. Austinson who graduated from the School of Law in 1913.

TAXATION — GOVERNMENTAL INSTRUMENTALITIES STATE SALES TAX

A Federal Land Bank, having acquired certain farm properties by foreclosure proceedings, sought to effect repairs and improvements on the buildings and purchased lumber and other materials from a Bismarck lumber company which demanded $8.02 as a state sales tax on the purchses. The Federal Land Bank claimed exemption under Section 26 of the Federal Farm Loan Act of July 17, 1916, c. 245, 39 Stat. 360, 380, 12 U. S. C. A.

§§ 931-933. Section 26 provides that "every Federal land bank . . . , including the capital and reserve or surplus therein and the income derived therefrom, shall be exempt from Federal, State, municipal, and local taxation, except taxes upon real estate held, purchased, or taken by said bank. . . ." Held, that Federal land banks are instrumentalities of the federal government engaged in the performance of an important governmental function, and that Congress has the power to protect the instrumentalities which it has constitutionally created. Federal Land Bank of St. Paul v. Bismarck Lumber Co. et al., 62 S. Ct. 1 (1941).

It has long been settled that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operation of constitutional laws enacted by Congress to carry into execution the powers vested in the general government. McCulloch v. Maryland, 4 Wheat. 316, 436, 17 U. S. 159 (1819). In Railroad Co. v. Peniston, 18 Wall. 5, 36, 85 U. S. 5 (1873), Justice Strong lays down the test as being "whether the tax does in truth deprive the (the government instrumentalities) of power to serve the government as they were intended to serve it, or does it hinder the efficient exercise of their power." The activities of the corporation through which the national government lawfully acts must be regarded as governmental functions and, as such, entiled to whatever immunity attaches to those functions when performed by the government itself through its departments. Congress has not only the power to create a corporation to facilitate the performance of governmental functions but has the power to protect the governmental functions thus validly authorized. Pittman v. Home Owners' Loan Corporation, 308 U. S. 21, 32, 84 L. Ed. 11, 60 S. Ct. 15 (1939). In Panhandle Oil Co. v. State of Mississippi, 277 U. S. 218, 48 S. Ct. 45, 72 L. Ed. 857 (1928) it was held that, while the State of Mississippi may impose charges upon the petitioner for the privilege of carrying on trade that is subject to the power of the state, it may not lay a tax upon transactions by which the United States secures the things desired for its governmental purposes.

In several cases it has been held, however, that state sales taxes could be constitutionally imposed on sales to national parks, where, in ceding the park territory, the state reserved the right to tax persons and corporations. See Rainier National Park Co. v. Martin, 18 F. (2d) 481, 302 U. S. 661, 82 L. Ed. 511, 58 S. Ct. 478 (1937 DC); James v. Dravo Contracting Co., 302 U. S. 134, 82 L. Ed. 155, 58 S. Ct. 208 (1937). The question arises as to when shall a government instrumentality be subject to, and when shall it be immune from, state taxation, and there has developed the "implied immunity" principle that neither the federal government nor a state may so exercise its respective powers as unduly to burden or impair the effective functioning of the other within its allotted sphere. The division of the functions of government into those that are strictly governmental and those that are proprietary nor non-governmental was developed in connection with the problems of the liability of municipal corporations

for the torts of their agents. The principal test is whether the state is engaged in a business which constitutes a departure from the usual governmental functions and to which, by reason of its nature, the federal taxing power would normally extend. Helvering v. Powers, 293 U. S. 214, 55 S. Ct. 171, 79 L. Ed. 291 (1934). However it has been stated that "the immunity of the federal government from state taxation seems not to be lost with respect to activities which would be considered non-governmental if carried on by a state." Rottschaefer, Constitutional Law, p. 106. In Van Brocklin v. State of Tennessee, 117 U. S. 151, 155, 6 S. Ct. 670, 29 L. Ed. 845 (1886) Justice Gray declared that, "the attempt to use the taxing power of a state on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give." The real question would seem to be whether the application of the distinctions between governmental and proprietary functions to federal functions is consistent with the necessity for maintaining federal supremacy. In South Carolina v. United States, 199 U. S. 437, 463, 26 S. Ct. 110, 50 L. Ed. 261 (1905) the Supreme Court upheld a federal tax imposed upon a liquor enterprise operated by the state. In that case Justice Brewer stated that, "it is reasonable to hold that while the former (state) may do nothing by taxation in any form to prevent the full discharge by the latter (federal government) of its governmental functions, yet whenever a state engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation." While Congress may, undoubtedly, confer upon the federal instrumentalities of its selection or creation an immunity from state taxation more extensive than that which they have under the implied immunity principle, the states, for their part, seem to be without power to confer upon their agencies, whether public or private in character, any immunity beyond that accorded them under the principle of their implied immunity from federal taxation. Rottschaefer, Constitutional Law, p. 109. In all those cases in which the court upheld the application of a state tax to the property or activities of a corporation operating under a federal charter or performing services for the federal government no specific exemption from taxation was involved. Thus it would seem clear that all corporations created by the federal government which have a legitimate basis serve as agents in the performance of some power conferred by the Constitution. As agents of the federal government they are performing functions which can only be classified as governmental. And in performing governmental functions they are, under the doctrines of the Supreme Court, exempt from taxation by the states save as Congress may waive that immunity. For a good, extensive discussion of this topic see Stoke, State Taxation and the New Federal Instrumentalities, 22 Iowa Law Review 39 (1937).

JOHN A. ANDERSON
Third Year Law Student.