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Taxation—Tax Increase on Harness Tracks Upheld

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addition, there is authority that as a general rule the exemption should be construed strictly against the party claiming it.[29] Thus, a denial of the exemption in the present case would not have been without basis.

The exemption statute must, however, not be so strictly construed as to vitiate its purpose.[30] The purpose of this easing of the tax burden is to encourage, foster, and protect charitable institutions in view of the benefit to the community afforded by the religious, moral, and intellectual influence of these institutions.[31] The courts, then, should not be overly strict in construing charitable exemptions and should take into account modern changes in society as the result of which religious organizations may engage in not strictly religious practices in order to further their religious goals. Recent case law indicates a recognition of the fact that an indirect application of the property to a charitable or religious purpose need not defeat the statutory exemption.[32] In not requiring that the 5% surplus produce be plowed back into the ground, the Court expanded on the literal meaning of the statute. This decision, however, confirms a trend toward a more realistic application of the statute, upholding the spirit of the charitable exemption.

J. D. R.

TAX INCREASE ON HARNESS TRACKS UPHELD

In 1956, pursuant to Article I, Section 9 of the New York Constitution,[33] the Legislature added Section 45-a to the Pari-Mutuel Revenue Law.[34] In 1959 the plaintiff brought an action to compel the Harness Racing Commission to credit its construction account for Federal income taxes in lieu of Section 45-a. Before the action was tried, the Legislature enacted the 1959 amendment to Section 45-a explicitly prohibiting reimbursement for Federal income taxes.[35]

After the plaintiff had obtained the relief requested in the complaint in

29. Congregation Gedulath Mordecai v. City of New York, 135 Misc. 823, 238 N.Y. Supp. 525 (Munic. Ct. 1929).

30. Congregation Emanu-El v. City of New York, 150 Misc. 657, 270 N.Y. Supp. 6 (Sup. Ct. 1934).

31. Van Alstyne, supra note 17 at 462; Seminary of Our Lady of Angels v. Barber, supra note 25.

32. Cf. Seminary of Our Lady of Angels v. Barber, supra note 25; Clarkson College v. Haggett, supra note 24; Pace College v. Bayland, supra note 23; N.Y. Conference of 7th Day Adventists v. Nutt, supra note 25.

33. N.Y. Const. art I, § 9:
no lottery . . . except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of the government, shall hereafter be authorized . . . ; and the legislature shall pass appropriate laws. . . .

34. N.Y. Unconsol. Laws § 7603-a(10) (McKinney 1956). The statute provides in general for a credit to a construction account for capital improvement, "until such date as the amounts paid to such harness race track from the construction account less income taxes paid thereon to the United States by such harness race track, equals the cost of capital improvement."

35. N.Y. Unconsol. Laws § 8020(10) (McKinney 1961). The statute provides that no harness race track shall be reimbursed for any Federal income taxes.

the Supreme Court,[36] and in the Appellate Division,[37] the defendant appealed to the Court of Appeals.

The main issues before the Court of Appeals in the present case, *Roosevelt Raceway, Inc. v. Monaghan*,[38] were whether Section 45-a was constitutional, and whether the 1959 amendment operated as an unconstitutional impairment of a contractual obligation. The Court, with five separate opinions, reversed the Appellate Division and Supreme Court.

Chief Judge Desmond and Judge Burke concerned themselves with the question of whether Section 45-a was a tax statute,[39] for if it was not, then the 1959 amendment was invalid as an impairment of the contractual obligation created by Section 45-a. Chief Judge Desmond, basing his opinion on the statutory exclusions from taxation found in the New York Tax Law,[40] concluded that an exemption from taxation means an immunity or freedom from tax.[41] There was no exemption under Section 45-a, as the statute guaranteed that the State would receive taxes no lower than those paid by plaintiff in 1955. The statute reduced taxes only if plaintiff paid taxes in any year beyond the 1955 level, and then only if the amount of the reduction was applied by the plaintiff to a construction project which would produce increased taxes for the state. Chief Judge Desmond also concluded that this statute was not a surrender of the taxing power under the first phrase in Article XVI, Section 1 under any reasonable interpretation. The 1959 amendment was held to be an unconstitutional impairment of a contract created by Section 45-a.

Judge Burke held that this statute was not a general tax statute for several reasons. The track by making improvements will have to pay more, and not less taxes. The State only promised the plaintiff that it would be reimbursed for capital improvements by an adjustment of tax rates, which can be the subject of a contract, as it is not a tax exemption or a yielding of the tax power. Judge Burke further indicated that the Legislature was empowered under Article I, Section 9 to make such a contract.

Judge Froessel, in upholding the constitutionality of Section 45-a, placed his reliance on Article I, Section 9 of the New York Constitution.[42] This provision gave power to the Legislature to regulate betting. In view of the State's desire for increased revenue, it had the power to reduce tax rates by applying excess monies to the construction fund.

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36. 22 Misc. 2d 776, 199 N.Y.S.2d 195 (Sup. Ct. 1960).
37. 11 A.D.2d 206, 202 N.Y.S.2d 646 (1st Dep't 1960).
38. 9 N.Y.2d 293, 213 N.Y.S.2d 729 (1961).
39. N.Y. Const. art. XVI, § 1:
The power of taxation shall never be surrendered, suspended or contracted away. . . .
Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except for those exempting real or personal property used exclusively for religious, educational or charitable purposes.
40. N.Y. Tax Law § 4.
41. E.g., City of Rochester v. Rochester Ry. Co., 182 N.Y. 99, 74 N.E. 953 (1905).
42. Supra note 33.

On the other hand, Judge Dye, although concurring with Judge Fuld, held Section 45-a unconstitutional for several reasons, one of which was based on the inability of the Legislature to surrender the taxing power. However, his main contention was that the money in the construction fund was public money which cannot be paid out in aid of a private corporation.[43] Furthermore, funds belonging to the State or under its control can only be paid out by legislative appropriation,[44] and only upon the audit of the comptroller.[45] These construction monies were held to be public funds because they are derived from the 15 per cent set aside from the betting pool from which taxes due the State are to be paid and are not available to the tracks until the 1955 tax totals are exceeded. The State by implication has the beneficial ownership, as the funds are subject to periodic audit and may not be used except for the purposes of Section 45-a. The fact that the money is not in the public treasury does not change its character.[46]

Judge Fuld, with Judges Van Voorhis and Foster concurring, held that the 1959 amendment was valid as an exercise of the taxing power regardless of the validity or invalidity of Section 45-a, which they refused to pass upon in the exercise of their discretion. However, Judge Fuld stated his belief that Section 45-a was probably unconstitutional under Article XVI, Section 1 of the New York Constitution.[47] The exact content of the contract which plaintiff claimed to exist was not at all translucent. In the lower courts plaintiff had successfully contended that the State had not employed public funds for the construction of harness tracks, and if this position is now accepted, then the only other alternative is to hold that the contract in question is one for tax relief. It is thus a promise to keep in force tax rates which deprive the State of tax revenues and, therefore, violates the first provision of Article XVI, Section 1 of the State Constitution, which provides that the State shall not surrender the tax power. Furthermore, the fact that Section 45-a will ultimately increase tax revenues does not negate the conclusion that a certain amount of plaintiff's revenues were exempt from taxation. It is thus subject to repeal under the second provision of Article XVI, Section 1.

Of course, once Section 45-a is found to be constitutional and not a tax statute, the dissenting judges must find the requisite elements of a contract

43. N.Y. Const. art. VII, § 8:
The money of the state shall not be given or loaned to or in aid of any private corporation or association. . . .
44. N.Y. Const. art. VII, § 7:
No money shall ever be paid out of the state treasury or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law. . . .
45. N.Y. Const. art. V, § 1:
The payment of any money of the state, or of any money under its control, or the refund of any money paid to the state execpt upon audit by the comptroller, shall be void. . . .
46. See Fox v. Mohawk and Hudson River Humane Soc., 165 N.Y. 517, 59 N.E. 353 (1901); People ex rel. Ensfield v. Murray, 149 N.Y. 367, 44 N.E. 146 (1896).
47. Supra note 39.

present. On this point Chief Judge Desmond and Judge Burke were correct. There was an offer, and an acceptance coupled with reliance on the part of the plaintiff.[48]

It is submitted that Judge Fuld's position on the constitutionality of Section 45-a, although he specifically refused to pass on this issue, is more tenable, no matter whether Section 45-a is considered as a surrender of the tax power or a tax exemption subject to amendment. As Judge Fuld pointed out, if this statute is not a tax statute, then it would probably be unconstitutional under the public monies theory of Judge Dye, although Chief Judge Desmond and Judge Burke failed to discuss this possibility. But aside from that, it is apparent that plaintiff's construction is being financed as a result of lower taxes. Under Article XVI, Section 1 of the New York Constitution it would seem that the State cannot be bound by such a contract.

It is noteworthy that Judge Fuld did not rely on the constitutional issues involved in Section 45-a but attacked the 1959 amendment directly in an attempt to avoid the main constitutional issues. It was especially appropriate to avoid discussion of the constitutional issues involved in Section 45-a, when for all practical purposes the validity of Section 45-a may never arise again.[49]

It is to be noted also that the avoiding of the constitutional issues removes the need to answer the contention of Judges Burke and Froessel that this statute is authorized by another constitutional provision, Article I, Section 9. If such an issue must be faced, it must necessarily result in making a choice between Article I, Section 9 and Article XVI, Section 1, unless it can be held that Article XVI, Section 1 is inapplicable, or unless the decision turns upon the grounds that Judge Dye put forth. In his opinion, Judge Fuld, although discussing Section 45-a generally, impliedly rejected this contention.

In any event four Judges did hold the 1959 amendment valid per se under both provisions of Article XVI, Section 1. This was the only actual holding in the case. The various positions of the Judges on Section 45-a can be considered dicta at this point in time.

M. A. L.

RECEIPTS FROM SERVICES AFFECTING INTERSTATE COMMERCE, BUT LOCAL IN NATURE, TAXABLE

In *Mohegan International Corp. v. City of New York*,[50] petitioner sought a declaratory judgment that the New York City General Business and Financial

48. Cf., People ex rel. New York Cent. and H.R.R. Ry. Co. v. Mealey, 224 N.Y. 187, 120 N.E. 155 (1918), aff'd sub nom., Troy Union Ry. Co. v. Mealey, 254 U.S. 47 (1920); New York Electric Lines Co. v. Empire City Subway, 235 U.S. 179 (1914); American Smelting and Refining Co. v. Colorado, 204 U.S. 103 (1906).

49. In a supreme court case just decided the plaintiff was held to have no standing to sue. See St. Clair v. Yonkers Raceway, Inc., an unreported case decided in the Supreme Court in Erie County.

50. 9 N.Y.2d 69, 211 N.Y.S.2d 161 (1961).