Buffalo Law Review

Volume 10 | Number 1 Article 33

10-1-1960

Constitutional Law—Delegation of Power to Municipality to Tax Limited

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the Legislature was not justified. The Attorney General, appearing in the proceeding pursuant to Section 71 of the Executive Law,[20] filed a general denial.

The same landlord had previously challenged the constitutionality of the 1955 re-enactment and extension[21] in *Lincoln Building Associates v. Barr*.[22] There the court dismissed the petition but stated that rent controls have justification only in periods of emergency and left open the question of how long the Legislature may lawfully continue the office rent control. Subsequent to the *Barr* decision the Legislature effected a gradual relaxation of controls by systematically reducing the amount of rent required to make office space applicable for decontrol under the 1956 amendment.[23]

The Court of Appeals affirmed the order of the Municipal Court of the City of New York,[24] which had dismissed the petition, stating that petitioner's evidence only showed that the intensity of the emergency . . . "has moderated to some extent but not in substantial degree."[25] The Court noted that such a process of gradual cessation of controls avoided economic disruption and dislocation and held that such determination of the Legislature was not arbitrary or a violation of constitutional guarantees. The dissenting opinion, argued as it did in the *Barr* case, that the act in question was an excessive use of the police power in an emergency, as defined by the United States Supreme Court,[26] and resulted in the violation of an individual's constitutional rights. The dissent stressed that the emergency which gave rise to the act, namely conditions of war, no longer existed, urging a distinction between conditions caused by war and those resulting from a general prosperity in which both tenants and landlords share.

It appears that the Business Rent Control Law will eventually disappear; the decision indicating judicial approval of the legislative process of gradual cessation of controls. Such a gradual process, the Court feels, is in line with the stated purpose of the act "to protect and promote public health, safety and general welfare."

Delegation of Power to Municipality to Tax Limited

Article 3, Section 1 of the New York State Constitution confers on the Legislature the exclusive power to levy taxes and to determine the class of persons to be taxed provided such classification has a reasonable basis. The

20. N.Y. Executive Law § 71:
Whenever the constitutionality of a statute is brought into question . . . the court or justice before whom such action or proceeding is pending may make an order, directing the party desiring to raise such question to serve notice thereof on the attorney-general and that the attorney-general be permitted to appear at such trial or hearing in support of the constitutionality of such statute.
21. N.Y. Sess. Laws 1955, Chap. 701.
22. 1 N.Y.2d 413, 153 N.Y.S.2d 633 (1956).
23. N.Y. Sess. Laws 1956, ch. 735, §§ 2, 3.
24. 21 Misc. 2d 500, 196 N.Y.S.2d 241 (Mun. Ct. 1960).
25. Supra note 15 at 181, 203 N.Y.S.2d 87 (1960).
26. Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922).

Legislature, through enabling acts, may delegate a taxing power to its municipal sub-divisions and stipulate therein limitations on its application. Imposition of the resultant tax is unconstitutional if it exceeds the limited authority conveyed by the enabling legislation.

Section 24(a) of the General City Law, as amended in 1947 and 1948,[27] authorized municipalities, having populations of over one million people, to impose a gross receipts tax upon persons making sales within that city or engaged therein for profit or gain in any trade, business, profession, vocation or commercial activity. The broad classification of "general business" can be taxed at a rate not to exceed 1/5 of 1% of gross receipts. It also provides that persons carrying on a "financial business" can be subjected to the higher rate of 2/5 of 1%. "Financial business" is defined as: "the services and transaction of private banks, private bankers, dealers and brokers in money, credits, commercial paper, bonds, notes, securities and stocks, monetary metals, factors and commission merchants."[28]

The distinction between the two classifications of tax-payers and the respective maximum rates was the basis for the Court's decision in the matter of *United States Steel Corporation v. Gerosa, Comptroller of the City of New York*.[29] United States Steel carried on operations as a holding company wholly within the city. Its objection to the defendant's deficiency assessment[30] on the gross receipts tax was founded upon its rejection of the comptroller's determination that it was a "financial business." United States Steel alleged that this classification was unconstitutional in that its application to the plaintiff's business in New York City exceeded the powers delegated to that City by the enabling act.

The comptroller relied on a local law[31] which added the term "holding company" to the statutory definition of "financial business" set out in the State enabling act. He assessed the plaintiff at the higher rate but apportioned its gross receipts on the basis of 12½% to New York City. Both parties agreed that the resultant tax was less than it would have been had the lower rate of the "General Business" classification been applied to the total gross receipts of the plaintiff.[32] United States Steel denied, however, that it could be taxed at either rate without an allocation, but the question of allocation was not presented in the petition for review, which was transferred from the Supreme Court to the Appellate Division[33] where the tax determination was unanimously affirmed.

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27. N.Y. General City Law § 21.
28. Id. § 21(2).
29. 7 N.Y.2d 454, 199 N.Y.S.2d 457 (1959).
30. This assessment was made for the years 1948, 1949 and 1950 and embraced a principle amount of $176,767.28 plus penalties and interest of $144,388.62.
31. New York City Administrative Code B46-1.0.
32. Without allocation, application of the "general business" rate would have resulted in a principle tax of $808,379.91.
33. 7 A.D. 839, 182 N.Y.S.2d 299 (1st Dep't 1959).

The Court of Appeals, in a five to two decision, annulled the determination, stating that the classification of a "holding company" as a "financial business" and the tax assessed by the defendant were unconstitutional and remitted the matter to the comptroller for further proceedings.

Judge Dye, in the majority opinion, limited the scope of the Court's inquiry to the narrow question of whether the plaintiff could be properly classified as a "financial business." Looking to the definition in the enabling act, the Court noted that it contained an enumeration of specific types of businesses, which were preceded by the words "shall mean or include."[34] This, it reasoned, was indicative of a legislative intent to restrict the classification and to preclude New York City from adding yet another business to this classification. The expansion of that definition in the New York City local laws was an unauthorized expansion of the class definition set out in the enablement act and in excess of the delegated powers to levy the instant tax on that basis.

Defendant argued that repeated re-enactment of the General City Laws evinced a tacit approval by the Legislature of the defendant's then existant practice of construing "financial business" to include holding companies. The Court noted that while generally this does manifest a legislative favoring of reasonable administrative interpretation,[35] yet the legislative history of the act would not countenance this interpretation of the leglislative will. The State Legislature had resisted repeated efforts[36] by New York City to have the definition of "Financial Business" changed in its enablement, and seemed to have manifested deliberateness in refusing to add "holding companies" to that defin-nition, by expressly including it in similar enabling acts for smaller municipalities.[37]

Chief Judge Desmond, with Judge Burke concurring, agreed with the majority in holding that the plaintiff was not a financial business." The minority differed, however, with the Court's disposition of the case. They would have upheld the tax on the premise that the "general business and financial taxes" were one tax rather than two. They seemed to view the two classifications as being in effect two faces on one and the same coin. They further declared that the issue before them was not the validity of classification, which merely set separate maximums for two kinds of business, but rather whether the single tax authorized was validly levied.

Recalling the Court's previous stated policy of declaring the whole law on the undisputed facts[38] the minority suggested that a wider scope of review was called for. They noted that the instant tax, because of the comptroller's

34. Supra note 27.
35. Matter of Supock, 274 N.Y. 198, 9 N.E.2d 485 (1937). See also 110 A.L.R. 1158 (1937).
36. Assembly Int. No. 3519 and Senate Int. No. 3124, New York Legislative Record and Index, 180th Session, 1957. See also Assembly Int. No. 3725 and Senate Int. No. 3186, 1958.
37. N.Y. Sess. Laws 1948, ch. 651.
38. Cahill v. Regan, 5 N.Y.2d 292, 184 N.Y.S.2d 348 (1959).

decision to allocate the gross receipts, was actually less than it would have been had the proper classification been applied to the receipts without allocation. This allocation by the comptroller, while lawful, was not required. They held that the two classifications were relevant only in determining the ceiling on the amount of the one tax which could be imposed. This dissenting opinion maintained that there was nothing to litigate unless the tax had been improperly assessed in an amount in excess of that authorized by the enabling legislation.[39]

The majority opinion indicated that where the classification is improper, the constitutional question is reached and it refused to consider whether or not the comptroller's determination could be upheld on the broader grounds introduced by the minority opinion.

The dissent cited the federal case of *Lewis v. Reynolds*,[40] wherein a refund was claimed for a tax paid to the Internal Revenue Department. The fact situation there arose out of a tax determination negating the petitioner's claim of over-payment and the effect of the statute of limitations as a bar to a new assessment. The minority noted that the refund there was denied because it was held that even though no new assessment could be made after the statute had run, the tax-payer, nevertheless, was not entitled to a refund because he had failed to show that he had over-paid his tax. The analogy applicable to the instant case is found in the plaintiff's failure to show that the comptroller could not levy the tax without allocation.

To support this supposition that allocation was not required by the defendant, the minority noted the decision in *Steinbeck v. Gerosa*,[41] which held that even though the petitioner's business activities may induce or occasion interstate commerce, the relationship must be a close and direct one to escape the gross receipts tax. There the petitioner received royalties, from out of state publishers under contracts negotiated in New York. That court held that the payment did not directly result from interstate commerce.

The apparent analogy drawn by the dissent was that United States Steel, as a holding company by the nature of its supervisory and financing role, was doing business which was distinguishable from the direct operations of its subsidiaries outside of the state. The likening of the petitioner and his publishers in the *Steinbeck* case as being more akin to a creditor and debtor than to a partnership or joint venture seemed to suggest a further application of this reasoning by the dissent to the holding company and its subsidiaries.

APPLICATION OF SECTIONS 86-A AND 87(2) OF THE MEMBERSHIP CORPORATION LAW TO EXISTING CONTRACTS

In 1910, the Grove Hill Realty Co. sold and conveyed certain land to the Ferncliff Cemetery Association. The parties entered into an agreement wherein

39. Nash v. Lynch, 253 N.Y. 564, 171 N.E. 784 (1930).
40. 284 U.S. 281 (1931).
41. 4 N.Y.2d 302, 175 N.Y.S.2d 1 (1958).