Buffalo Law Review

Volume 7 | Number 1 Article 99

10-1-1957

Taxation—Claim for Refund of General Business Tax

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Foreclosure Of In Rem Tax Lien

Town of Somers v. Covey[35] involved reargument before the Court of Appeals, following reversal of its prior decision[36] by the Supreme Court of the United States.[37] The Supreme Court had reversed on the grounds that notice by publication, to an incompetent, of foreclosure of a tax lien did not satisfy the requirements of due process.

In the instant case, the Court explained that its prior decision was not based on the sufficiency of such notice, but rather on the grounds that the incompetent's committee had pursued the wrong remedy. The committee sought to vacate the judgment of foreclosure, but the Court had held that, pursuant to statute,[38] the foreclosure proceedings could only be attacked by an action to set aside the deed executed by virtue of that judgment. Hence, sufficiency of notice was immaterial in view of this holding; furthermore, the committee was now without remedy altogether for the statutory remedy was subject to a two-year limitation period[39] which had now expired. Thus the committee defeated himself by persisting in his error.

Claim For Refund Of General Business Tax

The City of New York imposed a gross receipts tax[40] upon advertising receipts earned by petitioner over a three year period, upon the theory that these receipts were the fruits of activity peculiarly local, even though the subsequent circulation of the magazine could be considered interstate commerce. Petitioner, a New York City publisher, brought this proceeding to obtain a refund of monies paid to the city declaring that the tax upon gross receipts was a burden upon interstate commerce.[41] To succeed, petitioner had to distinguish the facts of its own situation from the Supreme Court decision in *Western Livestock v. Bureau of Revenue*,[42] a case involving state taxation of advertising receipts for advertising appearing in a magazine circulated throughout the country. The tax was sustained, and the business of "preparing, printing, and publishing magazine advertising"[43] was deemed to be local activity, and any burden upon interstate commerce viewed as too remote to call for an invalidation of the tax.

35. 2 N.Y.2d 250, 140 N.E.2d 277 (1957).
36. 308 N.Y. 798, 125 N.E.2d 862 (1955).
37. 351 U.S. 141 (1956); see 6 BUFFALO L. REV. 345 (1957) for discussion of the instant case as well as the Supreme Court decision.
38. N.Y. TAX LAW §165-h(7).
39. *Ibid.*
40. ADMINISTRATIVE CODE OF CITY OF NEW YORK, §§41, 46.
41. New Yorker Magazine v. Gerosa, 3 N.Y.2d 362, 165 N.Y.S.2d 469 (1957).
42. 303 U.S. 250 (1937); for a discussion of the decision see, note, 13 IND. L. J. 500 (1937). The case is also noted in ROTTSCHAEFER ON CONSTITUTIONAL LAW, 168, 169 (1939).
43. 303 U.S. at 258, 259.

Petitioner in *New Yorker v. Gerosa*[44] was unable to factually distinguish the *Western Livestock* decision, and the dismissal of its claim was affirmed. The only reasonable basis for distinction would be the fact that one of the reasons for the decision in the *Western Livestock* case was that a tax on the taxpayer's activity could not be levied elsewhere.[45] In the instant case, the Court, in accepting the finding of the Comptroller of New York City, admitted that the gross receipts could in part be subjected to taxation elsewhere. This is evidenced by the fact that the tax here involved was imposed on advertising receipts, less those received from the Chicago branch office of the petitioner.[46] Nevertheless, this is not to admit that the sale of advertising is now considered in New York as interstate commerce, but rather a recognition that petitioner carried on local activity in two separate cities located in different states, and that each city could properly tax the amount of gross receipts allocable to advertising activity within that particular city. The Court correctly rejected the attempts of petitioner to recover the funds paid, and maintained the position found acceptable to the Supreme Court where advertising receipts are involved. The sale of advertising space, and the receipt of advertising receipts is a purely local activity, subject to a municipal tax on said receipts.

Recovery Of Taxes Paid Under Mistake Of Law

Despite the statutory admonition that "when relief against mistake is sought . . . relief shall not be denied merely because the mistake is one of law rather than fact,"[47] Lord Ellenborough's famous dictum in *Bilbie v. Lumley*[48] still influences New York law.

Without statutory provision to the contrary, taxes cannot be recovered unless paid under protest or involuntarily.[49] Payments under mistake of fact has long been classed as involuntary[50] but no relief has been given for mistake of law,[51] often for little more reason than that given by Lord Ellenborough.[52]

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44. *Supra*, note 41.
45. See note 42 *supra*, at 260.
46. 3 N.Y.2d at 471, 165 N.Y.S2d at 471.
47. N.Y. CIV. PRAC. ACT §112-f.
48. 2 East 469, 102 Eng. Rep. 248 (1802), wherein Lord Ellenborough said:
> . . . [E]very man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried.

49. Adrico Realty Corp. v. New York, 250 N.Y. 29, 164 N.E. 732 (1928).
50. Mutual Life Insurance Co. v. New York, 144 N.Y. 494, 39 N.E. 386 (1895); Brooklyn, Q. C. & S. R. Co. v. New York, 224 App. Div. 659, 229 N.Y. Supp. 9 (2d Dep't 1928), *aff'd*, 250 N.Y. 542, 166 N.E. 317 (1929).
51. Sanford v. New York, 33 Barb. 147 (N.Y. 1860); New York v. New Rochelle, 36 N.Y. Supp. 211 (2d Dep't 1895).
52. *Cf.* Adrico Realty Corp. v. New York, *supra* note 49, per Crane, J.:
> . . . [The taxpayer] . . . may be charged with a knowledge of the law, but not with knowledge of those facts which, being disputed, must ultimately be decided by a court.