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Administrative Law—Validity of Administrative Regulations

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Judge Dye agreed with this holding but felt the subpoenas were unreasonable in calling for documents as far back as 1946, four years before petitioners first came under investigation.

Validity of Administrative Regulations

Administrative regulations fell afoul of the displeasure of the Court of Appeals in two cases decided at the last term. In *Gulf Oil Corp. v. Joseph*,[35] the regulations involved were those of the Comptroller of the City of New York as to the allocation formula to be used in cases where a gross receipt cannot in its entirety be subjected to a local tax by reason of the Commerce Clause of the United States Constitution.

Whether or not a city or state may include in the measure of its gross receipts tax, imposed for the privilege of doing business in the city or state, a share of the receipts from interstate sales which is properly attributable and allocable to the doing of business within the city or state is a question on which the Supreme Court of the United States has split time and time again, answering now in the affirmative, then in the negative.[36] The Court of Appeals has determined the question in the affirmative and has upheld such levies.[37]

The statute in point provides that where a gross receipt cannot be taxed in its entirety due to the Commerce Clause prohibition, the City Comptroller shall establish an allocation formula so that just that portion of the receipt which is attributable to business done in the city should be taxed.[38] In carrying out this mandate, the Comptroller promulgated regulations establishing an allocation formula based on the proportion that property of the company within the city, wages and salaries paid within the city, and receipts attributable to city business, respectively, bear to these same factors in country-wide business.[39] These three factors are then averaged together and if the resultant average is above 66⅔%, it shall be reduced to that figure for purposes of allocation; if it is below 33⅓%, it shall be raised to that figure for purposes of allocation.[40] It was this latter provision that was objected to, petitioners' resultant average having been raised to 33⅓% from a lower actual figure. The court held that the use of

35. 307 N. Y. 342, 121 N. E. 2d 360 (1954).
36. See discussion in *Constitution of the United States of America—Analysis and Interpretation* (E. S. Corwin, ed.) 202-208.
37. *Olive Coat Co. v. McGoldrick*, 261 App. Div. 1070, 27 N. Y. S. 2d 471 (1st Dep't 1941), *aff'd* 287 N. Y. 769, 40 N. E. 2d 642 (1942).
38. NEW YORK CITY ADMINISTRATIVE CODE § RR 41-2.0(b), § B 46-2.0(b).
39. NEW YORK CITY COMPTROLLER'S REGULATIONS Art. 211-I.
40. *Ibid.*

such minimum figures was arbitrary and out of harmony with the expressed statutory mandate to tax only that portion of the receipt properly attributable to business done within the state.

In *Claim of Gold*,[41] the State Industrial Commissioner's regulations for the ascertainment of gratuities includable in employee remuneration for the purpose of computing unemployment insurance benefits were found defective.[42] In consonance with the statutory mandate[43] of formulating and promulgating all regulations necessary to carry out the Unemployment Insurance Law,[44] the Commissioner declared that determination of the amount of gratuities earned by hotel chambermaids would be made by means of the filing by the chambermaids of a signed statement of the amount so received with her employer, after having been duly notified of such requirement by the employer. If no such statement should be filed, the amount of gratuities should be deemed to be "nil".

In the instant case, the chambermaid's employer did not notify her of this requirement and she submitted no statement of gratuities. Hence when she applied for unemployment insurance benefits, she discovered that the $400 in gratuities she had in fact received over the time in question were excluded from the computation of her benefits, even though she worked in a hotel known to be one of the type where tipping of chambermaids is common (the so-called American Plan hotels). The court decided that in view of the *mandatory* duty imposed upon him by § 517[45] to determine the amount of gratuities, it was unreasonable and arbitrary for the Commissioner to penalize the employee by invoking a presumption that such gratuities were nil where he had done nothing more to determine the fact than to instruct the employer to do so, and the latter had in fact failed to do so.

Statutory Construction

In two cases, the Court of Appeals was called upon to construe Federal statutes in regard to housing. In *Peters v. New York City*

41. 307 N. Y. 224, 120 N. E. 2d 799 (1954).

42. § 517 of the Labor Law, defining remuneration to employees, includes as such remuneration gratuities received by employees in the course of their work. Hence such gratuities are includable for purposes of computing unemployment insurance benefits under §590(2). The employer is therefore obligated to include the amount of such gratuities in his payroll for the purpose of ascertaining the amount he is required to contribute under § 570(1).

43. LABOR LAW § 530(1).

44. LABOR LAW Art. 18.

45. "Where gratuities are received by an employee in the course of his employment from a person other than his employer, the value of such gratuities *shall* be determined *by the commissioner* and be deemed and included as part of his remuneration paid by his employer." [Emphasis added.]