

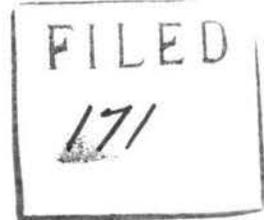
TAXATION (INTANGIBLE):
CONSTITUTIONAL LAW:

House Bill No. 537 does not violate the provisions of Article X of the Missouri Constitution and is therefore not unconstitutional.

OPINION NO. 171

June 23, 1972

Honorable Warren E. Hearnes
Governor of Missouri
Executive Office
State Capitol Building
Jefferson City, Missouri 65101



Dear Governor Hearnes:

You recently asked this office to answer the question of whether House Bill No. 537, recently passed by the Second Regular Session of the 76th General Assembly, is violative of Article X of the Missouri Constitution.

I. CHANGES MADE BY HOUSE BILL NO. 537

House Bill No. 537 makes two changes in the intangible tax law of Missouri, Chapter 146, RSMo 1969:

A. The most significant change is that the Act repeals certain sections of Chapter 146. The operative provisions, imposing an intangible tax, are repealed effective January 1, 1975.

B. The second change provides a new definition of "yield." The change proposed by House Bill No. 537 is designed to overrule Opinion No. 53-1972 of this office that determined that an account receivable held by a parent corporation evidencing an obligation of a subsidiary corporation is intangible personal property. The opinion further held that proceeds received by the parent corporation constitute "yield", therefore such a parent corporation holding the legal or equitable title or beneficial interest in intangible personal property is subject to the tax imposed by Chapter 146, RSMo.

As a result of the amendment, Section 146.010, RSMo would state, in relevant part:

Honorable Warren E. Hearnes

"The terms 'yield' or 'annual yield' means the aggregate proceeds received as a result of ownership or beneficial interest in intangible property whether received in money, credits or property, exclusive of any return of capital, and less the amount of interest required to be credited by the owner thereof, during the preceding calendar year, to reserve liabilities of the owner maintained under the statutes of this state, and less proceeds set aside or accumulated by the owner thereof under contracts or agreements for pension or retirement or employee benefits, and less the amount of interest or other proceeds from the use of intangibles received by any corporation on any loan by it to another corporation, at least eighty percent of whose voting stock was owned by the lending corporation, and less the amount of interest or proceeds from the use of intangibles received by any corporation from an affiliate corporation, each of whose stock was at least eighty percent owned by another corporation, or one hundred percent owned by ten or fewer individuals."
(Emphasis added)

This addition has the effect of eliminating the imposition of intangible tax prior to January 1, 1975 on interest received by a parent corporation from certain subsidiary and affiliated corporations.

II. POSSIBLE CONSTITUTIONAL OBJECTIONS

It could be suggested that enactment of House Bill No. 537 might violate Sections 2, 3, 4 and 6 of Article X of the Missouri Constitution. The repeal is arguably affected by Sections 2 and 3 whereas the new definition of yield is to be measured against the standards of Sections 3, 4 and 6. Section 2 of Article X deals with the inalienability of power to tax; Section 3 establishes the principle of uniformity of taxation; Section 4 provides for classification of property and the assessment of such property; and Section 6 restricts the power of the legislature to grant exemptions of property from taxation.

A. Constitutionality of the Repeal.

1. Application of Section 2. Section 2 of Article X of the Missouri Constitution states:

Honorable Warren E. Hearnes

"The power to tax shall not be surrendered, suspended or contracted away, except as authorized by this Constitution."

The repeal of the intangible tax act, Chapter 146 of the Missouri Statutes, does not constitute a violation of this provision. By the repeal, the legislature is not diminishing the power to tax but merely determining that the power to tax intangibles, as granted by the Constitution, shall not be exercised in its present form after January 1, 1975. It is entirely possible that, after a review of the matter, the legislature could enact a new intangible tax law or reenact Chapter 146. Because the repeal would not surrender the legislative power to tax but would only suspend imposition of the intangible tax, Section 2 of Article X is not violated.

2. Application of Section 3. Section 3 of Article X states, in relevant part:

"Taxes may be levied and collected for public purposes only, and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. . . ."

It has been observed that the General Assembly is vested with wide discretion to make classifications for taxation purposes without violating Article X, Section 3. Taxation measures are not constitutionally infirm because certain inequalities may result, so long as the classification is not "palpably arbitrary" and without reason or necessity. State ex rel. Transport Manufacturing and Equipment Company v. Bates, 224 S.W.2d 996 (Mo. 1949); State ex rel. Jones v. Nolte, 165 S.W.2d 632 (Mo. Banc 1942); Northwestern Masonic Aid Association v. Waddil, 40 S.W. 648 (Mo. Banc 1897). A tax is "uniform" when it operates with the same force and effect in every place where the subject of it is found. "Uniformity" does not mean that the same rate must be levied upon all subjects, but, when subjects are once classified, the rate must be uniform upon all subjects of the same class. City of Cape Girardeau v. Fred A. Groves Motor Company, 142 S.W.2d 1040 (Mo. 1940). In Ex parte Asotsky, 5 S.W.2d 22 (Mo. Banc 1928) the court observed that classification for taxing purposes is primarily a legislative question, and a particular scheme of classification will be upheld if justifiable upon any reasonable theory. In view of the broad legislative powers recognized in the above cited cases, we do not believe that the Act violates Section 3 of Article X.

It has been suggested that repeal of Chapter 146, RSMo would cause Chapter 148, RSMo, providing for taxation of financial institutions, to be unconstitutional because this would result in

Honorable Warren E. Hearnnes

a classification of intangible property or an exemption from property taxation contrary to the Constitution.

It is clear that Chapters 146 and 148 are based on different classifications of property and types of taxation, thus the repeal of Chapter 146 and the continued existence of Chapter 148 does not compel a conclusion that the "uniformity" section is violated. Prior opinions of this office have discussed the portions of Chapter 148 dealing with banks and credit institutions and have held that the taxes imposed are in the nature of privilege taxes rather than intangible taxes. See Opinions No. 241-1971; No. 105-1967. A significant decision, General American Life Insurance Company v. Bates, 249 S.W.2d 458 (Mo. 1952) observed, at 464, that the provisions of Chapter 148 dealing with insurance companies establish an excise or occupational tax imposed upon the privilege of conducting certain authorized businesses, and not a tax on intangible personal property. It would follow then that the use of the term intangible personal property, in Chapter 148, is a nullity and not a determinative of the issue of the type of tax imposed by that chapter. Thus, in light of the preceding authorities, the tax imposed by Chapter 148 with respect to savings and loan associations also constitute privilege taxes. At this juncture, it is impossible for this office to say that such a classification, on its face, is palpably arbitrary and unreasonable.

B. Constitutionality of the New Yield Definition.

As previously noted, the constitutionality of the new definition of yield is to be determined by the application of Sections 3, 4 and 6 of Article X. The effect of Section 3 is determined by considerations previously stated with respect to the uniformity issue presented by Section 3 and such holding is equally applicable to the resolution of this question (see supra, Section A, 2). This section is not contravened by the new yield definition.

1. Application of Section 4. Section 4(a) of Article X states:

"All taxable property shall be classified for tax purposes as follows: Class 1, real property; Class 2, tangible personal property; Class 3, intangible personal property. The general assembly, by general law, may provide for further classification within Classes 2 and 3, based solely on the nature and characteristics of the property, and not on the nature, residence or business of the owner, or the amount owned. Nothing

Honorable Warren E. Hearnes

in this section shall prevent the taxing of franchises, privileges or incomes, or the levying of excise or motor vehicle license taxes, or any other taxes of the same or different types."

A reading of the relevant portions of the debates on the Constitution of 1945 indicate that it was deemed wise and desirable to permit classification and subclassification of intangible personal property. Debates, pp. 6287, 6298. The view was also expressed that the General Assembly should have wide latitude in the process of subclassification. Debates, p. 6299. The debates reveal a discussion of particular types of intangible property that could constitute subclasses of intangibles. A differentiation was made between bonds, stocks and other intangible property. The view was expressed that certain types of intangibles have a difference in terms of economic value and productivity and that the tax system should recognize this. Debates, p. 6304. The adoption of a "yield" theory of taxation, with regard to intangibles, as opposed to a valuation theory, as used in real and tangible personal property, reflects this concern. A Mr. Phillips observed:

". . . If you are going into the field of classifying property, we should leave the General Assembly with the fullest authority the next ten to fifteen years to work out a good system in this state."
Debates, p. 6312

Thus, the conclusion is inescapable that the drafters of the 1945 Constitution intended the legislature to exercise wider powers with respect to classification of intangibles than on real property and tangible personal property, although Section 4(a) grants the power to classify in terms equally applicable to all property.

The promulgation of the new definition of yield, primarily affecting certain parent corporations and their affiliates, is within the power reserved to the General Assembly by the framers of the Constitution. The definition does not establish a new classification of intangible personal property based on the nature, residence or business of the owner or the amount owned.

The decision of General American Life Insurance Company v. Bates, supra, considered the question of what components the definition of yield could have. The provision attacked was one that excluded from yield ". . . amount of interest required to be credited by the owner thereof, during the preceding calendar year, to reserve liabilities of the owner maintained under the statutes of this state." Section 146.010, RSMo 1949. This

definition of yield was held not to contravene Sections 3, 4 or 6 of Article X of the Missouri Constitution. The contentions rejected in that case were that the uniformity clause requires all taxpayers similarly situated to be taxed uniformly; that the "yield" statutes create a subclass of owners of intangible personal property based solely on the business of the owners, and not on the nature and characteristics of the property as required by Section 4; and, to the extent the respondents were permitted to deduct the interest required to be credited to reserve liabilities from the gross returns received on intangible personal property, respondents were exempted from the payment of the intangible personal property tax, in contravention of Section 6. The court in General American Life Insurance Company, supra, at 466-467, stated that the provision under attack was designed to permit the taxpayer to arrive at the actual and true value of his intangible personal property for taxation purposes, and was not an exemption from taxation. It concluded:

" . . . the 'yield' statute provides for a deduction to reach the true and actual yield and not a fictitious yield, and is not an exemption of property from taxation, and that, so far as any classification may be concerned, it is based on the nature and characteristics of the intangible personal property involved." (at 467)

The court apparently was saying that there were grounds that could justify the deduction because the result would produce a figure subject to the intangible tax that reflected the particular value of the economic interest involved. The new definition could be similarly sustained on the basis that one could show that many inter-corporate loans are merely transfers of funds borrowed from another party. In any event, the statute, when measured by the standards of the Constitutional Convention and the General American Life Insurance case, is not invalid on its face and thus every presumption in favor of its constitutionality must be applied.

2. Application of Section 6. Section 6, in relevant part, states:

" . . . All laws exempting from taxation property other than the property enumerated in this article, shall be void."

Since Section 4(b) of Article X provides that the intangible tax shall be based on the annual yield, Section 6 can be reconciled because the change in the definition of yield is merely one of definition to reach a determination of value deemed consistent

Honorable Warren E. Hearnes

with the intent of the intangible tax chapter by the legislature. It is not an exemption from taxation for ". . . property other than the property enumerated in this article, . . ." as prohibited by Section 6. Instead, it is no more than legislative recognition of the fact that transfers of funds between affiliated corporations do not, in reality, generate yield which is properly subject to taxation. See, General American Life Insurance Company v. Bates, supra.

CONCLUSION

It is the conclusion of this office that House Bill No. 537 does not violate the provisions of Article X of the Missouri Constitution and is therefore not unconstitutional.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Peter H. Ruger.

Very truly yours,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 241
5-17-71, Bild

Op. No. 105
3-16-67, David