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Chapter 11 of the Acts of the 1937 Special Session of the Maryland Legislature imposed an income tax upon certain classes of individuals and corporations subject to the jurisdiction of the State with respect to net income received during the calendar years 1937 and 1938. The Act is, therefore, retroactive to January 1, 1937. This article will be devoted to a brief consideration of the history of income taxation in Maryland and the constitutionality of the present Act.

HISTORY

During the colonial period the Maryland tax system was thoroughly archaic and, in fact, far below the level attained on the Continent during the Middle Ages. Almost all State revenue was derived from the poll tax; prior to the taxes imposed by the Act of 1756[1] on land throughout the State "all taxes were levied upon the persons in the province by 'even and equal assessment' without reference to ability to pay, revenue enjoyed or property worth"[2]. With the adoption, however, of the State Constitution in 1777 and the concomitant abolition of the poll tax a new system embodying the principle of the general property tax was instituted. In addition, an income tax of one-quarter of one per cent. was imposed on the "clear annual Amount and Profit" received yearly by every person holding public office. A tax at the

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[1] Acts, February, 1756, Ch. 5.

[2] Report of the Maryland Tax Commission to the General Assembly, January, 1888, p. cxxviii.

same rate was levied upon income received from annuities, stipends or other yearly payments, and upon the "clear yearly Profit" of "every Person practising Law or Physic".[3] In 1778 the tax was raised to five-eighths of one per cent.[4] and in 1779 to two and a half per cent.[5] The tax was omitted, however, from the general assessment act of the following year.[6]

At the close of the 1830's Maryland, in common with many other states, found itself in serious financial difficulties as a result of its large investments in internal improvement companies. By 1840 the State debt had been increased within the past ten years from almost nothing to more than $15,000,000, of which all but $240,000 had been incurred for the purpose of internal improvement.[7] An increase of revenue became imperative and the State turned to new sources, including an income tax. A tax of two and one-half per cent. was imposed upon salaries and emoluments and upon all incomes and profits from professions, faculties and employments.[8] The salaries of judges and clergymen, income derived from taxed property and salaries less than $500 were exempted. A progressive tax was also levied upon income arising from ground rents.[9] In the following year the exemption was reduced to $300 and income from ground rents was made subject to the tax without the benefit of any exemption.[10] To assist in the enforcement of the law it was provided that the tax upon official and other salaries was to be paid by the State and other employers respectively. The tax encountered stiff opposition. The Governor in his annual message to the December 1843 session of the General Assembly complained that "past experience has fully demonstrated, that the tax system of the State, is destitute of the vigor which is indispensable to its faithful execution. Ever since its adoption, some of the counties have wholly failed to put it in operation and others

[3] Acts, February, 1777, Ch. 22, Secs. 5, 6.
[4] Acts, March, 1778, Ch. 7, Sec. 41; Acts of October, 1778, Ch. 7, Sec. 48.
[5] Acts, November, 1779, Ch. 35, Sec. 48.
[6] Acts, October, 1780, Ch. 25.
[7] Hanna, A Financial History of Maryland (1789-1848) (1907) 95.
[8] Acts, 1841-42, Ch. 325.
[9] Acts, 1841-42, Ch. 329.
[10] Acts, 1842, Ch. 294.

have done it in such an illegal and unsatisfactory manner, as to make it, at all times questionable, whether it would accomplish the purposes contemplated by its framers".[11] He recommended the adoption of stricter enforcement provisions. A majority of the Committee on Ways and Means concurred in this suggestion and estimated that the income tax, if properly assessed and collected, would amount to $40,000.[12] The Governor in his annual message of 1845 reported that in a large portion of the State, the income tax was not assessed "and in portions of the State where the assessments were made, they were so partial in their character as to render the law exceedingly obnoxious to the people. The result is that this law during the past fiscal year was not enforced in the City of Baltimore, and but partially enforced even in the counties in which assessments had been made; and the revenue derived from it has not exceeded $1,000".[13] The tax on income from ground rents was held unconstitutional by the Court of Appeals in an unreported decision and the taxes paid thereunder were directed to be refunded.[14] In 1850 the practical repeal of the income tax was achieved by an act which provided that the "collector, or his surety or sureties, shall not be liable in . . . suit for such amount of said tax as shall be proved by him or them, not to have been collected or received by said collector".[15] At the Constitutional Convention of 1851 it was stated that the law was repealed "because of its inquisitorial character, its impertinent scrutiny in the affairs of private life and of other difficulties which it had to encounter, and the frauds and impositions it caused, and above all, and the combined effects of all—its utter failure

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[11] Annual Message of the Executive to the General Assembly of Maryland, December Session, 1843, (1843) 4.

[12] Report of the Majority of the Committee on Ways and Means (1844) 7. The minority report states that this is an overestimate. Report of Mr. Carey, from the Committee on Ways and Means on His Own Behalf (1844) 6.

[13] Annual Message of the Executive to the General Assembly of Maryland (1845) 9.

[14] Acts, 1847, Resolution 27. Mr. Arthur W. Machen, Jr., has expressed the opinion that the ground of unconstitutionality was presumably double taxation. "Less Bread! More Taxes!" Transactions of Maryland State Bar Association, Vol. 34, 1929, 84. The tax on income from ground rents was expressly repealed by Laws of 1844, Ch. 251.

[15] Acts, 1849, Ch. 294.

to produce a sufficient sum''.[16] Other taxes which were in effect equivalent to income taxes were also levied during this period.[17]

No general income tax has been levied in Maryland since the 1840's until the imposition of the present tax although the tax on interest-bearing bonds,[18] interest-bearing mortgages,[19] and dividend-paying shares[20] and the excise tax on income from foreign fiduciaries[21] may no doubt properly be regarded as income taxes. The present income tax law was modeled substantially upon the Kentucky Income Tax Law enacted in 1936.[22]

Constitutionality

Nothing, it has been said, is more disconcerting to a law review writer than to be reversed by a court of last resort. Nevertheless, such risk of embarrassment is an occupational hazard that may not properly be avoided in the present case. A widespread impression prevails at the bar that an income tax is unconstitutional under the provisions of Article XV of the Maryland Declaration of Rights which requires that "All taxes . . . shall be uniform as to land within the taxing district, and uniform within the class or sub-class of improvements on land and personal property which the respective taxing powers may have directed to be subjected to the tax levy." This belief was one of the primary causes which induced the General Assembly of 1937 to submit to referendum in the election to be held November, 1938, a constitutional amendment permitting the imposition of a progressive income tax. In the opinion of the writer, this apprehension is without foundation. An income tax, whether imposed at a flat or a progressive rate is, it is believed, a valid tax measure under the Maryland Constitution.

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[16] Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution (1851) 227.

[17] For the history of these taxes, see Hanna, op. cit. supra, note 7, 110 et seq.

[18] Md. Code Supp., Art. 81, Sec. 6 (3).

[19] Md. Code Supp., Art. 81, Sec. 6 (4).

[20] Md. Code Supp., Art. 81, Sec. 6 (5).

[21] Md. Code Supp., Art. 81, Sec. 141A.

[22] Kentucky Laws of 1936, Third Special Session, Ch. 7. The act was held constitutional by the Special Kentucky Court of Appeals in Reynolds Co. v. Martin, 269 Ky. 378, 107 S. W. (2) 251 (1937); appeal dismissed U. S. Supreme Court, November 9, 1937.

The present discussion must, of necessity be limited to a consideration of the constitutionality of the act on its face. Particular provisions, as they are construed and applied, may perhaps tell a different story.

Equality and uniformity are the principles most frequently relied upon in attacks upon the validity of state income tax laws. At the outset, however, we encounter the question of power which, in the present case, presents two problems. In the absence of direct constitutional authority to impose the tax, does the legislature possess the inherent power to do so? Is a tax, part of the proceeds of which may be devoted to the relief of able-bodied persons unable to support themselves, imposed for a public purpose?

To both questions the answer is apparently in the affirmative. The Supreme Court of Minnesota has thus summarized the general rule: "The legislature can select income as a tax subject unless some constitutional provision expressly or impliedly prohibits it, despite the fact that no provision specifically or referentially confers upon it that power".[23] As the Supreme Court of Georgia has pointed out, "The question for decision is, not whether this power exists, but whether it has been exercised in contravention of any provision of the Constitution."[24]

No provision of the Maryland Constitution expressly states that taxes must be levied for a public purpose but it is uniformly held, in the absence of such a restriction, that there is an implied restriction which prevents the legislature from imposing taxes for the benefit of private persons.[25] The Maryland Court of Appeals has read into Article XV of the Declaration of Rights the limitation that taxes shall be imposed for public purposes only.[26] It has been expressly held, though not in Maryland, that the general rule,

[23] State v. Wells Fargo and Co., 146 Minn. 444, 179 N. W. 221 (1920).

[24] Featherstone v. Norman, 170 Ga. 370, 153 S. E. 58 (1930). See, to the same effect, State v. Pinder, 30 Del. 416, 108 Atl. 43 (1919).

[25] Cole v. LaGrange, 113 U. S. 1, 28 L. Ed. 896, 5 S. Ct. 416 (1885); Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 41 L. Ed. 369, 17 S. Ct. 56 (1896): Green v. Frazier, 253 U. S. 233, 64 L. Ed. 878, 40 S. Ct. 499 (1920).

[26] Baltimore and Eastern R. R. Co. v. Spring, 80 Md. 510, 31 Atl. 208 (1895). Although the Income Tax Act was enacted as part of the Relief Bill, none of the proceeds of the tax are earmarked for relief purposes. It may be possible, however, to establish that some of the proceeds were, in fact, so used.

that taxes may be levied for public purposes only, is not violated by the expenditure of public funds for the benefit of able-bodied persons whose inability to support themselves arises from the prevalence of wide-spread unemployment.[27] There is no reason to suppose that the Maryland Court of Appeals will hold to the contrary.[28]

The argument based upon equality and uniformity, which is the main ground of attack upon state income tax statutes, is, in brief, that a tax on income from real and personal property is in substance and effect a tax upon the property itself; so viewed, it becomes subject to the uniformity requirements of Article XV of the Declaration of Rights. The Maryland tax, however, is not progressive and this problem is therefore largely, though not entirely, eliminated.[29]

State constitutional restrictions upon taxation fall into three general classes: (1) Those which impose no direct limitations, and where therefore only implied limitations operate; (2) those which require taxes to be uniform upon the same class of subjects; and (3) those which require uniform treatment of all property. Maryland falls within the scope of the second class. In 1876 the Maryland Court of Appeals said: "Without extending this opinion by a review of the several cases in which this Article (XV) of the Bill of Rights has been considered, it is sufficient to say, they go to the extent of holding, and no further, that when taxes are *laid directly upon property, they must be equal and uniform upon all property in the State.*"[30] The express holding was that a gross receipts tax was not a direct tax upon property within the meaning of the Bill of Rights. Furthermore, in this same case the Court expressly stated that an income tax was not a tax upon property. "It will

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[27] Jennings v. City of St. Louis, 332 Mo. 173, 58 S. W. (2d) 979 (1933); Schnader v. Liveright, 308 Pa. 35, 161 Atl. 697 (1932); Carmichael v. Southern Coal and Coke Co., — U. S. —, — L. Ed. —, 57 S. Ct. 868 (1937).

[28] Mayor, etc., of Baltimore v. Keeley Institute, 81 Md. 106, 31 Atl. 437 (1895), holding that the use of public funds for the treatment of indigent drunkards at a private institution was for a public purpose.

[29] See Kelly v. Kalodner, 320 Pa. St. 180, 181 Atl. 598 (1935) holding that an income tax violated uniformity requirements of the State constitution, not only because of its progressive character, but also because it exempted incomes below certain amounts.

[30] State v. P. W. & B. R. R. Co., 45 Md. 361, 378 (1876).

hardly be contended," it said, "that an income tax is a direct tax upon property within the meaning of the Bill of Rights." In view of the well established Maryland rule to the effect that "all that is necessary in Maryland to render the decisions of the Court of Appeals authoritative on any point decided is to show that there was an application of the judicial mind to the precise question adjudged"[31], the statement of the court as to the nature of income is persuasive authority. If the tax is not subject to the provisions of Article XV of the Bill of Rights, the equality and uniformity argument, of course, fails.

The majority of cases hold that income is not property within constitutional limitations on taxation, although there are many decisions to the contrary.[32] Little would be gained by an attempted analysis of the hopeless confusion created by these holdings. In spite of the construction sometimes given to the *Pollock* case[33] little comfort can be gained from the Federal decisions by those who hold the view that a tax on income from property is a tax on property. Nothing seems to be left of that case but the holding that a tax on income from property is a direct tax. The final nail appears to have been driven by the *Cohn* case[34] which upheld the taxation of income derived by a resident from foreign real estate, and in which it was expressly stated that there was no support for "the contention that a tax on income is a tax on the land which produces it."

The validity of the Act, in addition, would not appear to be jeopardized even if the court should hold income to be property within the meaning of the constitutional restriction. Assuming, *arguendo,* that the court may regard the tax as one on property, then the only question open from the point of view of equality and uniformity is the validity of the exemptions.[35] The Act contains a separability clause, and the provisions relating to the personal exemptions could

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[31] McGraw v. Merryman, 133 Md. 247, 257, 104 Atl. 540, 544 (1918).

[32] See cases collected in 11 A. L. R. 313 (1920); 70 A. L. R. 468 (1930), and 97 A. L. R. 1488 (1935).

[33] Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 158 U. S. 601, 39 L. Ed. 759, 1108, 15 S. Ct. 673, 912 (1895).

[34] New York, ex rel. Cohn, v. Graves, 300 U. S. 308, — L. Ed. —, 57 S. Ct. 466 (1937).

[35] See Kelly v. Kalodner supra, note 29.

possibly be eliminated and the remainder of the Act stand.[36] Uniformity, however, does not mean universality. Primarily, it is a question of classification. So long as there is no discrimination within the class, the principle of uniformity is satisfied. In the Maryland Act, as was stated of the Wisconsin Act, "the exemptions in each class apply to every member of the class, and it is no objection that the exemptions in one class are different from those in another where there is proper classification."[37] In Delaware a flat rate income tax was sustained on the precise ground that income was "property". It was contended that inasmuch as income was not property it could not be taxed. The court, however, held to the contrary.[38]

Other constitutional points remain to be noticed. The most serious of these is the fact that the Act does not exempt the income of judges and public officers from the tax. Article III, Section 35 of the Maryland Constitution contains the familiar provision that "the salary or compensation of any public officer" shall not be "diminished during his term of office". The general rule,[39] although there are carefully reasoned cases to the contrary,[40] is that a state cannot impose an income tax upon the salaries of public officers protected by a provision of the type found in the Maryland Constitution. In the much criticised[41] case of

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[36] See Stern, *Separability and Separability Clauses* (1937), 51 Harv. L. Rev. 76.

[37] Wisconsin v. Johnson, 170 Wis. 218, 175 N. W. 589 (1919).

[38] State v. Pinder, supra, note 24.

[39] New Orleans v. Lea, 14 La. Ann. 194 (1859); Opinion of Atty. Gen. of N. C., 48 N. C. App. 1 (1856); Re Taxation of Salaries of Federal Judges, 131 N. C. 692, 42 S. E. 970 (1902); Long v. Watts, 183 N. C. 99, 110 S. E. 765 (1922); Com., ex rel. Hepburn, v. Mann, 5 Watts & S. 403 (Pa., 1843).

[40] Poorman v. State, 99 Mont. 543, 45 P. (2d) 307 (1935); Taylor v. Gehner, 329 Mo. 511, 45 S. W. (2d) 59 (1931); Northumberland County v. Chapman, 2 Rawle 73 (Pa. 1829); Krause v. Commissioner, 46 So. Afr. L. J. 374 (So. Afr. App. Div. 1929); Cooper v. Commissioner, 4 Comm. L. R. 1304 (Australia, 1907); Cf. State, ex rel. Wickham, v. Nygaard, 159 Wis. 396, 150 N. W. 513 (1915).

[41] (1920) 34 Harv. L. R. 70, 85; (1920) 30 Yale L. J. 75; (1925) 13 Corn. L. Q. 219; (1920) 5 Minn. L. R. 145; (1921) 20 Mich. L. R. 540. See also (1929) 45 L. Q. Rev. 291. In commenting upon the South African case cited in the preceding note, the writer in Harvard Law Review said: "To find that either the purpose or the letter of the constitutional provision forbids the tax in question requires a hypersensitiveness toward judicial independence happily lacking in the South African Court." (1929) 43 Harv. L. R. 318.

Evans v. Gore[42] the United States Supreme Court held that the salary of a Federal district judge could not be subjected to the Federal income tax in view of the constitutional prohibition with respect to diminution of salaries during continuance in office. Mr. Justice Holmes, in his dissent, expressed what, it is generally agreed, ought to have been the basis of the decision:

> "I think that the clause protecting the compensation of judges has no reference to a case like this. The exemption of salaries from diminution is intended to secure the independence of the judges, on the ground, as it was put by Hamilton in the Federalist (No. 79), that 'a power over a man's subsistence amounts to a power over his will.' That is a very good reason for preventing attempts to deal with a judge's salary as such, but seems to me no reason for exonerating him from the ordinary duties of a citizen, which he shares with all others. To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge. I see nothing in the purpose of this clause of the Constitution to indicate that the judges were to be a privileged class, free from bearing their share of the cost of the institutions upon which their well-being, if not their life, depends. . . . I see no greater reason for exempting the recipients while they still have the income as income than when they have invested it in a house or bond."

There is thus ample ground, in both principle and authority, to support a holding by the Maryland Court of Appeals that the present act is not invalid in this respect.[42a] But even though the Court should follow *Evans v. Gore* and hold

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[42] 253 U. S. 245, 64 L. Ed. 887, 40 S. Ct. 550 (1920). See also Miles v. Graham, 268 U. S. 501, 69 L. Ed. 1067, 45 S. Ct. 601 (1925).

[42a] The Kentucky Act, upon which, as stated, the Maryland Act is based, was held in Martin v. Wolfford, 269 Ky. 411, 107 S. W. (2nd) 267 (1937), to apply to judicial salaries in spite of a similar constitutional prohibition against changes in the compensation of public officers. The Court held that Evans v. Gore was not applicable, on the ground that the provision of the Federal Constitution was for the purpose of preventing Congress from using its unlimited taxing power to destroy the judiciary, whereas the provision of the State Constitution was to prevent the legislature from using its limited taxing power to control public officers by means of changes in their compensation during their terms of office. The distinction seems strained and has been characterized as a weak attempt to distinguish a manifestly contrary case. See Note (1937) 22 Minn. L. Rev. 106, where it is pointed out that the trend of state decisions is toward Holmes' dissent.

an income tax upon the salaries of public officers to be a diminution of such salaries within the meaning of Article III, Section 35, such a holding, under accepted canons of constitutional interpretation, would affect the act in its application to such salaries only, and the statute would not fall as a whole.[43]

It remains only to add, under the head of double taxation, that it is now too well established to admit of debate that a tax on income from property may be imposed in addition to a tax on the property.[44] Similarly, the fact that the act operates retrospectively does not make it unlawful.[45]

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[43] See Stern, op. cit. supra, note 36.

[44] State, ex rel Maxwell, v. Kent-Coffey Mfg. Co., 204 N. C. 365, 168 S. E. 397 (1933).

[45] Stockdale v. Atlantic Insurance Co., 20 Wall. 323, 22 L. Ed. 348 (1874); Brushaber v. Union Pacific R. Co., 240 U. S. 1, 60 L. Ed. 493, 36 S. Ct. 236 (1916); Tyee Realty Co. v. Anderson, 240 U. S. 115, 60 L. Ed. 554, 36 S. Ct. 284 (1916); Southern P. Co. v. Lowe, 247 U. S. 330, 62 L. Ed. 1142, 38 S. Ct. 540 (1918); Lynch v. Hornby, 247 U. S. 339, 62 L. Ed. 1149, 38 S. Ct. 543 (1918); MacLaughlin v. Alliance Insurance Co. of Philadelphia, 286 U. S. 244, 76 L. Ed. 1083, 52 S. Ct. 538 (1932); Reinecke v. Smith, et al., 289 U. S. 172, 77 L. Ed. 1109, 53 S. Ct. 570 (1933); Burnett v. Wells, 289 U. S. 670, 77 L. Ed. 1439, 53 S. Ct. 761 (1933).

Article XVII of the Maryland Declaration of Rights, forbidding the enactment of *ex post facto* laws, has been construed to embrace only laws imposing criminal penalty. Baugher v. Nelson, 9 Gill 299 (1850). See also Wilson v. Hardesty, 1 Md. Ch. 66 (1847); Elliott v. Elliott, 38 Md. 357 (1873); Harrison v. State, 22 Md. 468 (1863). As to tax cases, see The Roland Park Company v. State, 80 Md. 448, 31 Atl. 298 (1895); Dryden v. Baltimore Trust Company, 157 Md. 559, 146 Atl. 572 (1929).