

1652.

TAX AND TAXATION—INVESTMENT TRUST CERTIFICATES; REPRESENTING INTERESTS IN TRUST FUNDS IN FOREIGN STATE, TAXABLE WHEN HELD BY OHIO RESIDENT.

*SYLLABUS:*

*Although this state may not, by its laws, provide for the taxation of the shares of stock, moneys or other property constituting the corpus of an investment trust fund in the hands of a trustee in another state, the laws of this state do effectively provide for taxing the beneficial interests of residents of this state in investment trust shares represented by investment trust certificates issued against such trust fund.*

COLUMBUS, OHIO, March 22, 1930.

*The Tax Commission of Ohio, Columbus, Ohio.*

GENTLEMEN:—You have submitted for my opinion the question with respect to the taxability in this state of investment trust shares owned by residents of Ohio which are represented by investment trust certificates issued against the corpus of trust funds in the hands of the trustee in another state.

Investment trust certificates and investment trust shares represented thereby, are more or less familiar to the business world, as they are sold and offered for sale on the market by stockbrokers and others.

An investment trust of the kind here under consideration is usually created by the assignment of a certain block or unit of shares of stock in certain designated corporations by a holding company owning and holding such shares of stock to a trust company or other trustee, which shares of stock, together with certain amounts of money designated as a reserve fund are to be held in trust by said trustee and managed and applied by the trust company, as set forth in the trust agreement executed by and between the depositor of such shares of stock and money, and the trustees. The equitable interest in each such block of stock or unit thus deposited, assigned and transferred to such trustee, is divided into shares evidenced by certificates of the trustee which recites that each share represents a certain designated fractional interest in the stock unit and reserve fund deposited with the trustee. These share certificates are, by their terms, made payable to bearer, and, as above noted, are sold to the public either by the corporation depositing such share unit with the trustee or by the brokers into whose hands such certificates have come for purposes of sale.

The trust agreement executed by and between the depositor of such stock unit and the trustee named therein, conveys the legal title to the securities and moneys deposited as such stock unit, but may reserve to such depositor certain rights with respect to the management of a trust and the voting of the shares of stock held by the trustee, and other matters. No rights, however, are given to the owners and holders of said share certificates with respect to the management, control or investment of the corpus of the trust property or fund consisting of said stock unit and reserve fund deposited with said trustee. By the provisions of the trust agreement, the trust extends until a certain named date in the future unless the same is terminated prior thereto by the corporation depositing the shares of stock and reserve fund with the trustee. An investment trust certificate bearer may, however, terminate the trust as to any one stock unit upon the purchase by him of all the outstanding investment share certificates issued against such stock unit.

The trustee designated in such trust agreement holds the stock unit constituting the corpus of the trust fund as well as the income, profits and proceeds thereof for the sole use and benefit of the holders of the share certificates issued against such trust fund, and agrees to pay over to such holders from time to time proportionate shares of the income and proceeds received by such trustee in the management of the trust.

As above noted, the question here presented is whether under the laws of Ohio residents of this state who own and hold certificates representing trust shares issued against a trust fund of the kind above outlined in the hands of a trustee in another state, are required to list and pay personal property taxes on their interest on the shares represented by the certificates held by them.

In the consideration of the question thus presented it is to be recognized that the state's power of taxation is an attribute of sovereignty conferred upon the Legislature by the grant of legislative power contained in the provisions of Section 1 of Article II of the State Constitution; and as a sovereign function, this power of taxation is subject to only such limitations as inhere in the nature of the power itself or are found in the provisions of the state and federal constitutions.

One of the fundamental limitations on the taxing power of the state is that it can extend only to property or other subjects of taxation within the state's jurisdiction. "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property and business." *State Tax on Foreign held Bonds*. 15 Wall. (U. S. 300); *Union Refrigerator Transit Company vs. Ky.*, 199 U. S., 194.

Giving effect to this limitation and the reasons upon which the same is based, the United States Circuit Court of Appeals for the Sixth Circuit, in the case of *Goodsite, Treasurer vs. Lane*, 139 Fed., 593 in a decision touching some of the more general aspects of the question here presented, held: that a trust estate was not taxable under the provisions of Section 2731 of the Revised Statutes of Ohio (Section 5323, General Code) providing that all property within the state and all moneys, credits, investments in bonds, stock or otherwise, of persons residing in the state, shall be subject to taxation, where such trust estate and the beneficiaries thereof were both outside the State of Ohio, and the trustee although a resident of said state did not perform any act as trustee therein. The court in its opinion in this case said:

"The property involved in this case had never been brought within the State of Ohio, and therefore could not be taxed upon the ground that it was tangible property within the state. The tax must be sustained, if at all, upon the ground that the estate was the property of a person residing in Ohio, who, being within the jurisdiction of the state, and owing it an obligation, might be compelled to contribute to its support out of his property, wherever located. *Kirtland vs. Hotchkiss*, 100 U. S. 491, 498, 25 L. Ed. 558. The exaction must find its justification in the privileges and protection enjoyed in the state, under its laws, by the person taxed, in the capacity in which taxed. The person taxed must therefore be in the jurisdiction of the state not only personally, but officially in the capacity in which he is taxed, and in that capacity must be enjoying the benefits referred to. In the case of a trustee, he must be exercising his office of trustee within the state, and be enjoying, as trustee, privileges of value to the estate, for which it is just the estate should pay. An examination of the cases will show that, where this tax has been sustained, either the trust estate or the beneficiary, or the trustee, as trustee, was receiving benefits

from the state, for which it was only fair the trustee should pay. \* \* \* But where the estate and beneficiaries were outside the state, and the trustee only resided, and did not act as trustee, within the state, the tax was not sustained. *Hawk vs. Bonn, Auditor*, 6 Ohio Cir. Ct. R. 452; *People ex rel. Darrow vs. Coleman*, 119 N. Y. 137, 23 N. E. 488, 7 L. R. A. 407. In the case of *Callup vs. Schmidt*, 154 Ind. 196, 56 N. E. 443, an estate was held taxable in Indiana, where the trustee was appointed, although he was a resident of New Hampshire; the court holding that, having been appointed in Indiana, he was to be regarded, in his capacity of trustee, as a resident of that state. \* \* \* In the present case neither the trust estate nor the beneficiary nor the trustee, in any proper sense, was within the jurisdiction of the State of Ohio. The trust estate was in New York. The trustee was appointed in Connecticut, and acted wholly outside of Ohio. The fact that as an individual he resided in Ohio could not authorize the taxation of this foreign estate, which had received no benefit whatever from the laws of Ohio."

Although under the authorities it is clear that a trust estate located in a particular state and in the hands of a trustee there resident, is taxable in such state, it is equally clear that, consistent with the constitutional limitation above noted the legislation of another state where the beneficiaries of such trust estate reside, may provide for the taxation of the interests of such beneficiaries in the trust fund. *Maguire vs. Trefry*, 253 U. S., 12; *Hunt vs. Perry*, 165 Mass., 287, *Maguire vs. Tax Commission*, 230 Mass., 503; *McCeney vs. County Commissioners*, 153 Md., 25. *Augusta vs. Kimball*, 91 Me., 605. *City of St. Albans vs. Avery*, 95 Vt., 249; *Selden vs. Brock*, 104 Va., 832; *First Trust & Savings Bank vs. Los Angeles County*, 273 Pac., 1066. And in such case the taxing of the corpus of the trust estate in the hands of the trustee in one state and the taxing of the interests of the beneficiaries in and to said trust estate in another state where such beneficiaries reside does not constitute double taxation. *McCeney vs. County Commissioners, supra*; Cooley on Taxation (4th Ed.) Vol. 1, Section 230; 37 Cyc., 755.

The further question remains as to whether the laws of this state have provided for the taxing of the species of property involved in the question here presented; for, in this connection, it is to be recognized that the provisions of Section 2 of Article XII of the State Constitution imposing upon the Legislature the duty of enacting laws taxing all property by uniform rule at its true value in money, except only such property as may be exempted under authority of said constitutional provisions, is not self-executing; and unless laws have been enacted which include within their provisions the kind of property here in question, it must be concluded that the same is not taxed.

In the case of the *Scottish Union and National Insurance Company vs. Bowland, Treasurer*, 196 U. S. page 620, it is said that:

"\* \* \* the scheme of taxation of personal property in Ohio involves the requirement that it shall be returned or listed by some person or corporation whose duty it is by law to return or list such property. Provision is not made for assessing or taxing personal property by proceedings *in rem*, but before a recovery for taxes can be justified, either by action or distraint, it must appear that it was required to be returned for the purpose of taxation under some law of the state."

Touching this question, the Supreme Court of this state, in the case of *Anderson*

vs. *Durr, Auditor*, 100 O. S. 251, in the per curiam opinion by which this case was decided, said:

“The Constitution, Section 2, Article XII, enjoins the legislature to enact laws taxing by a uniform rule all property at its true value in money, with right to exempt certain property. It is well determined that this section is a limitation on the general power to tax conferred by the first section of Article II of the Constitution, and unless tax laws have been enacted which include the property here in question it is not taxed.”

To the same point see *City of St. Albans vs. Avery, supra*.

Section 5328, General Code, provides:

“All real or personal property in this state, belonging to individuals or corporations, and all moneys, credits, investments in bonds, stocks, or otherwise, of persons residing in this state, shall be subject to taxation, except only such property as may be expressly exempted therefrom. Such property, moneys, credits, and investments shall be entered on the list of taxable property as prescribed in this title.”

Construing the provisions of this section, as then found in Section 2731, Revised Statutes, the Supreme Court of this state in its opinion in the case of *Myers vs. Seabarger*, 45 O. S., 232, 235, said:

“The first clause evidently embraces all tangible property, real or personal, situated in this state, irrespective of the residence of the owner; and the second clause embraces all intangible property of persons residing in this state, irrespective of where the subject of the property may be situated.”

Definitions of various kinds of personal property, tangible and intangible, for purposes of taxation, are found in the provisions of Sections 5323 to 5327, inclusive, of the General Code, classified therein respectively as “investment in bonds”, “investment in stocks”, “personal property”, “moneys”, and “credits”.

I do not deem it necessary, for the purposes of this opinion, to here set out the provisions of the sections of the General Code, above noted. It is sufficient to say that looking to the provisions of these sections, there is found therein no specific mention of equitable interests in trust property. In this connection, however, it is pertinent to note, as held by the court in the case of *St. Albans vs. Avery, supra*, that:

“While the Legislature must select the subjects of taxation and make that selection effective by necessary regulations for assessment, this does not mean that every species of property must be specifically named for taxation. General words of description are sufficient, as the question is one of determining the legislative intent by the ordinary rules of statutory construction. General words in any instrument or statute are strengthened by exceptions, and weakened by enumerations. The courts will also presume that the Legislature intended to carry out the directions of the Constitution, and will so construe the statute, whenever such construction is admissible.”

In the case from the report of which the above quotation was made, the court had under consideration the question as to whether certain statutory pro-

visions enacted by the Legislature of the State of Vermont were effective to provide for taxing the beneficial interests of certain persons residing in that state, in a trust fund the corpus of which was in the hands of a trustee whose domicile was in the State of Massachusetts.

With respect to this question, the court holding said statutory provisions to be effective for the purpose, said:

"General Laws, Section 682, provides; 'All real and personal estate shall, except as otherwise provided, be set in the list at one per cent. of its value in money on the first day of April of the year of its appraisal.' By Section 684 certain property, real and personal, is declared to be exempt from taxation. As to such property it is 'otherwise provided' within the meaning of the former section. Section 667 provides: 'The words "taxable property" as used in this title (title Public Revenue), shall include taxable estate, both real and personal, including choses in action.' And Section 13 provides: 'The words "personal estate" shall include all property other than real estate.' See *Bellows vs. Admr. of Allen*, 22 Vt. 108.

It is apparent from these provisions of the statute that the Legislature intended that all property within the State, not declared to be exempt, should be subject to taxation, and that for this purpose everything should be considered personal property except real estate.

A statute more simple in terms or more workable in its administration is seldom found. No attempt is made to enumerate either the tangible or the intangible personalty, because all of both, not covered by the exemptions, are embraced in these statutory provisions."

In the case of *Lee vs. Sturges*, 46 O. S. 153, 159, the court in its opinion, speaking of Section 2730, Revised Statutes, which then contained the provisions now found in Sections 5323 to 5327, General Code, inclusive, and the provisions of Section 5322, General Code, defining "real property" for taxation purposes, said:

"\* \* \* every presumption is in favor of that construction of the law which gives effect to the requirement of the section of the constitution referred to, and we are forced to the conclusion that the general assembly, in enacting this law, intended, so far as the complex nature of human business affairs should make it practicable, to include within the taxing provisions all property within the state, and not to exceed in its exemptions the limit prescribed, as to persons, of 'personal property not exceeding in value two hundred dollars for each individual.'"

In the case of *Anderson vs. Durr, Auditor*, 10 O. A., 329, wherein was involved the question as to whether membership in the New York Stock Exchange owned by a resident of this state was property which could be taxed in his name at the place of his domicile, the court in its opinion holding such membership to be property taxable in this state, among other things, said:

"Section 5325 provides that 'the term "personal property" as so used, includes,' etc. Then follows an enumeration of certain forms of property. This does not exclude the property in question. If the statute had been passed pursuant to constitutional provisions which merely authorized or empowered the levying of a tax, we would be disposed to hold that other

kinds of property were excluded by force of the rule 'expressio unius est exclusio alterius.' However, the Legislature was required to pass laws subjecting all real and personal property to taxation. The effect to be given to this is well stated by the Supreme Court of Minnesota. That state had a constitutional provision substantially like that of Ohio. In the case of *State vs. McPhail*, 124 Minn., 398, in discussing whether a seat of the Duluth Board of Trade was taxed, the court says, at page 404:

'Section 797 names 11 specific classes of personal property, in no one of which are by name included Board of Trade memberships. So far as here material, its language is as follows: "Personal property" \* \* \* shall be construed to include:

"1. All goods, chattels, moneys and effects." Then follows 10 other particular classes of property.

'Section 835 provides that the assessor shall fix the value of the items of personal property under 30 heads, the last of which is "The value of all other articles of personal property not included in the preceding items."

'We think it should not be held that Section 797 was intended to describe all personal property that was subject to taxation. The language of the section does not compel such a conclusion. "Shall be construed to include" does not necessarily mean 'shall only include.' The section was not intended to be restrictive, but rather to help define what was meant by "all personal property," as that term is used in Section 794. This view is greatly strengthened by the unquestioned fact that it is the settled policy of the State, as expressed in its constitution, statutes, and decisions, that all property within the state shall be taxed, unless exempt. *Board of Co. Commrs. of Rice County vs. Citizens' National Bank of Fairbault*, 23 Minn., 280, 286; *State vs. Jones*, 24 Minn., 251; *County of Olmsted vs. Barber*, 31 Minn., 256, 17 N. 473, 944; *In re Jefferson*, 35 Minn., 215, 219, 29 N. W. 256; *State vs. Stearns*, 72 Minn., 200, 222, 75 N. W. 210. In the Rice County case, decided in 1877, in referring to Section 1, c. 1, p. 1, Laws 1874, which provides that "all real property in this state, and all personal property of persons residing therein \* \* \* is subject to taxation," the court said: "The evident purpose of this section was to declare, in general terms, that all property, both real and personal, within the jurisdiction of the state, unless specially exempted, should be subject to taxation." In *State vs. Jones*, where it was decided that a certain debt was property and subject to taxation, Chief Justice Gilfillan said: 'This debt was property, and it was the intention both of the constitution and statute that all property, unless expressly exempted, should be taxed.' At the time these and other decisions were rendered, there were in force statutory provisions similar to Section 797, Laws 1874, p. 1, c. 1, Sec. 3, provided that "personal property shall, for the purposes of taxation, be construed to include" certain described classes of property, and the same provision was contained in chapter 1, section 3, Laws 1878, in chapter 11, Sec. 3, G. S. 1878, and in Section 1510, G. S. 1894. In no case has it been considered that these provisions amounted to a declaration that no property was to be taxed that was not covered by the classes. It would have been a breach on the part of the Legislature of a duty imposed by the constitution to omit from taxation property that was not exempt, and we certainly should not find such a breach unless the statute is fairly open to no other construction."

The decision of the Court of Appeals in the case of *Anderson vs. Durr, Auditor*, was affirmed by the Supreme Court in a case under the same title, reported as before noted, in 100 O. S., 251. Touching the immediate question here under consideration, the Supreme Court, in its per curiam opinion in this case said:

"The provisions of Section 5328, General Code, are comprehensive and provide for the taxation of all real or personal property, and that includes the property here in question.

Section 5325, General Code, does not exclude any property or thing from the term personal property, but out of abundant caution provides that the term shall include the things named. It cannot be construed as if it read the term shall *only include*.

As pointed out in *Ohio Electric Ry. Co. vs. Village of Ottawa*, 85 Ohio St., 229, 236, the maxim *expressio unius exclusio alterius* is to be applied only as an aid to discover intention, and not to defeat clear intention.

In view of the plain provision of the constitution enjoining the taxation of all property real and personal, and of the equally plain provision of Section 5328, General Code, passed in obedience to that constitutional injunction, there can be no doubt that when it is once determined that the membership in question is personal property, and that its situs is the domicile of the plaintiff in Hamilton County, it is taxable there."

There can be no doubt but that an equitable interest in a trust fund or estate is property. In the case of *Williston Seminary vs. County Commissioners*, 147 Mass. 427, 18 N. E. 210, it is said:

"The word 'property', in its ordinary legal signification, 'is nomen generalissimum, and extends to every species of valuable right and interest.' \* \* \* An ordinary cestui que trust has a property in a fund held for his benefit; he has a right and interest which he may vindicate in various ways."

In the case of *Maguire vs. Tax Commission, supra*, the court had under consideration the application of an income tax law; but the existence of a taxable property interest of a beneficiary residing in Massachusetts in and to a trust estate held and administered in the State of Pennsylvania was clearly recognized by the court. The court in its opinion in this case, said:

"The trustee in Pennsylvania holds simply the legal title. He is possessed of the property in question solely for the benefit of the cestui que trust. The latter "is the real, substantial and beneficial owner of an estate which is held in trust as distinguished from the trustee in whom the mere legal title is vested." *Larkin vs. Wikoff*, 75 N. J. Eq. 462, 474, affirmed on this point in 77 N. J. Eq. 589. The cestui que trust has important legal rights respecting the trust fund which are personal to her. They are rights in the nature of property. They cannot be taken away from her by arbitrary or irrational procedure. They attach to her person wherever she goes. One of these is the right to receive the income. That is a property right. The income when received is property. The tax here in question is a property tax. *Tax Commissioner vs. Putnam*, 227 Mass. 522, 531, 532. Whether it be regarded as a tax on the right of the cestui que trust or a tax on the income as received, in either event a property tax is permissible."

In affirming the decision of the Supreme Court of Massachusetts in this case the Supreme Court of the United States in its opinion, said:

"It is true that the legal title of the property is held by the trustee in Pennsylvania. But it is so held for the benefit of the beneficiary of the trust, and such beneficiary has an equitable right, title, and interest distinct from its legal ownership.' 253 U. S. 16."

Having arrived at the conclusion that the beneficial interests of residents of Ohio in investment trust shares representing equitable interest held by such persons in the trust fund against which such investment trust shares are issued, are property, within the legal sense of that term, it follows under the authority of the case of *Anderson vs. Durr, supra*, and other cases above noted that such investment trust shares are taxable in this state and that such investment trust shares should be listed by the owner thereof as required by the provisions of Section 5370, General Code, which provides that "each person of full age and sound mind shall list the personal property of which he is the owner."

Further, in this connection, the term "personal property", as used in the provisions of Section 5370, General Code, just quoted, clearly includes investments in bonds, stocks, "or otherwise", which by the further provisions of Section 5328 of the General Code are expressly made subject to taxation. Investments in trust certificates of the kind here under consideration are a species of investment which was unknown at the time of the enactment of the provisions of Section 5328, General Code. This fact, however, constitutes no objection to the inclusion of this species of investments within the descriptive language of Section 5328, General Code, above noted. It is a well established rule that "a statute may include by inference a case not originally contemplated when it deals with a genus within which a new species is brought." *State vs. Cleveland*, 83 O. S. 61.

In arriving at the conclusion above noted with respect to the question here presented, I am not unmindful of the provisions of Section 5372-1, General Code, which provides among other things that personal property, moneys, credits, investments in bonds, stocks, joint stock companies or otherwise, in the possession or control of a person as trustee, shall, except as otherwise provided, be listed by the person having possession or control thereof and be entered upon the tax list and duplicate in the name of such trustee. The provisions of this section have application, of course, only to property in the possession and control of trustees in this state, and no question is here presented with respect to the taxation of beneficial interests in property so held.

The foregoing discussion of the question here presented proceeds on the theory that the property interest of the owner and holder of an investment trust certificate is equitable rather than legal in its nature. In concluding this opinion I venture the assertion that such is not the case. Assuming that the trust agreement between the "depositor" and the "trustee", and the deposit under such agreement of the securities making up the "unit" against which investment trust certificates are issued constitute a true trust, notwithstanding the rigidity of the trust agreement and the fixed nature of the so-called trust, it appears that the rights of the holder of an investment trust certificate arise wholly on contract as they are fixed by the terms of the certificate, and by the provisions made for his benefit in the trust agreement which is referred to in the investment trust certificate and made a part thereof. I take it that a legal right or interest as distinguished from an equitable right or interest is one recognizable and enforceable in an action at law. Noting this distinction in the character of an interest or estate, the Supreme Court of this state, in the case of *Avery vs. Dufrees*, 9 Ohio, 145, 147, said:



"If it be such an interest as can be enforced in a court of law, it is a legal interest or estate. If it be such as can only be enforced in a court of chancery, it is an equitable interest or estate."

See *In re Folwell's Estate*, 68 N. J. Eq., 728, 731.

Certainly the rights that may arise between the buyer and seller of investment trust certificates and the shares represented thereby are such as are cognizable in courts of law, as would likewise be the right of the owner and holder of an investment trust certificate to dividend payments represented by the coupons attached to such certificates. *Gunsaulus vs. Pettit*, 46 O. S. 27.

In the consideration of the immediate question, it is significant that during the life of the trust agreement the holder of an investment trust certificate cannot by an action in equity or otherwise assert any right to the corpus of the trust unless he gets into his ownership and possession the certificates representing all of the shares issued against the securities unit. In this case he is entitled to receive all of the shares of stock deposited with the trustee constituting such securities unit. However, this is a right which is given him by contract; and inasmuch as in this situation the trust is closed and liquidated as to the shares of stock constituting such unit, the holder of the outstanding trust certificates can enforce his rights by an action at law. *Johnson vs. Johnson*, 120 Mass., 465, 466.

By way of specific answer to the question here presented, I am of the opinion that although the laws of this state are not effective to tax the corpus of an investment trust fund owned and held by a trustee in another state or any proportionate part thereof, such laws do effectively provide for the taxation of investment trust shares represented by investment trust certificates owned and held by residents of this state and that the same should be listed for taxation at the domicile of such owner in this state.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

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1653.

APPROVAL, BONDS OF VILLAGE OF NORTH OLMSTED, CUYAHOGA COUNTY—\$2,188.49.

COLUMBUS, OHIO, March 24, 1930.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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1654.

APPROVAL, BONDS OF VILLAGE OF NORTH OLMSTED, CUYAHOGA COUNTY—\$1,496.70.

COLUMBUS, OHIO, March 24, 1930.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*