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INJUNCTIONS IN FEDERAL TAX CASES WITH SPECIAL REFERENCE TO THE WINDFALL TAX

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The recent decision of Judge Baltzell in the first case involving the tax on unjust enrichment1 again stimulates speculation as to the fate of R. S. Section 3224, both in general and with particular reference to the windfall tax.2 That statute contains a blanket prohibition against this issuance of injunctions by federal courts in federal tax cases. At the beginning of the last decade, however, the Supreme Court, while enforcing the prohibition in the particular cases, began to recognize certain exceptions to its general language.3 Dicta in these cases indicated that the statute would be avoided if "some extraordinary and entirely exceptional circumstances" were presented in addition to the ordinary grounds of equitable jurisdiction.4

Such hardship or exceptional circumstances were finally presented in the case of Hill v. Wallace;5 and the court held that the provisions of the statute were not applicable. Again, in Miller v. Standard Nut Margarine Co.,6 the court held the provision inapplicable where the tax statute did not cover the complainant's product and the collector had previously informed him it was not taxable. Still, a different type of exception was recognized in Lipke v Lederer,7 where the court held the statute inap-

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1 Kingan & Co., Inc., v. Smith, S. D. Ind., Sept. 30, 1936. Since the manuscript was first received this case has reached a more advanced state than is indicated by the article itself. The government refused to plead further after its motion to dismiss the complaint was overruled by the court. On October 27 an order of the Court was entered that the Bill of Complaint, as amended, be taken pro confesso. A final decree will probably be rendered on or after November 26, and it is expected that the government will probably appeal at once.
4 For a general discussion of the problems involved, see Notes (1932) 45 Harv. L. Rev. 1221; (1935) 49 Harv. L. Rev. 109.
5 259 U. S. 44 (1922).
6 284 U. S. 498 (1932).
7 259 U. S. 557 (1922).
licable to what was in substance a penalty, although denominated a tax by the statute in question.

Until the recent decisions of the Court in the processing tax case of Rickert Rice Mills, Inc., v. Foutenot,5 these cases stood alone and afforded little comfort to the taxpayer who sought a determination of the validity of the tax before its imposition and payment. The difficulty which taxpayers had in obtaining equitable relief is shown by the case of Graham v. Du Pont,9 where truly unusual circumstances were present, and by a large number of cases involving processing taxes in the lower federal courts10 where equitable relief was denied despite the hardship imposed upon taxpayers in order to obtain a refund in case the tax, after payment, was held invalid.

The Rickert decisions, therefore, in granting equitable relief without attempting to bring the results within the recognized exceptions to R. S. Section 3224, gave the taxpayer new hope and, in fact, kindled the feeling that the statute had been laid to rest. In the first Rickert opinion,11 an injunction was granted by a divided court of six to three, without any explanation on the part of the majority. The cases of Lipke v. Lederer, Hill v Wallace, and Miller v. Standard Nut Margarine Co. were not cited. The court did not find that a penalty was exacted or that unusual or exceptional circumstances were present. Yet, it would have been necessary for the court to discuss the particular nature of the exceptional circumstances if a merely factual situation were involved so as to bring the case within the rule of the previous exceptions. Significant, also, is the fact that equitable relief was denied in both of the lower courts12 on the ground that the case did not fall within the recognized exceptions to the statute. And the dissent of the three Justices13 is inexplicable without comment from them, unless we assume they were aware that the majority of the court were disregarding and nullifying

5 56 Sup. Ct. 249 (1935); same, 56 Sup. Ct. 374 (1936).
6 262 U. S. 234 (1923).
7 These cases were by no means a majority. In the larger number of cases under the A. A. A., equitable relief was granted. See 49 Harv. L. Rev. 109, 114.
8 56 Sup. Ct. 249 (1935).
9 (Apparently only the opinion in the Circuit Court of Appeals is reported, 79 Fed. (2d) 700 (1935). The memorandum opinion is even briefer than that of the Supreme Court.)
10 Brandeis, Stone, and Cardozo, J. J.
the prohibition contained in the statute. Although it is characteristic of these three Justices to persist in dissent on certain propositions and holdings of the court, they have always recognized the binding nature of precedent and accompanied their dissents with observations that the "objectionable" decisions should be overruled. Absent such observations here, the conclusion is inescapable that the Rickert case goes beyond any previous decisions and, in fact, nullifies R. S. Section 3224.

The significance of Judge Baltzell's decision lies in the fact that it is the first even to approximate a recognition of this important development. Judge Baltzell, in effect, says that he does not understand the first opinion in the Rickert case but that it must be some new sport in the treatment of R. S. Section 3224. It would, of course, have been difficult for Judge Baltzell, in the absence of appropriate explanation in the opinion of the Supreme Court, to come out as openly as has here been attempted and say that the Supreme Court actually emasculated Section 3224. Nevertheless, the important thing is that he was not disturbed by the decision. He accepted it for what it is. Other judges, on the other hand, who have dealt with it, have been at an utter loss to account for it. Thus, Judge Paul, in Jewell Ridge Coal Corp. v. Early, was at a loss to account for the issuance of an injunction in the first Rickert opinion and attempted to explain it on the ground of exceptional circumstances, despite the fact that the court itself had not made this the ratio decidendi and despite the further fact that the two lower courts, aware of this exception to the statute, had denied the requested relief.

Additional support for the present interpretation of the Rickert case is furnished by the second opinion of the court in that case. That case involved the 1935 Amendment to the

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14 Thus, the second opinion in the Rickert case was unanimous.
15 The intimations of the opinion are more striking than what is actually said: "In that case [the second opinion in the Rickert case], the Supreme Court had previously restrained collection of what was designated a tax under the Agricultural Adjustment Act, thus holding that the provisions of Section 3224, supra, did not apply to the exaction required under the terms of that Act. It is significant that the injunction was issued in that case [the first opinion in the Rickert case] by the Supreme Court after it had been denied by both the District Court and the Circuit Court of Appeals, but prior to its decision in the case of United States v. Butler, et al., supra."
17 56 Sup. Ct. 374 (1936).
Agricultural Adjustment Act. The Amendment had not previously been before the court. Yet, in the same opinion the Act was held unconstitutional and collection of the impounded tax funds permanently enjoined. The decision is, of course, eminently sound in refusing to countenance any attempt to collect a concededly illegal tax. But the decision runs counter to the earlier case of Bailey v. George, in which precisely the opposite result was reached. Although the Bailey case precedes the Child Labor Tax Case in the reports, it was both argued and decided on the same days as the latter, and it involved the same tax or what was there denominated a regulatory measure. The Supreme Court Journal even indicates that the Child Labor Tax opinion was handed down before that in the Bailey case, so that in denying equitable relief, the court held that the mere unconstitutionality of a tax does not avoid the prohibition of Section 3224, although there was no room for review of the question as to whether the tax was invalid. The Bailey case was not distinguished or even cited in the Rickert opinion, and it is clear that it is therein effectively overruled. No legitimate distinction can be drawn between the decisions on the ground that the Rickert funds were impounded, whereas, the Bailey funds were still in the hands of the taxpayer, since the collector was no more likely to attempt an illegal collection of impounded funds than a distraint on the property of the taxpayer still in his control. In fact, if any distinction is to be drawn between the cases, the Bailey case was more persuasive for the avoidance of R. S. Section 3224, in that the tax statute was known to be invalid prior to the denial of equitable relief and in a different case; whereas, the injunction was issued in the Rickert case at the same time and in the same opinion as that in which the tax was held to be illegal.

It does not, of course, follow from the foregoing analysis that R. S. Section 3224 has been effaced from the statutes as if it had been declared unconstitutional. In fact, no definite prediction of its fate is warranted. It will undoubtedly still be applied in ordinary income, estate and similar customary tax cases. But, it would seem to follow from the Rickert decisions that it may be ignored in all novel types of taxes which in the least

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18 259 U. S. 16 (1922).
19 259 U. S. 20 (1922).
smack of regulatory measures, penalties, or other illegal exactions. The Standard Nut Margarine Case has been called a "tribute to the tenacity of the American taxpayer."20 The Rickert cases may perhaps now be called a tribute to the indignation of the Supreme Court at Congress's persistent attempts to exceed its constitutional powers. Taxpayers subject to the windfall tax ought, therefore, to have little difficulty in obtaining a judicial determination of the validity of the tax by means of injunction before collection and payment.

If, however, they should fail to obtain from the Courts the same response that was accorded by Judge Baltzell, still another approach is open to them, which differs radically from suggestions which have so far appeared in this connection.21 All will agree that equitable relief will be granted, despite the present status of Section 3224, if an adequate legal remedy does not exist.22 Thus, if after payment of the tax the taxpayer could not obtain a refund although the tax had been declared invalid, he would be entitled to an injunction against its collection.

Now, Title III of the Revenue Act of 1936, which imposes the Windfall Tax, makes no provision for such refund. A general section (Sec. 503(a)) incorporating "all provisions of law (including penalties) applicable with respect to taxes imposed by Title I of this Act" might, indeed, be held to incorporate Section 322 of Title I providing for overpayments, refunds and credits,22a so that no question would arise as to the avoidance of R. S. Section 3224. This has been the view generally taken of Title III, Section 503. Such a simple disposition of Section 503, however, encounters several difficulties.

At the very outset, one is immediately struck by the fact that despite the general scope of the incorporating provisions, specific reference is made to the incorporation and inclusion of the penalty provisions. This at once suggests that the provisions for refunds have been intentionally omitted.23 It is true that

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20 Gorovitz, Federal Tax Injunctions and the Standard Nut Margarine Cases (1932) 10 Tax Mag. 446.
22a The same applies to R. S. § 3225, which might thereby be deemed incorporated into § 503.
23 Nothing to the contrary is contained in Title VIII, Sec. 1001(b). The latter section merely means, as here applied, that the provisions
Section 351(c) of Title I-A contains an identical general incorporating provision with the exception of certain named sections which are made specifically inapplicable. But what is said of Section 503 would perhaps also be true of Section 351(c).

The very nature of the Windfall Tax suggests the possibility that Congress intended no provision for refunds. The tax was imposed in order to recapture certain unpaid excises subsequently declared invalid. The tax was thus final in its nature, an attempt to recoup a loss, to equalize the burden of taxation between those who had and those who had not paid the invalid excise. It is not general in its operation. It strikes only a few who have been guilty of a thereby condemned practice. Even when applied prospectively to future invalid excises, it is essentially retrospective in effect. Whether valid or not, it applies only to past acts. It is not imposed in order to acquire new revenue but to salvage lost revenues. It may, therefore, be said that Congress did not intend to make room for an evasion or avoidance of its salvage operations by providing for refunds in the event the tax was declared invalid. This observation is fortified by Section 501(1). It is there specifically provided that in case the Windfall Tax is invalidated, a substitute tax shall be imposed. The substitute tax is, therefore, intended in lieu of a refund. Section 501(1) would have been the proper place for a refund provision. Its absence gives a striking intimation of the mental processes of Congress.

Returning now to Section 503 itself, we find that it is identical to a similar provision in the Guffey Coal Act, except that the latter also incorporated a specific provision for refunds: "All provisions of law, including penalties and refunds, * * *." In denying equitable relief in the Jewell Ridge case, Judge Paul seems to have had the phrase "and refunds" especially in mind when he observed that the taxpayer had an adequate remedy at law for the recovery of an invalid tax.

The Guffey Act thus indicates that the same Congress which imposed the Windfall Tax was well aware of the method of dealing for refunds have not been excluded. It does not mean that the use of "including" precludes the idea that there has been an omission. Thus, it is not that Congress has thereby excluded the provisions for refunds but that it has failed properly to include them.

= Supra, note 16.
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Regarding refunds and incorporating provisions therefor into the general Administrative Provisions section of the statute. Several other revenue producing measures enacted by the same congress lead to a similar conclusion. Thus, in the Agricultural Adjustment Act there are two specific sections dealing in detail with the refund of taxes imposed by the Act. Yet, Section 619(b) is substantially identical to Section 503 of the Windfall Tax; and the general incorporating provision is contained in a section headed "Collection of tax; * * *; returns." Two inferences may be drawn from such juxtaposition: (1) The general incorporating provision is supplemental to and does not cover the refund sections of the statute; and (2) the general incorporating provision relates to administrative matters, procedural details, concerning the return, payment, collection and penalties in connection with the tax. Without the specific inclusion of penalty provisions, the section would deal only with procedural matters involved in the tax itself, not with what happens to the tax if not paid, and certainly not with remedies for its recovery after the tax itself has been disposed of. The inclusion of the penalty provision, therefore, extends the scope of the section beyond the mere matter of the tax and covers also what happens in case the tax has been delayed or not paid. It would take another specific inclusion of a refund provision as in the Guffey Act to cover the complete scope of tax administration and reach what becomes important after the tax itself has been disposed of.

Similarly, the Cotton Marketing Act contains a section almost identical to Section 503 of the Windfall Tax. But the general incorporating provision is contained in a section headed "Offenses and penalties." The heading shows that Section 714(a) does not deal with refunds but solely with procedural questions relating to violations of the tax statute and what will happen if the tax is delayed or not paid. The addition of the phrase "and penalties" in the heading demonstrates the necessity and effectiveness of the phrase "including penalties" in the procedural provision itself. And that the section in question

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7 U. S. C. A. Sec. 601.

One in the Amended Act of August, 1935.

Sections 615 and 623 (f).

Section 619 (b).


7 U. S. C. A. Sec. 701.

Section 714 (a).
does not cover refunds is further shown by Section 720 which makes specific provision for refunds. Again, in the Tobacco Control Act, there is a general incorporating provision under the section heading "Collection of Taxes." Again, we must assume that the provision itself refers only to procedural questions, such as the return, payment and collection of the tax, and that the specific mention of penalties extends its scope to what happens after the tax is due but before it has been paid and recovery sought. Similarly, Section 761 contains a special refund section as in the other Agricultural Acts; and, although the Potato Control Act does not contain a general incorporating provision, it does provide a method for the recovery of refunds. To the same effect are Section 143(f) and 58 of the 1936 Revenue Act, Title I, which refer to Section 322 and thus may be said to make specific provision for refunds.

All of these statutes taken together should prove beyond all peradventure that Section 503 of Title III makes no provision for the recovery of the tax if it should later be declared invalid. The same Congress has demonstrated in numerous instances that it knows how to deal with and provide for refunds when it deems it proper or necessary. Failure to so provide in a specific manner may, therefore, be regarded as evidence of intent to impose a tax without making provision for its recovery in the event it is declared illegal, but, on the contrary, disclosing an intent to substitute a different tax in such event.

The fact that certain sections of the 1936 Act are specifically excepted by Section 503 from application to the Windfall Tax in nowise alters the foregoing conclusion. Those sections deal with substantive matters relating to the tax itself. They have no bearing upon either penalties or refunds. Hence, as has been demonstrated above, Section 503 relates only to procedural and administrative questions involved in the return, payment and collection of the tax. The parenthesis, "including penalties," enlarges this, but only partially, and not beyond its express terms.

If the Courts are unwilling categorically to accept the con-

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23 7 U. S. C. A. Sec. 751.
24 Section 756.
25 7 U. S. C. A. Sec. 801.
26 Section 815.
27 It is denominated "Administrative Provisions" in the heading.
clusion here drawn, at least it must be admitted sufficient doubt is presented by Section 503 to warrant injunctive relief on the ground that the legal remedy for recovery of the tax, if illegal, is uncertain. The section will not be officially construed until it reaches the Supreme Court. Although the Court might well disregard the suggested difficulties inherent in the section, it is at least possible that they will hold somewhat in the manner of the present analysis. In the meantime, the taxpayer cannot know whether he is entitled to a refund or not, in case he pays an invalid tax. In such situation, the Courts will not close the portals of equitable jurisdiction to the diligent taxpayer.