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Taxation

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Estate Taxes—Apportionment Between Probate, Estate and Inter Vivos Trust

In *Myers v. Sinkler*,[1] testatrix died in 1957 leaving a will executed in 1954. In 1936 by deed of trust she had irrevocably conveyed certain real property in Charleston, retaining the net income to herself during her life, with life estates to her sisters after her death, and remainders to children of her sisters. This trust property was includible in her gross estate for Federal estate tax computation.[2] Her will provided in Item II that taxes "imposed against my estate . . . shall be paid out of my residuary estate as an expense of administration, in order that all legacies and bequests made by my Will shall be free from the same." Item VII of the will referred to the trust, stating that the testatrix had spent $2,000 improving the realty, and that this amount should be collected from the residuary beneficiaries of the trust, and should fall into the residue of the will. Item VIII left the residue of the estate in trust, net income in equal shares to her sisters, and on the death of the survivor of her sisters, the corpus to go to named beneficiaries.[3] The executor under the will brought this action against the trustee and beneficiaries of the trust, asking a declaratory judgment that the trust property bear its proportionate part of the Federal Estate Tax and the State Inheritance Tax.[4]

The trial judge ruled that the taxes must be apportioned between the trust property and the probate property.[5] This was affirmed in an incisive opinion by Mr. Justice Legge. The question of the ultimate burden of death taxes, state and

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1. 235 S. C. 162, 110 S. E. 2d 241 (1959).
2. Under INT. REV. CODE OF 1954, § 2036 as a reserved life estate. The section applies to all transfers made on or after March 4, 1931.
3. The provisions of the will are set out at 235 S. C. at 166, 110 S. E. 2d at 24.
4. The life interests under the inter vivos trust and the probate trust, after the death of the testatrix, were the same; there was substantial similarity in the remainder interests as well, but some differences existed in the identity and shares of the remaindermen.
5. The excellent opinion of Judge Bussey, below, is printed in the Transcript of Record, at 14-30.

federal, is largely a matter of state law.[6] First looking to the will, the Court found no clearly expressed intent either to require or to deny apportionment. Item II was held to be concerned with the probate, not the non-probate estate. As to Item VII, the Court rejected the argument "expressio unius," pointing out that the language might indicate equally the desire that each of the two estates pay its own way. Thus there was found no clear intention in either the trust deed or the will. No South Carolina statute covered the question, nor were there any controlling decisions.[7] The Court then posed the issues as follows:[8]

> (1) Which is the fairer and more reasonable—that the ultimate burden of the tax be borne solely by the beneficiaries of the residuary probate estate, or that it be apportioned ratably between them and the beneficiaries of the non-probate trust?
>
> (2) May such apportionment be decreed in the absence of statutory authority?

The Court held for apportionment, "in accord with the equitable principle that those who have a common interest in a subject matter should bear in common any burden affecting it."[9] Further support was found in the fact that the two estates were separate entities, and that the testatrix might well have been inattentive to the fact[10] that these assets, over which she had no power of disposition, might be included in her gross estate. As to judicial power in the premises, the reasoning of the Court is irresistable:[11]

> . . . Judicial application of equitable principles [the doctrine of equitable apportionment] requires no statutory sanction. . . .
>
> Here there is but one estate contemplated by the federal estate tax statute—an estate comprising the probate assets and those of the non-probate trust—the tax is levied upon the whole of that 'taxable estate.' But the probate estate and the non-probate estate are in reality separate

6. Riggs v. Del Drago, 317 U. S. 95 (1942). The few specific provisions in federal law are found in INT. REV. CODE OF 1954, §§ 2205-2207.
7. The nearest case in point was the *Gaither* case, discussed below.
8. 235 S. C. at 170, 110 S. E. 2d at 244.
9. 235 S. C. at 173, 110 S. E. 2d at 246.
10. As well might her lawyer, at the date of this trust. A much greater awareness of the existence and impact of tax law has come to the bar since 1936.
11. 235 S. C. at 175, 110 S. E. 2d at 247.

> entities; the former was the testator's true estate, of which he disposed by his will; the latter was not his property. The artificial concept of the two as a single taxable estate, while convenient for the purpose of the tax, does not destroy the separate identity of each estate. The equitable doctrine is clearly applicable.

The closest authority in this jurisdiction, the *Gaither* case,[12] was distinguished by the Court, in that that case dealt with apportionment between items of the probate estate, i.e., specific gifts or the residuary estate, whereas the instant case deals with apportionment between probate and non-probate property. The Court found apportionment to be particularly called for on principles of fairness where as here the non-probate property was included in the taxable estate by "legislative fiction."[13] Further basis for distinguishing the *Gaither* case might be found in the fact that in *Gaither* the Court felt compelled to follow prior direct holdings,[14] whereas in the instant case it was writing on a clean slate.

By this decision the Supreme Court has indicated that it is sensitive to this very serious problem. The legal result in this State is that, absent an indication from the relevant documents, estate taxes will be borne by the residue, as between residuary property and specific legacies, but will be apportioned as between probate and inter vivos property includible in the taxable estate. This is not a completely satisfactory solution. More symmetry would be achieved were the legislature to enact an apportionment statute. It must be kept in mind, however, that the primary burden rests on the draftsman of the legal documents to think through the tax impact on the trust and the estate, and to clearly indicate where the tax burden should rest.

Tax Accounting—Accrual Method—Dealer's Reserves

In *Johnson v. South Carolina Tax Comm'n*,[15] taxpayer sued to recover additional income taxes paid under protest. Taxpayer was in the business of selling trailers. Under his method of operation, if a purchaser did not pay in cash, the

12. Gaither v. United States Trust Co., 230 S. C. 568, 97 S. E. 2d 24 (1957), discussed in SURVEY OF SOUTH CAROLINA LAW, 10 S. C. L. Q. 132-135 (1957).
13. 235 S. C. at 174, 110 S. E. 2d at 246.
14. Warley v. Warley, Bail. Eq. 397 (S. C. 1831); Brown v. James, 3 Strob. Eq. 24 (S. C. 1849); Duncan v. Tobin, Dud. Eq. 161 (S. C. 1838).
15. 235 S. C. 155, 110 S. E. 2d 173 (1959).

purchaser would execute a note for the unpaid purchase price of a trailer, plus insurance, interest and any other charges, and execute a mortgage as security. The taxpayer usually endorsed these notes to finance companies or banks (hereinafter called lenders) either with recourse or with a guaranty of the unpaid balance. As each note was transferred, the lender would remit to the taxpayer the balance due, less an amount credited to taxpayer's reserve account on the lender's books, usually five per cent of the unpaid balance of each note. If a purchaser's contract became due and unpaid, the lender would charge this reserve account with the unpaid balance. After all indebtedness was discharged, the ultimate unpaid balance in the reserve account would be paid to the taxpayer. Under the agreements with the lenders, taxpayer could only receive that portion of the reserve credited to him when the same exceeded a certain prescribed percentage of the outstanding balance on the total debt of his purchasers.

The question was whether these amounts held by the lenders as reserves were nevertheless includible in the income of the taxpayer in the year in which the notes were signed by the purchasers, or whether they were not includible or were deductible, as taxpayer argued. In his state income tax returns, taxpayer reported as gross income the sums thus held by the lenders. Taxpayer then deducted these amounts as ordinary and necessary business expense. The Commission denied the deductions and assessed the additional income taxes. Taxpayer took the position that he was on the cash basis, but the Tax Commission ruled that he was already on the accrual method of accounting, but if he were not, the Commission exercised its power under statutory authority[16] to shift him to the accrual method in order to clearly reflect his income. The Supreme Court sustained this action of the Commission, so that the principal question in the case concerned the proper accounting of these reserve account items for an accrual basis taxpayer.

The trial court held for the taxpayer, on the two theories that either the amounts held in the dealer's reserves of the lenders were not gross income to the dealer until received in cash, or that they were deductible as business expense. Whether the taxpayer was on the cash or the accrual basis made no difference in the opinion of the trial court. On

16. CODE OF LAWS OF SOUTH CAROLINA § 65-281 (1952).

appeal, the Supreme Court held as stated above that the taxpayer was on the accrual method, and that all events had occurred to fix his rights to the amounts in question, and therefore such amounts were gross income. No statutory provision authorizing deduction of such amounts was found, and hence the Court decided that the Tax Commission must prevail.

Previously, the same taxpayer had won a federal income tax decision in the Fourth Circuit involving the identical question and two identical tax years.[17] Two months before the instant decision was handed down, however, the Supreme Court of the United States, in *Commissioner v. Hanson*,[18] decided the same legal question adversely to the position of the taxpayer. The *Hanson* case is the latest in a series of decisions beginning with *Brown v. Helvering*[19] in 1934 in which the Supreme Court has upheld the skeptical attitude of the Internal Revenue Service toward reserve accounts of taxpayers.

As Mr. Justice Taylor points out in the instant decision, the essence of the accrual method of accounting is that it is concerned with the time when rights and liabilities arise, not with the time of actual payments. When the right becomes fixed, the income accrues. The purpose of such a rule is to permit expenses to be charged against the income generated by those expenses. "At the time a sale is made and the transaction completed, all events have occurred to fix the amount and determine the liability of the parties from whom it is forthcoming."[20] At this moment, a taxpayer on the accrual method has gross income whether he receives cash, a note, or an oral promise to pay. The fact that the claim might prove uncollectible when due does not affect the accrual of the amount as income.

Accountants and legal writers have expressed some dissatisfaction with the federal doctrine, on the ground that if the taxpayer can show that a fairly predictable amount of the accrued income will, based on past experience, never be collected, a reserve should be permitted as an offset against income to mirror this prediction. Only thus can income be clearly reflected. Despite the *Brown* case and its offspring,

17. Johnson v. Commissioner, 233 F. 2d 952 (4th Cir. 1956).
18. 360 U. S. 446 (1959).
19. 291 U. S. 193 (1934).
20. 235 S. C. at 160, 110 S. E. 2d at 175.

some liberal federal decisions have permitted reserves of this nature to be set up. Congress itself in 1954 recognized the legitimacy of this argument when it enacted section 462 of the Internal Revenue Code of that year to permit such a deduction.[21] This section and its companion section 452 were repealed when the Internal Revenue Service persuaded the Congress that the effect would be disastrous to the revenue. As the Tax Commission's brief stresses in the instant case, the South Carolina statute does not even have the provision authorizing a deduction for a reserve for bad debts, as contained in the federal act.[22] Thus this line of attack was foreclosed to the taxpayer.

Exemption of State Stamp Taxes on Notes Issued by Building and Loan Association to Secure Federal Home Loan Bank "Advances"

In *Laurens Fed. Sav. & Loan Ass'n v. South Carolina Tax Comm'n*,[23] the association sued to recover documentary stamp taxes[24] in the amount of $2,270 paid under protest. The assessment was on ten promissory notes issued by the association, a Federal Savings and Loan Association,[25] to the Federal Home Loan Bank of Greensboro, North Carolina,[26] hereinafter called the "bank". The notes were required by law[27] to be issued by the association in order to obtain funds from the bank. The bank was one of many established in various districts throughout the United States. It issued,

21. At the time of repeal, the Senate Finance Committee Report said, 1955-2 CUM. BULL. 861, "Your committee desires to make its position clear that it expects to report out legislation dealing with prepaid income and reserves for estimated expenses at an early date." Congress in 1960 enacted the Dealer Reserve Adjustment Act of 1960, P. L. 86-459, which deals with the specific problem of the *Johnson* case and *Hanson* case. No general legislative solution of the problem of reserves for estimated expenses has been enacted since the abortion of § 462.

22. INT. REV. CODE OF 1954, § 166(c).

23. 236 S. C. 2, 112 S. E. 2d 716 (1960).

24. CODE OF LAWS OF SOUTH CAROLINA §§ 681, 688 (1952).

25. Created pursuant to the Home Owners Loan Act of 1933, 12 U. S. C. § 1461 (1952).

26. Created pursuant to the Federal Home Loan Bank Act of 1932, 12 U. S. C. § 1421 (1952).

27. Section 10 of the 1932 Act, *supra* note 26, provides as follows:
(a) Each Federal Home Loan Bank is authorized to make advances to its members upon the security of home mortgages, or obligations of the United States, or obligations fully guaranteed by the United States, subject to such regulations, restrictions, and limitations as the Board may prescribe. . . .
(c) Such advances shall be made upon the note or obligation of the member or non-member borrower secured as provided in this section, bearing such rate of interest as the board may approve or determine....

pursuant to law, its capital stock to which various eligible savings and loan associations could subscribe and thereby become members of the bank. The association became such a member. The purpose of the bank was to lend funds secured by their shares or by first mortgages on homes, and thereby to promote home ownership, particularly among the lesser income groups, at minimal borrowing cost. Members and nonmember borrowers, including federal associations similar to taxpayer herein, are entitled to apply in writing for "advances" from the bank, such advances to "be made upon the note or obligation" of the borrower.[28]

The position of the taxpayer association in the trial court was that the assessment of the tax was in direct violation of a specific exemption given by Congress in the 1932 statute which created the Federal Home Loan Banks.[29] Taxpayer argued that *Pittman v. Home Owners' Loan Corp.*,[30] was a controlling precedent. The Tax Commission argued that the tax was specifically permitted by the 1933 statute which authorized the creation of federal building and loan associa-

28. *Ibid.*

29. Section 13 of the 1932 Act, *supra* note 26, 47 Stat. 735, 12 U. S. C. § 1433 (1952), as amended, provides:

Any and all notes, debentures, bonds, and other such obligations issued by any bank, and consolidated Federal Home Loan Bank bonds and debentures, shall be exempt both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The bank, including its franchise, its capital, reserves, and surplus, its advances, and its income, shall be exempt from all taxation now or hereafter imposed by the United States, by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority; except that any real property of the bank shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed. The notes, debentures and bonds issued by any bank, with unearned coupons attached, shall be accepted at par by such bank in payment of or as a credit against the obligation of any homeowner debtor of such bank.

30. 308 U. S. 21 (1939). In this case Maryland had imposed a documentary stamp tax on a mortgage given by a borrower to the Home Owners' Loan Corporation, a now abolished subsidiary of the Federal Home Loan Bank Board. The tax was imposed when the corporation sought to record the mortgage. The pertinent statute, section 4(c) of the 1933 Act, provided that the corporation, including its "loans", was exempt from all state taxation. The Supreme Court held that the exemption covered the entire process of lending, including recordation of the mortgage, and the exemption applied. It was argued that the tax was on the borrower and not the corporation itself. In answer to this contention, the Supreme Court said, quoting from Federal Land Bank v. Crosland, 261 U. S. 374, 378-79, "whoever pays it, it is a tax upon the mortgage and that is what is forbidden by the law of the United States." 308 U. S. 21, 31.

tions.[31] Since the tax was neither assessed against nor paid by the bank, it was argued that neither the exemption in the 1932 statute,[32] nor the *Pittman* case,[33] applied. The trial judge, Judge Littlejohn, granted judgment on the pleadings for the Tax Commission, since there was no question of fact involved. The opinion of Judge Littlejohn gave controlling weight to the 1933 statute as the latest expression of the Congress, and distinguished the *Pittman* case on the ground indicated. The Supreme Court of South Carolina affirmed in an opinion by Mr. Justice Moss, holding that the 1933 statute is "clear, unambiguous and unequivocal in permitting the imposition of a documentary stamp tax on promissory notes executed by Federal Savings and Loan Associations when such is no greater than that imposed by the [State] on similar local Building and Loan Associations."[34] The Court further found that the association was not immune from the tax as an instrumentality or agency of the United States.[35] The association was granted certiorari by the Supreme Court of the United States, and the United States filed a brief in support of the position of the association, arguing that the tax was in violation of the express exemption and impaired the national policy sought to be furthered by the statutory scheme.

It is probable that at the time this Survey is published the Supreme Court will have decided the case. The position main-

31. Section 5(h) of the 1933 Act, *supra* note 25, 48 Stat. 133, 12 U. S. C. § 1464(h) (1952), provides as follows:
(h) Such associations, including their franchises, capital, reserves, and surplus, and their loans and income, shall be exempt from all taxation now or hereafter imposed by the United States (except the taxes imposed by sections 1410 and 1600 of Title 26 with respect to wages paid after December 28, 1939, for employment after such date, and except, in the case of taxable years beginning after December 31, 1951, income, war-profits, and excess-profits taxes), and all shares of such associations shall be exempt both as to their value and the income therefrom from all taxation (except surtaxes, estate, inheritance and gift taxes) now or hereafter imposed by the United States; and no State, Territorial, county, municipal, or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions.

32. See note 29 *supra*.

33. See note 30, *supra*. It was argued that in *Pittman*, the tax was directly on the federal corporation.

34. 236 S. C. at 12, 112 S. E. 2d at 721.

35. This question does not seem to have been raised by the pleadings, but apparently was argued before the Supreme Court of South Carolina. Neither brief directly raises the question in the briefs filed in the Supreme Court of the United States, but the State discusses the federal instrumentality cases as an analogy pointing towards the non-existence of federal exemption conferred by the statutes.

tained by the association appears to be a strong one. The 1932 statute expressly grants exemption from taxation on the "advances" of the bank. Clearly, if the statute of the State sought to tax the bank itself on the advances, the statute would be a bar. Instead, the association securing the advances from the bank is taxed on notes required by the statutory scheme to be executed and delivered as a prerequisite to obtaining the advances. The authority of the *Pittman* and *Crosland*[36] opinions must be weakened if the tax is to be sustained.

Use Tax As Applied to Subcontractor of Federal Instrumentality

E-G Sheet Metal Works v. Crain[37] involved the recurrent problem of the imposition of a state tax on the activities or the property of a firm contracting with the federal government. The duPont Company, in 1950, entered a contract with the Atomic Energy Commission, acting as agent of the United States, under which duPont was to construct and operate the Savannah River Plant for the production of nuclear materials. DuPont was to be reimbursed for all its expenses, and to receive the nominal sum of one dollar for its services. Title to all materials, equipment and supplies purchased by duPont for the project was to vest in the United States whenever title passed from the vendor. DuPont was authorized to enter sub-contracts and made such a contract with E-G, a New Jersey partnership, under which the latter was to supply materials and labor for sheet metal duct work and to construct a central fabricating shop on the site. The subcontractor purchased a substantial amount of materials which it incorporated into the project, title to which vested in the United States. It also purchased some materials, such as trucks, automobiles and other articles of heavy equipment, to which title never passed to the Government. It also purchased some materials, such as paper and other small items, which were consumed by it in carrying out its contract. The Tax Commission collected under protest use taxes on the latter two categories of property, to which title never passed to the general Government. Taxpayer E-G brought this action to recover these taxes. It argued, first, that the trans-

36. See note 30 *supra*.
37. 235 S. C. 290, 111 S. E. 2d 562 (1959).

actions were protected from state taxation by the doctrine of implied constitutional immunity, and second, that section 9(b) of the Atomic Energy Act of 1946[38] expressly granted exemption. Both of these contentions were upheld by the circuit court, affirming the report of the master.

The Supreme Court reversed in an opinion by Mr. Justice Oxner. As to the argument based on implied immunity, the Court found that the decisions of the Supreme Court of the United States in *Alabama v. King & Boozer*[39] and *Curry v. United States*[40] were controlling. These decisions established that the test of state power rested upon the legal incidence of the particular tax, rejecting the previous rationale testing the legitimacy of the tax by asking whether the economic burden was on the government. The Court rejected the argument of the taxpayer that the case of *Kern-Limerick, Inc. v. Scurlock*[41] had overruled the *King & Boozer* and *Curry* decisions. More recent decisions[42] of the Supreme Court of the United States approving the latter two decisions were cited.

The Court admitted that the issue of statutory exemption was a more difficult one. The taxes in question related to items purchased before October 1, 1953, the effective date of repeal of the last sentence of section 9(b) of the Atomic Energy Act of 1946. Hence at the time of purchases of these items, the sentence was in effect. It read as follows: "The

38. 60 Stat. 765, deleted by Act of Aug. 13, 1953, 67 Stat. 575.

39. 314 U. S. 1 (1941). The taxpayer sold lumber on the order of "cost-plus-a-fixed-fee" contractors for use by the latter in building an army camp for the United States. Alabama subjected the transactions to sales tax under a statute requiring the seller to pay the tax, but collect it from the purchaser. The Court held that although the burden of the tax would ultimately be borne by the federal government, the legal incidence was on the contractors, and the tax was not violative of federal immunity.

40. 314 U. S. 14 (1941). In this case, a companion case to the *King & Boozer* decision, the materials subjected to the Alabama sales tax were used by contractors in performing their cost-plus contract with the government. Again, the Court found no exemption.

41. 347 U. S. 110 (1954). Private contractors engaged in construction of a naval ammunition depot procured from Kern-Limerick two tractors for use on the project. Arkansas applied its Gross Receipts Tax Law, a sales tax, to the purchases. The Court held that the government was the real purchaser, with the contractors merely acting as purchasing agents. No liability of the purchasing agent to the seller arose from the transaction. Finding that the purchaser was the United States, the Court held that *King & Boozer* was not controlling, and ruled the transactions exempt from state sales tax. Justices Black and Douglas and Chief Justice Warren dissented.

42. U. S. v. City of Detroit, 355 U. S. 466 (1958); U. S. v. Township of Muskegon, 355 U. S. 484 (1958); City of Detroit v. Murray Corporation, 355 U. S. 489 (1958).

Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof." Hence, the question arose whether the contract between E-G and duPont and its performance were "activities of the Commission" within the activities clause of section 9(b). In *Carson v. Roane-Anderson Co.*[43] the Supreme Court of the United States had held that Roane-Anderson, as manager of the government-owned town of Oak Ridge, Tennessee, and Carbide and Carbon Chemicals, as operator of Oak Ridge plants for the production of fissionable materials, were engaged in "activities of the Commission", and thus exempted from Tennessee sales and use taxes. In *General Electric Co. v. Washington,*[44] the Court on the authority of the *Roane-Anderson* case reversed per curiam a decision of the Supreme Court of Washington which had sustained a business occupation tax on General Electric, the manager of the Hanford plant in that state.

The issue was complicated by the fact that the contract between E-G and duPont contained a provision that "The prices listed herein do not include any State or local sales or use taxes, as any work performed or materials purchased as the result of this subcontract are exempted from such taxes." However, Justice Oxner pointed out that this contractual provision as well as section 9(b) itself had apparently always been construed by the Atomic Energy Commission as applying only to property physically incorporated into the project, and to which the Commission acquired title.

The Supreme Court of South Carolina distinguished *Roane-Anderson*[45] and *General Electric*[46] on the ground that the contractors in those cases were essentially agencies of the Atomic Energy Commission, performing essential activities of the Commission. In the instant case, it was pointed out, title to the taxed property never passed to duPont or the Commission, "nor did either ever assume any liability for payment."[47] The Court said:[48]

> . . . We do not think that Section 9(b) contemplated that every person, firm or corporation who might do business

43. 342 U. S. 232 (1952).
44. 347 U. S. 909 (1954).
45. 342 U. S. 232 (1952).
46. 347 U. S. 909 (1954).
47. 235 S. C. at 299, 111 S. E. 2d at 567.
48. *Id.*

with duPont or who might have some part, however remote, in the construction of the Savannah River Project should be exempt from taxation. If respondent is exempt, are the purchases made by those who did business with it exempt? Does the exemption extend to all those who sold merchandise which in some manner was ultimately consumed or used in the construction of the project? Adoption of respondent's construction would lead to a rather unreasonable result.

Intergovernmental Immunity Doctrine—
Use Tax Applied to Federal Contractor

The extent to which the doctrine of intergovernmental immunities protected duPont itself, as agent of the United States operating the Savannah River plant, from subjection to sales and use taxes was before a three-judge United States District Court in *United Stated v. Livington.*[49] The taxes assessed in this case related to articles purchased at the Savannah River Project after the effective date of repeal of the sentence in section 9(b)[50] granting exemption from State and local taxes. The United States and duPont brought the action against the members of the South Carolina Tax Commission to enjoin the collection of sales and use taxes upon the use of purchased materials at the Savannah River Project. The statutory[51] three-judge Court, in an opinion by Judge Haynsworth, after rejecting arguments that it did not have jurisdiction of the case, or should in its discretion abstain therefrom,[52] held that duPont was the alter ego of the United States for the purpose of carrying out the contract. The factual background and the terms of the contract, together with the fact that title to all goods and materials purchased passed directly from the vendors to the United States, led the majority to this conclusion. The prayer for injunction was granted. Judge Timmerman dissented both on the jurisdictional arguments and on the merits. On appeal,

49. 179 F. Supp. 9 (E. D. S. C. 1959).
50. See note 38 *supra.*
51. 28 U. S. C. §§ 2281, 2284 (1952).
52. It was argued that jurisdiction was lacking in that, pursuant to 28 U. S. C. § 1341 (1952), a "plain, speedy and efficient remedy" was available in the state courts. The majority held that since it was at least doubtful whether interest would be paid on any amount paid under protest to the state, in the event duPont prevailed in a suit for refund, the remedy at law was inadequate.

the Supreme Court of the United States summarily affirmed per curiam.[53]

As in the *E-G Sheet Metal Works* case,[54] the Court felt that the central legal question concerned the line drawn by the Supreme Court between the *King & Boozer* and *Curry* cases[55] on the one hand, and the case of *Kern-Limerick, Inc. v. Scurlock*[56] on the other. The majority felt that although the contract with the Atomic Energy Commission did not in name designate duPont an "agent" of the Commission, it was in fact a managing agent and its contracts and procurement activities were "authorized, and were openly on behalf of the United States and at the government's expense and risk."[57] Thus, the contract was analagous to that in *Kern-Limerick,* where the taxpayer had been designated by the contract purchasing agent for the Navy Department in connection with construction of an ammunition depot. Judge Timmerman concluded that the duPont Company was not an agent but an independent contractor, and, therefore, the legal incidence of the taxes did not fall upon the United States.

The Tax Commission also argued that irrespective of ownership, duPont had a separable and beneficial use of the property for the purpose of carrying out its contract with the Government, and that the statute reached such use. It was argued that, while in form the contract purported to pay duPont only one dollar, in actuality duPont profited both by procuring on behalf of the Government products from duPont's separate commercial organization and by gaining familiarity and expertise with nuclear science and technology. The Court held that even assuming any peripheral profits accruing to duPont from its activities, the use of goods and materials at the plant was so completely a use by the United States that the immunity applied.

53. 364 U. S. 281 (1960). Justices Black and Douglas indicated their opinion that the case should have been put down for full briefing and argument in the Supreme Court.
54. 235 S. C. 290, 111 S. E. 2d 562 (1959).
55. See notes 39, 40 *supra.*
56. See note 41 *supra.*
57. 179 F. Supp. at 22.