VOLUME 32 **Opinion No. 20**

TAXATION: Assessments of Solvent Credits, Situs of Intangible Property—Article XII, Section 7 and Article XII, Section 17, Montana Constitution.

HELD: The County Assessor may assess accounts receivable which arise out of business conducted in the state of Montana.

October 10, 1968

Mr. John L. Adams, Jr.
Yellowstone County Attorney
Billings, Montana

Dear Mr. Adams:

You have requested my opinion with regard to the following situation. The Yellowstone County Assessor received the assessment reports from the local manager of J. C. Penney Company. On their report they did not list any accounts receivable arising out of credit sales made in Montana. From the enclosed correspondence it appears that the Penney Company is taking the position that there are no accounts receivable having a Montana situs as of the assessment date. This position is based on the alleged sale of such accounts by the J. C. Penney Co., Inc., to the J. C. Penney Credit Corporation. This latter corporation is incorporated in Delaware and is wholly owned by the J. C. Penney Co., Inc.

Article XII, Section 7 of the Montana Constitution provides as follows:

> The power to tax corporations or corporate property shall never be relinquished or suspended, and all corporations in this state, or doing business therein, shall be subject to taxation for state, county, school, municipal and other purposes, on real and personal property owned or used by them and not by this constitution exempted from taxation.

The term "property" as used in the above quoted section includes moneys and credits. Article XII, Section 17, Constitution of Montana.

Intangible property includes among other things, accounts receivable and credits. The general rule is that the situs of intangible property for purposes of taxation is the domicile of the owner. This rule is usually based on the legal maxim "mobilia sequuntur personam"; i.e. "moveables follow the person" or as sometimes stated, the situs of personal property is the domicile of the owner. An exception to this general rule has always been recognized and that exception is, where the property has acquired a business situs in a state different from the domicile of the owner, the state of the business situs can tax the intangible property. See 84 CJS "Taxation" 234, §116; Cooley on Taxation (4th Ed.) Vol. 2, §455, p. 1006.

The question of whether a state can tax the intangible property of a foreign corporation doing business within its borders has been considered the Supreme Court of the United States. The case of Liverpool & London & Globe Insurance Company of New York v. Board of Assessors, 221 U.S. 346, 31 S.Ct. 550, 55 L.Ed. 762, involved the taxation of credits on open account. The appellant in that case argued that the levying of such a tax violated the Fourteenth Amendment to the United States Constitution. The Court upheld the tax noting:

> The legal ficion, expressed in the maxim mobilia sequuntur personam, yields to the fact of actual control elsewhere. And in the case of credits, though intangible, arising as did those in the present instance, the control adequate to confer jurisdiction may be found in the sovereignty of the debtor's domicile. The debt, of course, is not property in the hands of the debtor; but it is an obligation of the debtor and is of value to the creditor because he may be compelled to pay; and power over the debtor at his domicile is control of the ordinary means of enforctment. **Blackstone v. Miller,** 188 U.S. 205, 206. Tested by the criteria afforded by the authorities we have cited, Louisiana must be deemed to have had jurisdiction to impose the tax. The credits would have

> had no existence save for the permission of Louisiana, they issued from business transacted under her sanction within her borders; the sums were payable by persons domiciled within the State, and there the rights of the creditor were to be enforced. If locality, in the sense of subjection to sovereign power, could be attributed to these credits, they could be localized there. If, as property, they could be deemed to be taxable to all, they could be taxed there.

See, Orient Insurance Co. v. Board of Assessors, 221 U.S. 358, 31 S.Ct. 554, 55 L.Ed. 764; Board of Assessors v. Comptoir National, 191 U.S. 388, 24 S.Ct. 109, 48 L.Ed. 232; Curry v. McCanless, 307 U.S. 357, 59 S.Ct. 900, 83 L.Ed. 1339.

The Supreme Court of Montana has also considered the taxation of intangible property allegedly owned by corporations domiciled outside the state. The case of Commercial Credit Co. v. O'Brien, 115 Mont. 199, 146 P. 2d 637, involved the taxation of intangible personal property allegedly owned by a Delaware corporation. The facts in that case showed that the county assessor attempted to assess the credits and receivables of the Commercial Credit Company, which had offices in Montana. The Commercial Credit Company contended that the assessment was made against the wrong Commercial Credit Company and that while it originally purchased, owned and held the receivables, yet it had divested itself of the title and ownership by assigning them to another Commercial Credit Company which owned all the stock of the Montana company. The appellant in that case further alleged that the other Commercial Credit Company, a Delaware corporation, could not be taxed since it did not conduct business within the state of Montana.

The Supreme Court of Montana observed that the assignment of the receivables by the Montana company to the Delaware company was, in effect, a fiction since the latter owned all the stock and directed the affairs of the former.

> Under such circumstances when the parent company assumed to enter into a "contract" with the plaintiff it was merely attempting to contract with itself. The parent was certainly in a position to dictate its own terms when contracting with a contractor which it owns. Such a "contract" is no contract at all for we must recognize the legal principle that in order to make an express contract, there must be the assent of two separate independent minds; that no can can effectually make a contract with himself.
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> In the instant case we have but one independent mind, and that is the mind of the parent corporation. For this reason the alleged "contract" is ineffectual and there is no change in the ownership of the receivables alleged to have been assigned pursuant to such "contract".

The facts of the instant case as reported to me in your letter would seem to call for the application of the above quoted proposition to the J. C. Penney Company.

The Montana Court then went on to state the rule with respect to the taxation of solvent credits and accounts receivable.

> Where tangible property such as solvent credits or accounts receivable are created and used in the conduct of a business by the owner thereof in a state other than the owner's domicile, such property has, for taxing purposes, a **situs** in the state where such business is conducted irrespective of the domicile of the owner. (Citing authority.)

There is no doubt but that the accounts receivable in the instant case were created and used in the conduct of its business within the state of Montana by the J. C. Penney Company.

The taxation of such credits amounts to no more than requiring foreign corporations who do business within our state to pay their fair share of the revenue necessary to support the government which provides them with various services not the least of which is the protection of our laws and the legal system to insure that they will be able to collect the accounts receivable should the debtor fail to pay as agreed. The Supreme Court of the United States recognized this in the case of Board of Assessors v. Comptoir National, **supra**, at page 403 of the United States Reports:

> * * * The cases are numerous, both state and Federal, which recognize the right of the State, in view of the protection and remedial rights which its laws give to the owner of intangible property, such as notes and bills, to require from such property a contribution to the funds of the State, to be collected by taxation, for the purpose of maintaining and enforcing the laws which give force and effect to such obligations.

In cannot be argued that the imposition of this tax is discriminatory since the same rate applies to all persons and corporations holding credits or accounts receivable; nor can it be argued that such accounts receivable will be subject to double taxation since the state of Delaware, where the J. C. Penney Company is domiciled, does not levy a tax upon intangible personal property. If practices such as attempted here are to go unchallenged, it would result in discrimination against the businesses who pay taxes on their accounts receivable as required by law.

Very truly yours,

FORREST H. ANDERSON
Attorney General

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