

MAINE STATE LEGISLATURE

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EIGHTY - SEVENTH LEGISLATURE

Legislative Document

No. 777

House of Representatives, March 19, 1935.
Read and placed on file. 500 copies ordered printed.
HARVEY R. PEASE, Clerk.

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED
THIRTY-FIVE

QUESTIONS AND ANSWERS

Questions relative to Income Taxes Submitted by the House of Representatives of Maine to the Justices of the Supreme Judicial Court of Maine, March 8, 1935, with the Answers of the Justices Thereon.

STATE OF MAINE

In House, March 8, 1935.

WHEREAS, it appears to the House of the Eighty-seventh Legislature that the following are important questions of law, and the occasion a solemn one; and

WHEREAS, there is now pending before the Legislature of the State of Maine:

Bill "An Act Relating to Taxation" (H. P. 1361) (L. D. 471)

Bill "An Act Imposing an Income Tax" (H. P. 1359) (L. D. 472)
document copies of which are hereby enclosed and made a part hereof; and

WHEREAS, the constitutionality of these measures has been questioned; and

WHEREAS, it is important that the Legislature be informed as to the constitutionality of the proposed measures; now therefore, be it

ORDERED: That the Justices of the Supreme Judicial Court are hereby respectfully requested to give to the House, according to the provisions of the Constitution on this behalf, their opinion on the following questions, to wit:

Question 1. Has the Legislature the right and power to enact an income tax law providing for a graduated tax as proposed by said bills?

Question 2. Has the Legislature the right and power to enact an income tax law with a single fixed rate of tax upon all incomes regardless of the amount thereof?

Question 3. If a provision was inserted in the aforesaid L. D. 471 or L. D. 472, exempting income from real estate from the provisions of said acts, would the said acts be constitutional?

HOUSE OF REPRESENTATIVES

Read and Passed

Under Suspension of Rules

March 8, 1935

Harvey R. Pease,

Clerk.

Newton
Readfield

A True Copy,

Attest: HARVEY R. PEASE,

Clerk.

TO THE HONORABLE HOUSE OF REPRESENTATIVES OF THE
STATE OF MAINE:

The undersigned Justices of the Supreme Judicial Court, having considered the questions upon which their advisory opinions were requested by House Order of March 8, 1935, respectfully submit the following answers:

Question 1. Has the Legislature the right and power to enact an income tax law providing for a graduated tax as proposed by said bills?

Question 2. Has the Legislature the right and power to enact an income tax law with a single fixed rate of tax upon all incomes regardless of the amount thereof?

Question 3. If a provision was inserted in the aforesaid L. D. 471 or L. D. 472, exempting income from real estate from the provisions of said acts, would the said acts be constitutional?

Answer:

These questions are so closely interrelated that we find it feasible to answer them collectively. In doing so, we shall confine ourselves to the general problem whether or not the income tax proposed is constitutional and shall not attempt to pass upon the effect of the various provisions of the bills.

Has the Legislature the constitutional right to enact an income tax law, if it provide for a graduated tax or a single fixed rate or contain an exemption of income from real estate? Whether the Legislature has such a right is dependent upon the true nature of the proposed tax. If it be a tax upon real or personal estate, then it would be unconstitutional because it lacks equal apportionment and assessment required by Section 8 of Article IX of the Constitution as it now appears in Amendment XXXVI, which reads as follows:

“Sec. 8. All taxes upon real and personal estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof; but the legislature shall have power to levy a tax upon intangible personal property at such rate as it deems wise and equitable without regard to the rate applied to other classes of property.”

Unless the income tax be direct on property, the right of the Legislature to levy it is clear.

“The full power of taxation is vested in the Legislature and is measured not by grant but by limitation.” Opinions of Justices, 123 Me. 576, 577.

We must, then, determine its nature.

Said Section 8 “simply requires that any tax which shall be lawfully imposed upon any kind or class of real or personal property shall be apportioned and assessed upon all such property equally, etc. *Portland v. Water Company*, 67 Me. 135. It does not require the Legislature to impose taxes upon all the real and personal property within this State of whatever kind and to whatever use applied. The Legislature may, nevertheless, determine what kinds and classes of property shall be taxed and what kinds and classes shall be exempt from taxation.” Opinions of Justices, 102 Me. 528.

This Section does not “prohibit the Legislature from imposing other taxes than those on real and personal property. The Legislature is left

free to impose other taxes, such as poll taxes, excise taxes, license taxes, etc. It can impose such taxes in addition to, or instead of, taxes on property. It can subject persons and corporations to both or either kinds of taxation, or exempt them from either kind. Further, the Legislature can adopt such mode, or measure, or rule as it deems best for determining the amount of an excise or license tax to be imposed, so that it applies equally to all persons and corporations subject to the tax. It may make the amount depend on the capital employed, or the gross earnings, or the net earnings, or upon some other element." Opinions of the Justices, 102 Me. 528, 529.

Then is this proposed income tax a property tax? Its nature in both bills, No. 471 and No. 472, apparently finds expression in Section I, in which (the section being identical in each bill) is this language:

"A tax is hereby imposed upon every person a resident of the State, which tax shall be levied, collected and paid annually upon and with respect to his entire net income at the following rates:"

This language indicates a purpose to lay the tax upon the person, not upon property.

In both bills, the remedy for failure to pay the tax is that of the collection of "a personal debt from the person liable to pay the same to the State of Maine." (See Section 17 in both bills.) True, the bills provide for a lien, but the lien is general on all of the real and personal property of the person, and not specific against the particular property from which the particular income is derived. (See Section 35 of each bill.) Thus it would appear reasonably clear that these bills do not contemplate taxation upon property. The proposal is to tax the privilege of receiving income. To be sure, "an income tax is to be distinguished from an inheritance, legacy, or estate tax, * * *" 61 C. J., page 1560. None the less, there are elements of marked similarity.

In *State v. Hamlin*, 86 Me. 495, the Court held that a graduated tax on inheritances was constitutionally valid because it was not a property tax. The opinion in that case is pertinent here. The Court held that Sections 7 and 8 of Article IX of the Constitution, read together, manifested that the inheritance tax was not a property tax.

"It is clear that these sections contemplate only the general, constantly recurring assessment upon the same property, and do not include occasional, exceptional and special subjects and modes of taxation. * * * It is not laid according to any rule of proportion, but is laid upon the interests specified in the Act, without any

reference to the whole amount required to be raised for public purposes, or to the whole amount of property in the State liable to be assessed for public purposes. * * * The tax under this statute, is once for all, an excise or duty upon the right or privilege of taking property, by will or descent, under the law of the State. It is uniform in its rate as to the entire class of collaterals and strangers, which satisfies the constitutional requirement of uniformity." State v. Hamlin, *Supra*.

We find this language in the advisory opinion of Mr. Justice Peaslee in 77 N. H. 618:

"It is important that at the outset the fundamental difference between income and property be stated; and then as we go on, it will be more plainly seen how and why the attempt to treat the two things as one must necessarily fail. A man's property is the amount of wealth he possesses at a particular moment, while his income is the amount of wealth obtained during some specified period. The two are measured by different standards. One is measured by amount and present possession. The other is determined by receipts, and quantity and time are necessary elements of the measure employed. In the measure of property, present ownership is an essential element, and lapse of time can have no place. In the measure of income, lapse of time is an essential element, and present possession can have no place. Each is measureable, but a common measure cannot be applied to both. The two are as incommensurate as a line and an angle."

That in a general sense income is property is conceded. It is not, however, property as used in the Constitutional provisions already mentioned.

The distinction between property and income is made in a recent United States case, *Lawrence v. State Tax Commission*, 286 U. S. 276, 281 (May 16, 1932), and also in *Featherstone v. Norman*, 153 S. E. 58, 170 Ga. 370.

These cases hold that a tax on income is not a tax upon the property from which that income was derived; the weight of judicial authority is to this effect. *State v. Frear*, 148 Wis. 456, 134 N. W. 673; *State v. Wisconsin Tax Commission*, 161 Wis. 111, 152 N. W. 848; *Diefendorf v. Gallet*, 51 Idaho, 619; *Stanley v. Gates*, 179 Ark. 886, 19 S. W. (2nd) 1000; *Hattiesburg Grocery Co. v. Robertson*, 126 Miss. 34, 88 So. 4; *Featherstone v. Norman*, *Supra*; *O'Connell v. State Board of Equalization*, 95 Mont. 91, 25 Pac. (2nd) 114; *Ludlow-Saylor Wire Co. v. Wollbrinck*, 275 Mo. 339, 205 S. W. 196.

"Income in common parlance and in the law is used in contradistinction to property." 31 C. J. 397, Sec. 2-B.

Income is defined as: "Something derived from property, skill, ingenuity

or sound judgment, or from two or more in combination.” *Stony Brook R. R. v. Boston & Maine R. R. Co.*, 260 Mass. 379, 384; “That gain or recurrent benefit (usually measured in money) which proceeds from labor, business, or property.” *Webster’s New International Dictionary*, 2nd Ed.

“The term ‘property,’ as used in reference to taxation, means the corpus of an estate or investment, as distinguished from the annual gain or revenue from it. Hence a man’s income is not ‘property’ within the meaning of a constitutional requirement that taxes shall be laid equally and uniformly upon all property within the State. *Black on Income and other Federal Taxes* (3rd Ed.), sec. 44 * * * ‘The better rule seems to be that an income tax is not a tax on property within a constitutional requirement that taxation on property shall be in proportion to its value.’ *Cooley on Taxation* (4th Ed.), sec. 1751. * * *” *Featherstone v. Norman*, *Supra*.

The bills submitted contemplate the taxation of persons upon and with respect to their net incomes. The word “person” is not defined in either bill, and, in the absence of definition, it would include a corporation. *Rules of Construction*, R. S. 1930, Chap. 1, Sec. 6, Paragraph XIV.

Both of the bills provide in Paragraph 2 of Section 1 for taxation on the income of intangible personal property at a higher rate than the tax on income derived from other sources. Such a discrimination would be invalid.

CONCLUSION

In conclusion, then, we answer Questions 1, 2 and 3 in the affirmative, excepting as herein qualified.

Very respectfully,

W. R. PATTANGALL
 CHARLES J. DUNN
 GUY H. STURGIS
 CHARLES P. BARNES
 SIDNEY St.F. THAXTER
 JAMES H. HUDSON

March 16, 1935.