PROBLEMS OF INTERGOVERNMENTAL TAX IMMUNITIES ARISING OUT OF FEDERAL CONTRACT TERMINATION AND PROPERTY DISPOSAL

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I. IMPORTANCE OF THE PROBLEMS

SURPLUS property subject to disposal by the United States during and after the war falls into three principal categories: fabricated products (including materials, supplies and equipment which have been used in or purchased for the prosecution of the war), termination inventories (where title to all or a part of the inventory is held by the United States as an incident of a contract termination), and plant and production facilities. In the absence of federal immunity from state and local taxation the ownership, sale, and use of such properties would be subject to multiple state and local taxes, including ad valorem taxes on real and personal property, sales, use and occupational taxes, and some license and registration fees. The importance of the problems arising in the application of such taxes to contract termination and property disposal is apparent from the facts that about one-fifth of the total industrial facilities of the United States are government-owned, representing a federal investment of approximately sixteen billion dollars,[1] and that surplus property in the hands of owning and disposal agencies currently amounts to almost one billion, four hundred million dollars in terms of procurement costs.[2] The magnitude of the problem is further reflected in a Congressional committee estimate that the dollar valuation of stocks and supplies subject to post-war disposal by the United States would approximate fifty to sixty billion dollars.[3]

Sales, use, and occupational taxes are normally only two or three

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1. See testimony of Hans Klagsbrunn, Vice President of Defense Plants Corporation, quoted in the report of the War Contracts Subcommittee of the Committee on Military Affairs pursuant to S. Res. 198, 78th Cong. 2d Sess. (1944) 18.

2. *Summary of Second Quarterly Report of Surplus Property Board*, 91 Cong. Rec., June 12, 1945, at 6078.

3. It is, of course, impossible to estimate accurately the quantum of personal property which will become surplus after the war, since the volume and value of the property will depend on the exactitude with which estimates of military requirements are hereafter made. However, an excellent discussion of the prospective amount and nature of surplus war realty and personalty is incorporated in the report of the House Special Committee on Post-War Economic Policy and Planning. H. R. REP. No. 1855, 78th Cong. 2d Sess. (1944) 9 *et seq.*

per cent of the sales price of the property sold, and the amount of tax involved thus will be a limited proportion of the expense of the reconversion program.[4] However, the economic effect of such taxes may well exceed the amounts involved. Any factors which tend to obscure the respective rights and obligations of the United States, state and local taxing jurisdictions, contractors, and consumers serve materially to retard informed and speedy contract termination and surplus property disposition; and, because of the substantial amount of surplus property owned by the Federal Government, any delay in disposition would have a correspondingly significant effect upon the national economy.[5]

Moreover, the application of state and local taxes to disposition of surplus properties requires careful reconciliation of the interests of the states and the United States. Revenue collections are of obvious importance to state and local governments, some of which have displayed an increasing tendency to enlarge revenues at the expense of the federal treasury.[6] Accordingly, state and local tax officials may be expected to require payment of taxes by the United States where such taxes can be constitutionally imposed, and to solicit the voluntary cooperation of the United States in enforcing taxing statutes where the thrust of the statutes is addressed to purchasers of surplus property rather than the United States. On the other hand, where the United States is immune from the tax, agencies or employees of the United States are

4. Most states having sales taxes impose the tax only with respect to *retail* sales. The practical effect of immunity of the United States from state excise taxes thus will be further limited because sales of surplus personal property by the United States will normally be made to commercial distributors and retailers under the requirements of Section 2(n) of the Surplus Property Act of 1944, Pub. L. No. 457, 78th Cong., 2d Sess. (Oct. 3, 1944) (hereinafter referred to as the Act). Sales to consumers are, however, being made where single items of high value are involved. See the testimony of William Clayton, formerly Surplus War Property Administrator, *Hearings before Special Committee on Post-War Economic Policy and Planning Pursuant to H. Res. 408*, 78th Cong., 2d Sess. (1944) 53. Moreover, sales of contractor inventory owned by the United States will be made in part through contractors and some proportion of this property may go to consumers.

5. Prompt action has been emphasized as a basic policy in establishment of procedures for disposition of property. Section 2(r) of the Act provides that the Administrator, in formulating regulations to govern the disposition of surplus property shall give effect to the following policy: "to dispose of surplus property as promptly as feasible without fostering monopoly or restraint of trade, or unduly disturbing the economy, or encouraging hoarding of such property, and to facilitate prompt redistribution of such property to consumers." Absence of clarification of the rights of all persons participating in surplus property disposition undoubtedly is largely responsible for current delay in property disposal. Only sixteen percent of available surpluses were disposed of between June 1944 and March 1945. "Summary of Second Quarterly Report of Surplus Property Board" 91 Cong. Rec. June 12, 1945, at 6078.

6. See, *e.g.*, Tenn. Laws 1945, c. 151, seeking to require additional unemployment compensation contributions from employers engaged in work in federally-owned plants under cost-plus-a-fixed-fee contracts with the United States.

prohibited, in the absence of specific Congressional approval, from paying to the states taxes respecting the ownership, sale, or use of surplus property.[7] An obvious need thus exists for an accurate delineation of the scope of the immunities doctrine as applied to termination and disposal procedures in order that a sound basis may be established for mutual forbearance and cooperation between the states and the United States in the solution of their tax problems.

II. Termination and Property Disposal Procedures

Under the Contract Settlement Act of 1944 [8] the holder of a contract with the Federal Government is normally indemnified for losses he sustains by reason of its termination.[9] It is the policy of the Government to provide contractors with speedy compensation,[10] but, since some delay is inevitable, the Act establishes detailed procedures for interim financing while claims are being processed.[11] The contractor is encouraged by the War and Navy Departments to retain or sell materials, supplies, and partially fabricated and fabricated articles on hand at termination, whether title to the articles rests in the United States or the contractor, and to make claim for the losses, if any, sustained in connection with the sale or retention.[12] Consequently, it is hoped that a relatively small volume of termination inventories will be sold by the United States itself.

Personal Property. It is obvious that most surplus personal property of the United States will be owned by the War and Navy Departments, the Maritime Commission, and procurement agencies such as the War Food Administration, the Defense Supplies Corporation and the Procurement Division of the Treasury Department. For the duration of the war each of these agencies will determine which property under its control is to be designated as surplus,[13] and, except where specifically authorized to dispose of property, each is required to certify property as surplus to so-called "disposal agencies" which are empowered to sell the property when such certification is received.

Where surplus personal property accrues from sources other than contract termination, the civilian agencies of the United States normally dispose of the property. Thus, capital and producers' goods will

7. Rev. Stat. § 3224 (1875), 28 U. S. C. § 241 (1934); Comptroller General of the United States, General Regulation No. 86 as amended June 11, 1937.

8. Pub. L. No. 395, 78th Cong., 2d Sess. (July 1, 1944).

9. *Id.* at § 6(d).

10. *Id.* at § 1(b).

11. *Id.* at § 6(a).

12. The contracting officers of the War and Navy Departments may of course require that no disposition of Government-furnished equipment and materials be effected without approval. Joint Army-Navy Termination Regulation, 9 Fed. Reg. 13316 (1944) (hereinafter cited as JTR) §§ 411, 441.

13. Surplus Property Act § 11(a).

be sold by the Reconstruction Finance Corporation, maritime property will be sold by the Maritime Commission, and agricultural commodities will be sold by the War Food Administration.[14] In addition, the War and Navy Departments are authorized to dispose of nominal quantities of property, scrap and salvage, such equipment and materials as may be needed by industrial users engaged in war production, and, where acting through the contractors, termination inventories.[15] In all other cases the property will be certified as surplus to the appropriate disposal agency and sold by such agency.

Real Property. Procedures for disposal of real property currently parallel procedures for disposition of personal property. Most of the industrial properties now owned by the United States are under the control of the Reconstruction Finance Corporation and the National Housing Agency.[16] This real property as well as most of the real property owned by other branches of the Federal Government (including the War and Navy Departments) will be certified to these agencies for disposition.[17] While the Congressional intention that sales of property shall be expedited to the greatest possible extent is manifest,[18] delay in disposition of real property (and a consequent increase in tax problems) appears inevitable.[19]

14. By Section 10(a) of the Act, the Board is empowered to designate Government agencies to act as disposal agencies, except as designated by the Act. Section 10(b) allocates disposal of merchant vessels to the Maritime Commission and Section 21(a) authorizes the War Food Administrator, under supervision of the Board, to establish policies for disposal of surplus food. Detailed designation of disposal agencies has recently been made by the Board. Surplus Property Board Regulation No. 1, 10 FED. REG. 3764 (1945).

15. SURPLUS PROPERTY ACT § 14; Surplus War Property Administration Statement of Policy, April 21, 1944; Surplus War Property Administration Regulation No. 1, 9 FED. REG. 5096 (1944); JTR § 454.3.

16. See note 1 *supra.*

17. Surplus Property Board Regulation No. 1, 10 FED. REG. 3764 (1945).

18. See note 5 *supra.*

19. A reluctance of owning agencies to part with real property may be expected until it appears unmistakably clear that such property will be of no value. Complex procedures will be needed to secure the best price obtainable for the United States, and give effect to the prohibitions of Section 1 of the Act against fostering monopoly or restraint of trade, or unduly disturbing domestic economy. Delay may be expected under Sections 19 and 23 of the Act, requiring that surplus property be reported to Congress, Section 12, establishing procedures to insure preferential treatment to former owners, tenants, and veterans, and Sections 12 and 13, establishing procedures for disposal to federal, state and local agencies. Moreover, retention by the United States of title or a beneficial interest (or both) in surplus real estate may be anticipated to insure payment of the purchase price and in some cases control over the development and use of the property.

To date, only 189,000 acres out of a total of 9,000,000 acres and 26,000 parcels have been declared surplus. *Summary of Second Quarterly Report of Surplus Property Board,* 91 Cong. Rec., June 12, 1945, at 6078.

III. Disposition of Personal Property: Sales, Gross Income and Occupational Taxes

General Tests of Intergovernmental Immunity. Although the trend toward restriction of immunity is clear,[20] judicial attempts to designate which state and local taxes are proper and which improper have resulted in a welter of conflicting precedent.[21] However, two general principles are well established. First, it is clear that Congress may either specifically prohibit [22] or permit [23] taxation of property owned

20. Even where relatively direct taxes have been imposed on arms of the Federal Government, immunity from tax has been carefully restricted. See Penn Dairies v. Milk Control Comm., 318 U. S. 261, 271 (1943): "Even in the case of agencies created or appointed to do the government's work we have been slow to infer an immunity which Congress has not granted and which Congressional policy does not require." The Court cites, as illustrative of this trend, Reconstruction Finance Corp. v. J. G. Menihan Corp., 312 U. S. 81 (1941), and Colorado National Bank v. Bedford, 310 U. S. 41 (1940), comparing with them Baltimore National Bank v. State Tax Commission, 297 U. S. 209 (1936).

21. Compare the views of Mr. Justice (now Chief Justice) Stone, speaking for the Court in Helvering v. Gerhardt, 304 U. S. 405, 419 (1938): "In a period marked by a constant expansion of government activities and the steady multiplication of the complexities of taxing systems, it is perhaps too much to expect that the judicial pronouncements marking the boundaries of state immunity should present a completely logical pattern." Confusion is added by the failure of the Court to overrule specifically cases which no longer can be considered to represent the law. For example, in view of the decision in Helvering v. Producers Corp., 303 U. S. 376 (1938), specifically overruling Gillespie v. Oklahoma, 257 U. S. 501 (1922), and Burnet v. Coronado Oil & Gas Co., 285 U. S. 393 (1932), it seems probable that the conclusions reached in Choctaw & Gulf R. R. v. Harrison, 235 U. S. 292 (1914), Indian Oil Co. v. Oklahoma, 240 U. S. 522 (1916), and Jaybird Mining Co. v. Weir, 271 U. S. 609 (1926), will no longer be considered binding on the Court. Similarly, the decision in Alabama v. King & Boozer, 314 U. S. 1 (1941), specifically overruling Panhandle Oil Co. v. Mississippi, 277 U. S. 218 (1928), Graves v. Texas Co., 298 U. S. 393 (1936), and James v. Dravo Contracting Co., 302 U. S. 134 (1937), may hereafter be thought to have overruled by implication a major portion of the rationale of the decisions in Indian Motocycle Co. v. United States, 283 U. S. 570 (1931); Williams v. Talladega, 226 U. S. 404 (1912); Leloup v. Port of Mobile, 127 U. S. 640 (1888); Telegraph Co. v. Texas, 105 U. S. 460 (1881); Railroad Co. v. Peniston, 18 Wall. 5 (U. S. 1873).

22. Where Congress, acting within its constitutional powers to create an instrumentality or conduct the business of the Federal Government, has specifically directed that the instrumentality or the conduct of the business shall be exempt from state and local taxation, such taxation is void where contravening the Congressional directive, whether the taxes are assessed against payment of veterans' compensation benefits, Trotter v. Tennessee, 290 U. S. 354 (1933); Lawrence v. Shaw, 300 U. S. 245 (1937); or Indian lands, Choate v. Trapp, 224 U. S. 665 (1912); Board of County Commissioners v. Seber, 318 U. S. 705 (1943); or registration of documents, Federal Land Bank v. Crosland, 261 U. S. 374 (1923); Pittman v. Home Owners' Loan Corp., 308 U. S. 21 (1939). Where an arm of the Federal Government was involved, Congress has constitutionally prohibited sales taxes on property purchased, Federal Land Bank v. Bismarck Lumber Co., 314 U. S. 95 (1941); bonds issued, Smith v. Kansas City Title & Trust Co., 255 U. S. 180 (1921); and stocks owned by a federal instrumentality, Maricopa County v. Valley National Bank, 318 U. S. 357 (1943); or capital and reserves held by it, Baltimore National Bank v. State Tax Comm., 297 U. S. 209 (1936). In the most recent affirmance of the doctrine, the Court sustained the immunity of the Federal Public Housing Authority from state and local taxation. City of Cleveland v. United States, 323 U. S. 329 (1945).

23. See Van Allen v. The Assessors, 3 Wall. 573, 583, 585 (U. S. 1865); Bank v. Super-

by or transactions involving federal instrumentalities. Second, in the absence of a specific permission or prohibition by Congress, the court will endeavor to ascertain Congressional intention from the setting of the specific legislation [24] and the history of legislation authorizing the federal enterprise subjected to taxation. These general principles are particularly important in this discussion because Congress has neither expressly authorized nor forbidden taxation affecting contract termination or surplus property disposal.

Immunity from Tax: In General. In considering the immunity of federal agencies from taxation, it is important to note that independent contractors have not been considered generally to be such instrumentalities of government as to be cloaked with the immunity of the sovereign.[25] Accordingly, when sales, use, and occupation taxes are

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visors, 7 Wall. 26, 30, 31 (U. S. 1868); Thomson v. Pacific Railroad, 9 Wall. 579, 588, 590 (U. S. 1869); People v. Weaver, 100 U. S. 539, 543 (1879); Mercantile Bank v. New York, 121 U. S. 138, 154 (1887); Central Pacific R. R. v. Nevada, 162 U. S. 512 (1896); Northern Pacific R. R. v. Myers, 172 U. S. 589, 598, 599 (1899); Owensboro National Bank v. Owensboro, 173 U. S. 664, 668 (1899); Farmers Bank v. Minnesota, 232 U. S. 516, 521 (1914); Choctaw & Gulf R. R. v. Harrison, 235 U. S. 292 (1914); Shaw v. Gibson-Zahniser Oil Corp., 276 U. S. 575, 581 (1928); Oklahoma v. Barnsdall Refineries Inc., 296 U. S. 521, 525, 526 (1936); Baltimore National Bank v. State Tax Commission, 297 U. S. 209, 211, 212 (1936); British-American Oil Co. v. Board, 299 U. S. 159 (1936); James v. Dravo Contracting Co., 302 U. S. 134, 161 (1937); Helvering v. Gerhardt, 304 U. S. 405, 411, 412 (1938). In recent years Congress has not infrequently waived immunity of property of the United States from state and local taxation. HOME OWNERS' LOAN ACT, 48 STAT. 130 (1933), 12 U. S. C. § 1463(c) (1940); FARM CREDIT ACT, 48 STAT. 267 (1933), 12 U. S. C. § 1138(c) (1940); 48 STAT. 993 (1934), 28 U. S. C. § 124(a) (1940); FEDERAL CREDIT UNION ACT, 48 STAT. 1222 (1934), 12 U. S. C. § 1768 (1940); NATIONAL HOUSING ACT, 48 STAT. 1252 (1934), 12 U. S. C. § 1714 (1940); 49 STAT. 1160 (1936); 50 STAT. 68 (1937); BANKHEAD-JONES FARM TENANT ACT, 50 STAT. 531 (1937), 7 U. S. C. § 1024 (1940); 50 STAT. 806 (1937), 25 U. S. C. § 510 (1940). So, also, Congress has authorized payments by agencies of the United States of sums in lieu of taxes. TENNESSEE VALLEY AUTHORITY ACT, 48 STAT. 66 (1933), 16 U. S. C. § 831(*l*) (1940); 48 STAT. 577 (1934); 49 STAT. 2026 (1936), 40 U. S. C. § 422 (1940); 49 STAT. 2036 (1936), 40 U. S. C. § 432 (1940); SECOND DEFICIENCY APPROPRIATION ACT FOR 1937, 50 STAT. 221 (1937); BANKHEAD-JONES FARM TENANT ACT, 50 STAT. 531 (1937), 7 U. S. C. § 1024 (1940); INTERIOR DEPARTMENT APPROPRIATION ACT, 50 STAT. 570 (1937); 50 STAT. 876 (1937); UNITED STATES HOUSING ACT, 50 STAT. 895 (1937), 42 U. S. C. § 1413(c) (1940). Whenever permission to tax is extended, such permission will be strictly construed. Pacific Co., Ltd. v. Johnson, 285 U. S. 480, 491 (1932); Oklahoma v. Barnsdall Refineries, Inc., 296 U. S. 521, 526 (1936); Maricopa County v. Valley National Bank, 318 U. S. 357 (1943).

24. See Metcalf & Eddy v. Mitchell, 269 U. S. 514, 522–4 (1926); Shaw v. Gibson-Zahniser Oil Corporation, 276 U. S. 575, 578 (1928); Mayo v. United States, 319 U. S. 441, 447 (1943); Helvering v. Gerhardt, 304 U. S. 405, 411 (1938). *Cf.* the comments of Dr. Powell in *The Waning of Tax Immunities* (1945) 58 HARV. L. REV. 633, 669–70, respecting the presentation of the argument of Congressional intention in the brief of the United States in Alabama v. King & Boozer, 314 U. S. 1 (1941).

25. Thomson v. Pacific Railroad, 9 Wall. 579 (U. S. 1869); Metcalf & Eddy v. Mitchell, 269 U. S. 514 (1926); Trinityfarm Construction Co. v. Grosjean, 291 U. S. 466 (1934); James v. Dravo Contracting Co., 302 U. S. 134 (1937); Silas Mason Co. v. Tax Commission

levied upon materials purchased by an independent contractor and thereafter consumed or processed, the contractor is not relieved of the burden of the tax merely because he has contracted for sale of the completed article to the Federal Government.[26] It is equally clear that where a state tax is levied directly upon the operations of an arm of the Federal Government, the tax comes within the prohibition originally enunciated in *McCulloch v. Maryland.*[27]

At first it was held that taxes measured by the value of commodities sold or services rendered *directly* to the United States by independent contractors engaged in the discharge of a governmental function impeded the operations of the United States and, hence, violated the doctrine of intergovernmental immunity from taxation.[28] Implicit in the decisions was the conclusion that the imposition of the economic burden of a tax on the United States by the states was an unwarranted interference with federal functions. But with the widespread adoption of excise taxes by the states it was concluded that where taxes directly measured by the value of commodities sold or services rendered were imposed upon a contractor with the United States, the tax was valid as long as the legal incidence of the tax was on the contractor, rather than the United States[29] and that such a tax was not invalid merely because its economic burden was passed on to the United States.[30] The effect of the decisions discarding the "economic burden"

302 U. S. 186 (1937); Helvering v. Producers Corp., 303 U. S. 376 (1938); Buckstaff Bath House Co. v. McKinley, 308 U. S. 358 (1939); Penn Dairies v. Milk Control Commission, 318 U. S. 261 (1943). *Cf.* United States v. Allegheny County, 322 U. S. 174, 188 (1944), where Mr. Justice Jackson speaking for the Court stated: "a state may tax personal property . . . but it could hardly tax one of its citizens because of moneys . . . which were in his possession as . . . federal officer, agent or *contractor.*" (Emphasis supplied.)

26. Trinityfarm Construction Co. v. Grosjean, 291 U. S. 466 (1934).

27. Justice Jackson has observed: "Most of the immunity cases we have been called upon to deal with involved assertion of a right to tax Government property against an individual." United States v. Allegheny County, 322 U. S. 174, 188 (1944). Hence the question is not often squarely presented. In Clallam County v. United States, 263 U. S. 341 (1923), however, where a suit was brought by a corporation of the United States to cancel taxes levied by the county and the state the Court held that the tax in question could not be imposed; and in Mayo v. United States, 319 U. S. 441 (1943), the United States was held immune from an inspection fee levied by the Florida Commissioner of Agriculture.

28. Panhandle Oil Co. v. Mississippi, 277 U. S. 218 (1928); Graves v. Texas Co., 298 U. S. 393 (1936); *cf.* Indian Motocycle Co. v. United States, 283 U. S. 570 (1931) (dealing with the imposition of a federal tax on a sale to a municipality).

29. See cases cited *infra* note 37. Similar cases dealing with state regulation, rather than taxation, of federal activities include Penn Dairies v. Milk Control Commission, 318 U. S. 261 (1943), where, in the absence of Congressional action, the Court refused to adopt a theory of the Attorney General that the legal incidence of a state regulation fixing ceiling prices for milk was on the United States because the law fixed the terms on which the United States might purchase Army supplies from citizens of the state, and that such a law passed beyond the realm of local affairs and became a direct regulation of the United States.

30. James v. Dravo Contracting Co., 302 U. S. 134 (1937); Silas Mason Co. v. Tax

theory where state excise taxes were involved was to include such taxes within the well established principle that state and local property taxes might be constitutionally assessed against property owned and used by contractors in the discharge of contractual duties with the United States.[31]

Immunity from Tax: "Legal Incidence" of the Tax. An apparently simple criterion is that of "legal incidence," by which a tax is invalid if it is *laid upon* the United States. But such simplicity is illusory, since it may be difficult to determine when the tax is in fact laid on the Federal Government. This difficulty is illustrated by sales taxes which are assessed in the first instance against vendors of commodities.[32] For example, certain state statutes permit [33] or require [34] the vendors to pass such taxes on to the vendee, while in other states the taxing statute makes no reference to the right or duty of the vendor to pass the burden of the tax.[35] In cases where the United States is the vendee, the question of the legal incidence of taxes under such statutes becomes important. The incidence of the tax apparently is to be deter-

Commission, 302 U. S. 186 (1937); Helvering v. Producers Corp., 303 U. S. 376 (1938); see Helvering v. Gerhardt, 304 U. S. 405, 416 (1938), and cases cited; Graves v. New York, 306 U. S. 466 (1939); Alabama v. King & Boozer, 314 U. S. 1 (1941); Curry v. United States, 314 U. S. 14 (1941); *cf.* Penn Dairies v. Milk Control Commission, 318 U. S. 261 (1943). See also Indian Motocycle Co. v. United States, 283 U. S. 570, 580 (1931), where in a dissent Justice Stone expressed doubt that the economic burden of retail sales taxes was in fact shifted to the government purchaser.

31. It has always been conceded that no constitutional limitations prohibit a nondiscriminatory tax on property owned by an independent contractor with the Federal Government, although such property was used in the course of his duties as contractor. McCulloch v. Maryland, 4 Wheat. 316, 436 (U. S. 1819); Osborn v. United States Bank, 9 Wheat. 738, 867 (U. S. 1824); Railroad Company v. Peniston, 18 Wall. 5, 33 (U. S. 1873); see Van Brocklin v. Tennessee, 117 U. S. 151, 177 (1886).

32. It should be noted that the requirement that the "legal incidence" of the tax must be upon the United States has been adopted primarily with respect to sales or other taxes measured by the value of commodities sold. For example, the doctrine obviously has no application in the cases involving stocks and bonds, as pointed out in the majority opinion in the *Dravo* case, 302 U. S. 134, 152 (1937), or in cases where a registration tax was assessed upon documents issued in governmental affairs. In the latter case, note the decision in Federal Land Bank v. Crosland, 261 U. S. 374 (1923), holding that a state registration tax could not be applied to a first mortgage executed to a Federal Land Bank. As to the contention of the state that the tax was actually levied against the borrower rather than the lender, the Court, speaking through Justice Holmes, said: "It is said that the lender may collect the money in advance from the borrower. We do not perceive that this makes any difference. The statute says that the lender must pay the tax, but whoever pays it it is a tax upon the mortgage and that is what is forbidden by the law of the United States." *Id.* at 378. The distinction is obviously one of expedience rather than logic.

33. See, *e.g.*, N. C. GEN. STAT. (Michie, Sublett & Stedman, 1943) §§ 105–165.

34. See, *e.g.*, ALA. CODE (1940) Tit. 51, § 776; CALIF. REV. & TAXATION CODE (Deering, 1944) §§ 6052, 6053; MO. REV. STAT. ANN. (1943) § 11411; WASH. REV. STAT. (Remington, Supp. 1940) § 8370–21.

35. See, *e.g.*, MICH. STAT. ANN. (Henderson, Supp. 1944) §§ 7.521 *et seq.*

mined by the taxing statute itself, and weight is given to the interpretation of the statute by the state courts.[36] However, it appears from recent cases that where the statute merely authorizes the vendor to pass on the tax to the vendee, or is silent on the subject, the legal incidence is on the vendor rather than on the person to whom the economic burden of the tax is passed.[37] On the other hand, it appears

36. See Federal Land Bank v. Bismarck Lumber Co., 314 U. S. 95, 99 (1941); Colorado National Bank v. Bedford, 310 U. S. 41, 52 (1940); Clement National Bank v. Vermont, 231 U. S. 120, 134 (1913), and cases cited.

37. In early cases where a taxpayer was permitted by statute to pass the economic burden of the tax to another it was held that the "legal incidence" of the tax rested on the one to whom the tax was passed. In deciding United States v. Railroad Co., 17 Wall. 322 (U. S. 1872), the Court considered a statute providing that certain corporations, including railroads, must pay a tax of five per cent of the interest paid to bondholders by the corporation, and authorized, but did not require, the corporation to deduct this tax from payments of interest to the bondholders. The Court held that the tax was invalid in so far as applied to bonds held by a municipal corporation, pointing out that the tax "is no pecuniary burden upon the corporation, and no taxation of the corporation. The burden falls on the creditor. He is the party taxed." *Id.* at 327. The Court followed a similar dictum in Railroad Co. v. Jackson, 7 Wall. 262, 269 (U. S. 1868). The holding in the principal case was subsequently approved in Stockdale v. The Insurance Cos., 20 Wall. 323, 329 (U. S. 1873). Application of this principle to a vendee and a vendor of services was made in Colorado National Bank v. Bedford, 310 U. S. 41 (1940), where a statutory provision that a bank, payer of a tax on safety deposit services, should add the amount of the tax, as far as practicable, to the amount charged, was interpreted by Justice Reed to mean that the tax was required to be passed on and hence the tax was not upon the bank but upon the customer.

In Railroad Co. v. Collector, 100 U. S. 595 (1879), and United States v. Erie Ry., 106 U. S. 327 (1882), the Court considered the application of a dividend tax to corporations under a statute providing that the corporations *could* deduct the taxes paid from the dividends subsequently allowed to stockholders. Although, as was pointed out in a strong dissent by Mr. Justice Field, the factual situation in the latter case was identical to that in *United States v. Railroad Company*, the Court held that the tax was in fact upon the corporation and might be collected even in cases where dividends were payable to non-resident aliens who were not taxable. In New Orleans v. Houston, 119 U. S. 265 (1886), the Court considered a tax measured by the value of stock in a lottery enterprise. The tax was nominally placed on the shares of the stockholders, although it was to be paid by the company which was authorized, but not required, to collect the amount so paid from the shareholders. It was held that "a tax such as that sought to be imposed upon the company by the appellees, is a tax upon the corporation within the meaning or the prohibition of its charter, because it is compelled to become surety for taxes nominally imposed upon its stockholders, and is made liable primarily for their payment; a payment which, in the first instance, must be made out of the corporate property, without other recourse than an action against individual stockholders to recover the amounts advanced on their account." *Id.* at 279.

In view of the present trend of authority, it seems probable that the above noted lapse in the *Bedford* case lacks significance. In the field of excise taxes, recent decisions of the Court make it clear that there must be something more than mere passage of the economic burden of a tax by the original taxpayer to the United States in order to invoke the doctrine of intergovernmental immunity from taxation. James v. Dravo Contracting Co., 302 U. S. 134 (1937); Alabama v. King & Boozer, 314 U. S. 1 (1941). There is obviously nothing more than passage of the economic burden of a tax under statutes which merely authorize passage of the tax, or are silent on the question. The Court so held, sub silentio, in James v. Dravo Contracting Co., *supra*, dealing with gross receipts taxes. Since both

that a statutory requirement that a tax be passed on by the vendor places the "legal incidence" of the tax upon the vendee for purposes of the immunities doctrine;[38] and, in the absence of such a statutory requirement, specific statutory authority for a refund of the tax to the vendee has been held to place the legal incidence of the tax upon the vendee.[39]

Thus, in the absence of a requirement or a provision for refund of the tax to the vendee, a mere showing that vendors in practice passed on the tax to the vendee as a separate item of cost would not establish that the legal incidence of the tax was upon the United States where it is a vendee. To those familiar with the operation of such taxes, or engaged in nation-wide procurement, such a view is highly unrealistic, for in practice sales taxes and some occupational taxes are in fact passed on to the vendee, often as a separate item of cost. The economic burden upon and practical interference with the functions of the Federal Government are the same whether the tax is passed on under a statutory requirement (the sale then being immune from taxation if the United States is a party) or trade practice (in which case the tax is applicable); and to grant intergovernmental immunity from excise taxes on the basis of statutory refund provisions appears equally artificial.

Limitations on Procedures for Disposition of Personal Property. Where a state or local taxing statute is such that, under the preceding paragraphs, it may be said that the legal incidence of the tax is on the vendee, any transfer of title to termination inventory or other property from a contractor to the United States is immune from tax. If, under the preceding paragraphs, the tax is determined to be on the vendor (subject to the usual statutory provisions that sales for the purpose of resale are exempt), no current principles of intergovernmental im-

gross receipts taxes and so-called "vendor" sales taxes are imposed solely on the vendor and are measured by gross receipts from sales and services, the same holding may be anticipated where vendor sales taxes are involved. Substantially similar results were reached in connection with other excise taxes as indicated by the cases cited *infra* note 45.

38. Federal Land Bank v. Bismarck Lumber Co., 314 U. S. 95 (1941); School District v. Pfost, 51 Idaho 240, 4 P. (2d) 893 (1931).

39. Stahmann v. Vidal, 305 U. S. 61 (1938) *semble*, holding that where processing taxes were intended to fall on cotton producers but were assessed against ginners, there being no requirement that the tax be passed on, the producer was the person liable for the tax, and hence the legal incidence of the tax fell upon him, especially since refunds were to be made to the producers. In Monamotor Oil Co. v. Johnson, 292 U. S. 86 (1934), it was similarly held that an Iowa statute taxing motor fuel, levying a fee on distributors and requiring retailers to post with prices an announcement that the license fee was included, was a tax on the purchaser. The Court held that the statutes in question "lay no tax whatever upon distributors, but make of them mere collectors from users of motor vehicle fuel, and refund the tax only to that class of users upon whom no excise is intended to be laid. The distributor does not pay the tax; the user does." *Id.* at 95.

munity appear to deny the validity of the exaction as applied to transfers by the contractor to the United States.

Where sales of surplus personal property are made by the United States, and the state or local taxing statute is such that, under the preceding paragraphs, it may be said that the legal incidence of the tax is on the vendor, the tax clearly appears to be directed against the United States and to be violative of the doctrine of intergovernmental immunities as currently enunciated. But if the incidence of such a tax is on the vendee (the vendor acting merely as a collecting agent for the taxing body), the question then arises as to whether the United States, as vendor, may constitutionally be required to collect the tax from the vendee where sales are made in which title of the United States is transferred. This problem may be important from the standpoint of dollar valuation since prices paid for materials by potential vendees will be increased or decreased to the extent that state excise taxes may or may not be applicable to their respective purchases. Undoubtedly, Congress could pass legislation protecting its disposal agencies from the burden of collection and remittance of such taxes.[40] But even in the absence of a Congressional declaration of immunity, governmental action carried on by the United States has been held not subject to state taxation, regulation, or control.[41] It thus appears clear

40. See cases cited *supra* note 22.

41. Mayo v. United States, 319 U. S. 441 (1943). "These inspection fees are laid directly upon the United States. They are money exactions the payment of which, if they are enforceable, would be required before executing a function of government. Such a requirement is prohibited by the supremacy clause. We are not dealing, as in *Graves v. New York ex rel. O'Keefe*, [306 U. S. 466 (1939)], with a tax upon the salary of an employee, or as in *Alabama v. King & Boozer*, 314 U. S. 1, with a tax upon the purchases of a supplier, or as in *Penn Dairies v. Milk Control Comm'n*, 318 U. S. 261, with price control exercised over a contractor with the United States. In these cases the exactions directly affected persons who were acting for themselves and not for the United States. These fees are like a tax upon the right to carry on the business of the post office or upon the privilege of selling United States bonds through federal officials. Admittedly the state inspection service is to protect consumers from fraud but in carrying out such protection, the federal function must be left free. This freedom is inherent in sovereignty. The silence of Congress as to the subjection of its instrumentalities, other than the United States, to local taxation or regulation is to be interpreted in the setting of the applicable legislation and the particular exaction. *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U. S. 575, 578. *But where, as here, the governmental action is carried on by the United States itself and Congress does not affirmatively declare its instrumentalities or property subject to regulation or taxation, the inherent freedom continues.*" (Emphasis supplied.) See also Johnson v. Maryland, 254 U. S. 51 (1920). *Cf.* Prigg v. Pennsylvania, 16 Pet. 539 (U. S. 1842); Kentucky v. Dennison, 24 How. 66 (U. S. 1860); *Ex parte* Siebold, 100 U. S. 371 (1879). Where instrumentalities of the United States (such as national banks) are involved, as distinguished from the United States itself, imposition of tax collection duties by the state has been approved. In Colorado National Bank v. Bedford, 310 U. S. 41 (1940), the Court reviewed a Colorado statute providing in substance that any bank rendering safety deposit service should be liable for payment of a tax based on the value of service, and that the bank should add the amount of the tax, so far as practicable, to the amount charged for the service, showing the same as a separate item which should be

that no Congressional action is required to establish the immunity of the Federal Government from state regulation requiring government agencies to act as tax-collecting agents for a state or local taxing unit.[42]

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a debt due from the user to the bank. The bank was also forbidden to represent that it would absorb the tax, and amounts paid by the user were stated by the statute to be public money and trust funds of the state. The Court held that the bank could be required to collect the tax on behalf of the state, citing National Bank v. Commonwealth, 9 Wall. 353 (U. S. 1869), and Des Moines Bank v. Fairweather, 263 U. S. 103 (1923). A further distinction of the *Bedford* case from the present circumstances arises from the fact that in that case a private instrumentality for profit was involved, whereas in the present problem the United States itself is engaged in the sale of surplus properties. Emphasis in establishing intergovernmental exemption from taxation where the United States, rather than a private corporation for profit, was involved, is found in the decision of the Court in Clallam County v. United States, 263 U. S. 341 (1923). For further discussion of tax collection requirements and intergovernmental immunities see Waite v. Dowley, 94 U. S. 527 (1876); Corwin, *National-State Cooperation—Its Present Possibilities* (1937) 26 YALE L. J. 599; Plumb, *May the States be Required to Assist in the Collection of Federal Taxes on Their Employees?* (1942) 30 GEO. L. J. 534.

42. The parallel histories of the doctrine that the Federal Government is immune from interference through regulation by state and local agencies, and the rule that the United States is similarly immune from taxation, are important since cases relating to taxation and regulation are cited by the courts interchangeably. Both doctrines arise from U. S. CONST. Art. I, § 8, cl. 13; Art. IV, § 3, cl. 2; and Art. VI, cl. 2. The doctrine with respect to state and local regulation has developed in a manner similar to the doctrine applied to state excise taxes. In the era during which the Supreme Court concluded that an excise tax levied against a contractor with the United States was violative of the doctrine of intergovernmental immunities, Panhandle Oil Co. v. Mississippi, 277 U. S. 218 (1928), and Graves v. Texas Co., 298 U. S. 393 (1936), it had been similarly held that a Maryland statute requiring persons operating motor trucks on highways to submit to an examination to determine competence to drive could not constitutionally be applied to an employee of the Post Office Department of the United States. The Court held that "such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient." Johnson v. Maryland, 254 U. S. 51, 57 (1920). As encroachments on the *Panhandle* doctrine proceeded, Alward v. Johnson, 282 U. S. 509 (1931); Trinityfarm Construction Co. v. Grosjean, 291 U. S. 466 (1934); James v. Dravo Contracting Co., 302 U. S. 134 (1937), until the principle was specifically overruled, Alabama v. King & Boozer, 314 U. S. 1 (1941), the area of intergovernmental immunity from regulation was being equally restricted where applied to contractors with the United States. It was held that a contractor constructing a building for the United States on a federal enclave was subject to a state statute prescribing safety measures in construction, Stewart & Co. v. Sadrakula, 309 U. S. 94 (1940); *cf.* United States v. City of Chester, 51 F. Supp. 573 (E. D. Pa. 1943), and that a state statute establishing minimum prices for dairy products was applicable to a contractor selling such products to the armed forces of the United States, Penn Dairies v. Milk Control Commission, 318 U. S. 261 (1943). The doctrines are similar in that where "governmental action is carried on by the United States itself and Congress does not affirmatively declare its instrumentalities or property subject to regulation or taxation, the inherent freedom continues." Mayo v. United States, 319 U. S. 441, 448 (1943). While the area of intergovernmental immunity under each doctrine has been similarly restricted with respect to contractors with the United States, the basic considerations in determining immunity in each case are obviously different. As pointed out, *supra*, notes 32–6, and text, the basic determination in the tax cases relates to whether the legal incidence

In many cases the practical effect of the immunity will be limited since commercial channels of distribution will be used in disposal of surplus properties.[43] Sales by the United States to distributors normally would not be taxed inasmuch as sales tax statutes specifically exempt sales for resale purposes. Where no statutory exemption from occupational, gross income, or gross sales taxes exists respecting materials purchased for resale,[44] however, the desirability of minimizing the total number of transfers is obvious, since each transfer following the original transfer from the United States is a taxable event.

Although it therefore may be said that sales made by agencies of the United States (such as the Department of Agriculture or the Reconstruction Finance Corporation) are exempt from taxation, a sale of contractor-owned property clearly does not partake of the immunity of the United States.[45] Even where a fixed price contractor is acting in the interest of the United States in selling his termination inventory and deducting the proceeds of the sale from his claim for termination benefits, it seems proper to assume that the interest of the Government is so remote that no claim for immunity could be asserted by the contractor.

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of the tax is upon the United States. Although the cases are far from clear, it appears that the basic question in regulation cases is a determination of the circumstances under which a regulation of the contractor is also a regulation of the United States. For example, if a contractor with the United States is obligated by his contract to construct a building of designated height under direction of the United States and a local regulation is invoked to prohibit the erection of a building of such height, the regulation would be of doubtful validity; on the other hand, as was held in the *Sadrakula* case, *supra*, a requirement as to the contractor's method of construction, at least so far as controlled by the contractor, may be considered valid. *Cf.* Smith, *The Navy Guards Its Tax Dollars Too* (1945) 23 TAXES 141, 143.

43. See SURPLUS PROPERTY ACT § 2(n). However, some sales directly to consumers have been made and others may be expected to follow, especially in sales of single items of high value. See testimony of William Clayton, Surplus War Property Administrator, *Hearings before Special Committee on Post-War Economic Policy and Planning Pursuant to H. Res. 408*, 78th Cong., 2d Sess. (1944) 53. Moreover, sales of property under terminated war contracts will be made through contractors so far as possible and it is not unlikely that some proportion of this property may go directly to consumers.

44. A number of states impose such taxes: ARK. STAT. (Pope, 1937) § 14093; IND. STAT. ANN. (Burns & Watson, 1943) §§ 64-2601 *et seq.*; MISS. CODE ANN. (1942) §§ 10103 *et seq.* NEW YORK CITY ADM. CODE (Chanler, Supp. 1942) c. 41, tit. RR; WASH. REV. STAT. (Remington, Supp. 1940) § 8370.4-8370.15; W. VA. CODE (Michie, Sublett & Stedman, 1943) §§ 959 *et seq.*

45. As heretofore noted, independent contractors are not such instrumentalities of the United States as to partake of the immunity of the sovereign. See note 30 *supra*. Accordingly the Court has held that taxes may be laid on property owned by the contractor and used in fulfilling his contract obligations. Van Brocklin v. Tennessee, 117 U. S. 151, 177 (1886); Railroad Co. v. Peniston, 18 Wall. 5, 33 (U. S. 1873); Osborn v. United States Bank, 9 Wheat. 738, 867 (U. S. 1824); McCulloch v. Maryland, 4 Wheat. 316, 436 (U. S. 1819). In addition various state excise taxes levied against individuals and corporations doing business with the United States have been sustained, including a privilege tax measured by a percentage of gross premiums of a surety company furnishing insurance to United States enter-

If title to the property is re-transferred to the contractor by the United States, it is equally clear that any subsequent sale of the property purchased by him will not be immune from taxation. But where the contractor disposes of termination inventory to which title is held by the United States, the transfer is clearly made by the contractor as agent for the United States; for the contractor has no personal interest in the disposition of the property except in discharge of a contractual requirement of cooperation with the United States. The situation differs materially from that considered in *Alabama v. King & Boozer* [46] in which it was held that a contractor was not a purchasing agent of the United States in performing services under a cost-plus-a-fixed-fee contract inasmuch as the contractor had no power to pledge the credit of the United States and that the United States was not obligated to pay the purchase price.

In summary, it appears clear that a sale of personal property by the United States directly, whether acting through a contractor, an owning agency, or a disposal agency, is not subject to state and local sales and occupational taxes. The tax cannot be laid directly on the United States as a vendor; and, where the legal incidence of the tax is considered to be upon the vendee, the Federal Government cannot be required to collect and remit the tax.

Where a cost-plus-a-fixed-fee contract exists between the contractor and the United States, the situation is equally clear. In such cases title to the property has usually been vested in the United States (as was the case in *Alabama v. King & Boozer*) and where the contractor transfers property, title to which is held by the United States, he obviously could act only as agent for the United States. In such a case, the sale is clearly immune from sales and similar taxes. No tax immunity however, may be anticipated as to sales by the contractor to third parties where title to the property is in the contractor, for it is clear that the mere existence of the agency relationship between the United States and a cost-plus-a-fixed-fee contractor does not cloak the contractor with the immunity of the United States.[47] Sale of contractor-owned termination inventory by a cost-plus-a-fixed-fee contractor to the United States will, of course, be subject to taxation to the same extent as similar sales by a fixed price contractor.

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prises, Fidelity and Deposit Company v. Pennsylvania, 240 U. S. 319 (1916); social security taxes against a licensee of the United States, Buckstaff Bath House Co. v. McKinley, 308 U. S. 358 (1939); transportation taxes, Wheeler v. United States Lumber Co., 281 U. S. 572 (1930); sales taxes, Alabama v. King & Boozer, 314 U. S. 1 (1941); use taxes, Curry v. United States, 314 U. S. 14 (1941); and gross income taxes, James v. Dravo Contracting Co., 302 U. S. 134 (1937), and Silas Mason Co. v. Tax Commission, 302 U. S. 186 (1937).

46. 314 U. S. 1 (1941).

47. *Ibid.*

IV. Disposition of Surplus Property: State and Local Use Taxes

Application of the use tax is important to the disposition of surplus property when an owning or disposal agency transfers property while retaining the title or beneficial interest; this is the case, for example, under the usual contract of sale, a conditional sale, or a lease of personal property.[48] Although it has been held that persons using property in the discharge of contractual obligations are not exempt from application of a use tax because the contract is with the United States,[49] it has not been specifically decided whether a tax on the use of property owned by the United States [50] contravenes the doctrine of intergovernmental immunities. The recent case of *United States v. Allegheny County* [51] is, however, significant. There Allegheny County tax officials assessed a property tax on real property owned by a contractor with the United States, measuring the value of the property taxed by the total value of the premises including machinery thereon owned by the United States. The Court held that the value of the interest of the

48. Extremely wide latitude is given federal disposal agencies in methods of disposing of surplus war property. Section 15(a) of the Act provides that "Whenever any Government agency is authorized to dispose of property under this Act, then the agency may dispose of such property by sale, exchange, lease or transfer, for cash, credit or other property, with or without warranty, and upon such other terms and conditions as the agency deems proper."

49. Curry v. United States, 314 U. S. 14 (1941). The decision was based on an assumption that the contractors would have been subject to the tax under state law but for the asserted immunity arising from their contract with the United States. The Court held that the contractors were neither exempt nor immune from the tax as agents of the United States. The question of whether the materials subjected to tax were owned by the contractor or the United States was not at issue in that case.

50. While use taxes are ordinarily levied only upon the use of personal property by its owners, some states have extended the tax to cases where property is used by residents of the state, even though title rests in a non-resident. Such a rule is specifically established in some cases. Wash. Rev. Stat. (Remington, Supp. 1940) § 8370-32; New York City Laws 1940, Local Law No. 82; Kansas State Commission of Revenue and Taxation, Articles and Rulings 1940, Rule 46.

In any event, where the term "use" is defined by statute to include the exercise of any incidents of ownership over personal property, a taxable event obviously arises by mere possession of the property by a lessee, regardless of whether legal title to the property is held by a non-resident. The term is so defined in many jurisdictions. Calif. Rev. & Taxation Code (Deering, 1944) § 6009; Iowa Code (1939) § 6943.102(1); La. Laws 1944, Act. No. 57, § 2(h); Miss. Laws 1942, H. B. 719, § 2; N. C. Gen. Rev. Act (1939) art. XI, § 801(b); N. M. Stat. Ann. (1941) § 76-1502(b); Ohio Gen. Code Ann. (Page, 1937), § 5546-25; Okla. Stat. (1941) tit. 68, § 1310(h); Wash. Rev. Stat. (Remington, Supp. 1940) § 8370-35(b).

51. 322 U. S. 174, 187-8 (1944): "We think, however, that the Government's property interests are not taxable either to it or to its bailee. The 'Government' is an abstraction, and its possession of property largely constructive. Actual possession and custody of Government property nearly always are in someone who is not himself the Government but acts in its behalf and for its purposes. He may be an officer, an agent, or a contractor. His personal advantages from the relationship by way of salary, profit, or beneficial personal use of the property may be taxed as we have held. But neither he nor the Government can be taxed for the Government's property interest."

United States could not be included in the measure of the tax base. By analogy it might be anticipated that a contractor cannot be subjected to a use tax to the extent that an interest of the United States is included in the measure of the tax. A judicial differentiation between use and property taxes for the purposes of applying the doctrine of immunities would appear to be justified by neither logic nor expedience: in neither case is an attempt made to tax the possessor merely on the value of his possession; rather the tax is measured by the value of the property, including interests therein owned by the United States.[52] The language of the Court in the *Allegheny County* case appears equally applicable in either case: "We discern little theoretical difference, and no practical difference at all between what was done and what would be done if the machinery were taxed in form." [53]

Such a conclusion is supported by the fact that the use taxes here considered actually impose a tax on the property of the United States whether denominated an "excise" or a "property" tax. The basic determination to be made in ascertaining whether a tax is actually levied upon property is to analyze the "bundle of rights" comprising all the incidents of ownership.[54] It is clear that taxes on certain specific incidents of ownership are not taxes on the property itself; [55] but a tax which is imposed upon the exercise of any of the incidents of ownership is obviously directed to the entire "bundle of rights," and has

52. There is, of course, a practical distinction in the use to which the property of the United States is put. In the *Allegheny County* case the property was leased to expedite production of materials of war for the United States; whereas disposal of surplus property by lease or with retention of title does not present a case of similar national interest. Logically, however, questions of degree as to how property owned by the United States is used should make little difference; as pointed out in Van Brocklin v. Tennessee, 117 U. S. 151, 158 (1886): "The United States do not and cannot hold property, as a monarch may, for private or personal purposes. All the property and revenues of the United States must be held and applied, as all taxes, duties, imposts and excises must be laid and collected, 'to pay the debts and provide for the common defense and general welfare of the United States.' Constitution, art. 1, sect. 8, cl. 1; Dobbins v. Erie County Commissioners, 16 Pet. 435, 448." See, to the same effect, Federal Land Bank v. Bismarck Lumber Co., 314 U. S. 95, 102 (1941). However, the Court has adopted a potentially conflicting rationale in holding that a corporation organized by the United States under state law could not be subjected to state property taxes, emphasizing that "This is not like the case of a corporation having its own purposes as well as those of the United States and interested in profit on its own account." Clallam County v. United States, 263 U. S. 341, 345 (1923).

53. 322 U. S. 174, 185 (1944). It may be noted that here, in distinction to the *Curry* case, 314 U. S. 14 (1941), the question of *ownership* of the property taxed was a basic issue in the case.

54. Henneford v. Silas Mason Co., 300 U. S. 577, 582 (1937); Bromley v. McCaughn, 280 U. S. 124, 136 (1929); Dawson v. Kentucky Distillers & Warehouse Co., 255 U. S. 288, 294 (1921).

55. Gregg Dyeing Co. v. Query, 286 U. S. 472 (1932); Nashville C. & St. L. Ry. v. Wallace, 288 U. S. 249 (1933); Billings v. United States, 232 U. S. 261 (1914); Bowman v. Continental Oil Co., 256 U. S. 642 (1921).

repeatedly been classified as a tax upon the property itself.[56] In general, the so-called "use" taxes under consideration are taxes of the latter kind: they are not merely taxes upon utilization or consumption of property, but operate upon the exercise of any of the incidents of ownership over the property by the person taxed.[57]

The use taxes in question may also be considered taxes on property under the accepted doctrine that a tax falling upon an owner of property merely because he is the owner is a tax on property.[58] In the cases here considered the tax falls on the taxpayer (whether he be the person holding legal title or one designated by statute as owner because exercising the incidents of ownership) simply because he exercises a right which accrues to him as owner, even if such a right be no more than mere possession of property within the taxing jurisdiction.[59] Thus it appears that mere ownership is the occasion for the tax and that the tax is in fact upon the property of the United States.

V. Intergovernmental Immunities and Procedures for Disposition of Real Property

It is well established that the immunity of real property from taxation ceases as soon as title to the property passes from the United States,[60] notwithstanding that the United States retains a beneficial

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56. See cases cited *supra* note 54. The result is further supported by a determination that a tax on the right of withdrawal of whiskey from storage is a tax on the whiskey itself. Dawson v. Kentucky Distillers & Warehouse Co., 255 U. S. 288 (1921). Where some use taxes have been attacked as violative of state constitutional restrictions relating to ad valorem property taxes, state courts have, however, sustained the levies. Douglas Aircraft Co., Inc. v. Johnson, 13 Cal. (2d) 545, 90 P. (2d) 572 (1939); National Linen Service Corp. v. State Tax Commission, 237 Ala. 360, 186 So. 478 (1939); Banner Laundering Co. v. Grundy, 297 Mich. 419, 298 N.W. 73 (1941); Spokane v. State, 198 Wash. 682, 89 P. (2d) 826 (1939). The *Douglas* decision was reached on the ground that the use tax there in question was unlike standard property taxes in that it did not bear some of the historic attributes of such taxes: "It does not apply to the use of property to be resold. It does not recur annually, but falls due only once. It is not imposed on a fixed day although it is imposed quarterly . . ." *Id.* at 572. It should be noted that the foregoing distinctions were rejected by the United States Supreme Court in considering constitutional limitations affecting state taxation of materials in interstate commerce. Henneford v. Silas Mason Co., 300 U. S. 577, 582 (1937). These formal distinctions seem to be equally inapplicable in determining whether a state or local tax on (or measured by) property owned by the United States is violative of the doctrine of intergovernmental immunity from taxation.

57. See statutes cited *supra* note 50.

58. Bromley v. McCaughn, 280 U. S. 124, 137 (1929); Dawson v. Kentucky Distillers & Warehouse Co., 255 U. S. 288, 294 (1921).

59. As indicated *supra* note 56, some state courts have, however, held that state use taxes are not ad valorem property taxes within constitutional restrictions.

60. Deffeback v. Hawke, 115 U. S. 392 (1885); Tucker v. Ferguson, 22 Wall. 527 (U. S. 1874); Witherspoon v. Duncan, 4 Wall. 210 (U. S. 1866); Carroll v. Safford, 3 How. 441 (U. S. 1845).

interest or right of reversion.[61] It is equally clear that where the United States has legal title to real property, and no other party has an interest therein, such property is not subject to taxation by state and local taxing jurisdictions.[62]

Pursuant to the requirement of the Act that monopolistic practices should be discouraged,[63] federally-owned real estate, or interests therein, may be transferred with reservation of title in the United States as a means of control over use of the property.[64] This is particularly anticipated in industries, such as aluminum and synthetic rubber, where the major portion of plant facilities are owned by the United States. Retention of title by the United States as a means of insuring payment of the purchase price by vendees of doubtful solvency may also be anticipated as a matter of business practice.

The taxability of such property depends upon the nature of the title reserved by the United States. As long as the United States has only bare legal title, all beneficial interests being held by a transferee in possession, the transferee has what is described as equitable "title" and the whole value of the property is taxable to him.[65] The cases,

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61. Baltimore Shipbuilding Co. v. Baltimore, 195 U. S. 375, 382 (1904), in which title to the property was held by the transferee, where it was said: "It would be a very harsh doctrine that would deny the right of the states to tax lands because of a mere possibility that they might lapse to the United States." See People *ex rel.* Donner Union Coke Corp. v. Burke, 204 App. Div. 557, 198 N. Y. Supp. 601 (4th Dep't 1923), citing Wisconsin Railroad Co. v. Price County, 133 U. S. 496, 507 (1890), to establish that even where title had been transferred from the United States to the taxpayer the property could not be taxed so long as the United States held a present interest therein, and distinguishing the cited case because there the interest of the United States in the property was remote, arising only out of a condition subsequent, breach of which would vest title in the United States.

62. It is undisputed that property in which legal title and full beneficial interest is held by the United States is not subject to state and local taxation. The principle follows as a matter of course from McCulloch v. Maryland, 4 Wheat. 316 (1819), and was vigorously asserted in Van Brocklin v. Tennessee, 117 U. S. 151 (1886), in which many earlier decisions of state and federal courts were cited. The principle has often been reaffirmed. United States v. Allegheny County, 322 U. S. 174 (1944); Mullen Benevolent Corp. v. United States, 290 U. S. 89 (1933); City of New Brunswick v. United States, 276 U. S. 547 (1928); Lee v. Osceola Improvement Dist., 268 U. S. 643 (1925); Clallam County v. United States, 263 U. S. 341 (1923); Irwin v. Wright, 258 U. S. 219 (1922); Wisconsin R. R. v. Price County, 133 U. S. 496 (1890).

63. SURPLUS PROPERTY ACT § 2.

64. Under § 15(a) of the Act disposition of real property of the United States may be consummated upon such terms and conditions as the disposal agency deems proper.

65. City of New Brunswick v. United States, 276 U. S. 547 (1928); Union Oil Co. v. Smith, 249 U. S. 337 (1919); Bothwell v. Bingham County, 237 U. S. 642 (1915); Sargent v. Herrick, 221 U. S. 404 (1911); Elder v. Wood, 208 U. S. 226 (1908); Hussman v. Durham, 165 U. S. 144 (1897); Winona & St. Peter Land Co. v. Minnesota, 159 U. S. 526 (1895); Wisconsin R. R. v. Price County, 133 U. S. 496 (1890); Northern Pacific R. R. v. Traill County, 115 U. S. 600 (1885); Forbes v. Gracey, 94 U. S. 762 (1876); Tucker v. Ferguson, 22 Wall. 527 (U. S. 1874); Railroad Co. v. McShane, 22 Wall. 444 (U. S. 1874); Railway Co. v. Prescott, 16 Wall. 603 (U. S. 1872); Witherspoon v. Duncan, 4 Wall. 210 (U. S. 1866); Carroll v. Safford, 3 How. 441 (U. S. 1845).

however, do not satisfactorily decide what nature or volume of beneficial interest is necessary to establish equitable "title" so as to subject a private person in possession to a tax on the property.

For example, immunity from taxation has been denied where, under land patent procedures, nothing remained to be done to perfect the claim (to title) of an entryman having beneficial use of the property to the exclusion of the United States; [66] nor has immunity been granted where a railroad's right to a patent on public lands was complete, although the patent had not been issued.[67] In the same way the right of a discoverer of minerals has been held to be taxable property even though title to the land was in the United States.[68]

Conversely, it has been held that where a private party in possession had not completed payments to the United States for improvements on reclaimed property to which the United States had title, the property was not subject to taxation under the theory that the private person had equitable "title." [69] Nor is the transferee of terminable leasehold interests a holder of equitable "title." [70] And where payments were

66. Bothwell v. Bingham County, 237 U. S. 642 (1915); Sargent v. Herrick, 221 U. S. 404 (1911); Wisconsin R. R. v. Price County, 133 U. S. 496 (1890); Deffeback v. Hawke, 115 U. S. 392 (1885); Witherspoon v. Duncan, 4 Wall. 210 (U. S. 1866); Carroll v. Safford, 3 How. 441 (U. S. 1845).

67. Railway Co. v. McShane, 22 Wall. 444 (U. S. 1874); Railway Co. v. Prescott, 16 Wall. 603 (U. S. 1872). Reference has also been made to the rule in cases involving express Congressional permission to tax. Northern Pacific Ry. v. Myers, 172 U. S. 589 (1899); Northern Pacific R. R. v. Traill County, 115 U. S. 600 (1885).

68. Union Oil Co. v. Smith, 249 U. S. 337 (1919); Elder v. Wood, 208 U. S. 226 (1908); Forbes v. Gracey, 94 U. S. 762 (1876).

69. Irwin v. Wright, 258 U. S. 219, 229 (1922). The Court distinguished the earlier cases holding property taxable where final certificates had been issued, mining claims were involved, or express authority to tax was given by statute. It was also said: "Moreover, the confusion caused in the past by the taxation, when specifically permitted, of indefinite and inchoate interests of the beneficiaries of government land grants, should prevent an inference of the congressional intention to depart from the rule requiring an equitable title in the entryman before state taxation, unless a purpose to permit earlier taxation is express or strongly implied . . . ." *Id.* at 232.

70. United States v. Allegheny County, 322 U. S. 174, 186–7 (1944):

> "Mesta has some legal and beneficial interest in this property. It is a bailee for mutual benefit. Whether such a right of possession and use in view of all the circumstances could be taxed by appropriate proceedings we do not decide. Its leasehold interest is subject to some qualification of the right to use the property except for gun manufacture, is limited to the period it engages in such work, and is perhaps burdened by other contractual conditions. We have held that where private interests in property were so preponderant that all the Government held was a naked title and a nominal interest, the whole value was taxable to the equitable owner. *Northern Pacific R. Co. v. Myers*, 172 U. S. 589; *New Brunswick v. United States*, 276 U. S. 547. But that is not the situation here, and the State has made no effort to segregate Mesta's interest and tax it. The full value of the property, including the whole ownership interest, as well as whatever value proper appraisal might attribute to the leasehold, was included in Mesta's assessment."

made under an option to purchase property from the government, it was held that the property was not taxable to the vendee until he was entitled to receive a deed from the United States, at which time it was said equitable "title" passed to him.[71]

In view of the intent of Congress, as ascertained from the legislative history of the Surplus Property Act,[72] it appears reasonable to conclude that, at least in transfers of real property where title as well as a beneficial interest in property remains in the United States, the property may not be taxed as such. Even in the absence of the legislative history of the Act the cases seem to establish that no equitable "title" is held by one whose interest in the property is subject to an obligation for payment of moneys to, or reservation of control over the property by, the United States.

Some current statutes, however, purport to tax the *interest* of a taxpayer in real property, as separate and distinct from the real property itself.[73] It is clear from *United States v. Allegheny County* that where the United States has legal title plus a portion of the beneficial interest, the value of the Government's interest may not be used in the measure of the tax to be paid by the private person holding the remainder of the beneficial interest.[74] The question of whether the beneficial interest of a private person in realty may be taxed by state and local taxing units when the United States holds title to the property was expressly reserved in that case. It is established, however, that where the United States has a right of reversion for breach of contract, or holds a limited right of user, power to foreclose a tax lien against the private person in possession is not such a potential interference with the United States as to nullify the application of a tax.[75] This reasoning may be applied to sales of surplus property where title is retained by the United States simply to insure payment of the purchase price.

It is doubtful, therefore, that the interest of a private person in possession is immune from taxation where the only interest of the United States in real property is a right to payment under a contract

71. Baltimore Shipbuilding Co. v. Baltimore, 195 U. S. 375 (1904). The New York Supreme Court has also held that a transferee in possession of real property of the United States under a contract for deed reserving title in the transferor until payments under the contract have been completed does not have "equitable title" to the property.

72. Section 22(j) of the Senate bill (S. 2065) provided that property might be taxed after a purchaser took possession thereof, notwithstanding that title still remained in the United States, but that, in the event of reversion of all interests to the United States prior to passage of title, all liens for taxes should be extinguished. This section was eliminated when the bill was returned with approval of House and Senate conferees. 90 Cong. Rec., Sept. 19, 1944, at 8013.

73. *E.g.*, CALIF. REV. AND TAXATION CODE (Deering, 1944) §§ 103, 104; MASS. GENERAL LAWS (Ter. ed. 1932) c. 59, § 11.

74. United States v. Allegheny County, 322 U. S. 174 (1944).

75. Baltimore Shipbuilding Co. v. Baltimore, 195 U. S. 375 (1904); *cf.* United States v. Rickert, 188 U. S. 432, 438 (1903).

for sale secured by retention of title. This conclusion is supported by the general trend of recent decisions restricting intergovernmental immunities.[76] On the other hand, where the United States, for reasons of national policy, retains extensive control of the operations of a private person in possession of federally-owned property, the validity of state and local taxes is more doubtful.

Other tax problems may well impede disposition of real property by the United States. The statutory waiver of the immunity of the Reconstruction Finance Corporation and its subsidiaries may raise a problem when that corporation acts as a disposal agency for realty owned by an agency exempt from tax. However, since there is no provision in the Act for passage of title from the owning to the disposal agency, and since the benefits of sale do not accrue to the disposal agency,[77] it seems clear that the Reconstruction Finance Corporation acts in such cases only as agent in the sale of surplus real property. Hence, any title or interest reserved to the United States in such transfers is retained by the owning agencies rather than by the disposal agency and is probably exempt from taxation in spite of the waiver of immunity of the Reconstruction Finance Corporation.

VI. Contract Termination Procedures: Intangible Taxes

Problems concerning the imposition of ad valorem taxes measured by moneys owed or advanced to contractors by the United States may become increasingly important. Whether moneys advanced in controlled accounts by the United States to the contractors are taxable to the contractors will not, of course, become important under contract termination procedures.[78] However, substantial sums will be owing to the contractors by the United States as a result of contract terminations. In such cases contractors may obtain loans, guaranteed in part by the United States, on the basis of their termination claims. Consequently they may, for indefinite periods of time, hold credits for sums owed to them by the United States at the same time owing a substantially equal sum of money to public or private financing organizations for moneys borrowed.

The immunity of such credits from taxation by state and local

76. See note 20 *supra.*

77. Surplus Property Act § 30.

78. In United States v. Allegheny County, 322 U. S. 174, 188-89 (1944), the question of taxability of such advances, while discussed in a dictum, appears to have been definitely resolved:

> "A State may tax personal property and might well tax it to one in whose possession it was found, but it could hardly tax one of its citizens because of moneys of the United States which were in his possession as Collector of Internal Revenue, Postmaster, Clerk of the United States Court, or other federal officer, agent, or contractor. We hold that Government-owned property, to the full extent of the Government's interest therein, is immune from taxation, either as against the Government itself or as against one who holds it as a bailee."

jurisdictions therefore becomes important. With respect to subcontractors, the Act contemplates that primary liability for payment shall rest upon the prime contractor and not upon the United States; in such an event the question of taxability of the claim against the United States will not arise with respect to the subcontractor unless the United States has specificially undertaken to discharge his claim.[79]

The power of a state to assess property taxes against private parties, measured by the value of open accounts owed to them by the United States, was supported by the United States Supreme Court in *Smith v. Davis*.[80] In that case the Court upheld the power of a state to impose such taxes, limiting the immunity from taxation of obligations owed to private parties by the United States to cases in which the credit instrument was characterized by:

> "(1) written documents, (2) the bearing of interest, (3) a binding promise by the United States to pay specified sums at specified dates and (4) specific Congressional authorization, which also pledged the faith and credit of the United States in support of the promise to pay." [81]

Under these circumstances it seems obvious that mere claims against the United States for amounts due the claimant by reason of contract termination would be subject to state and local property taxation measured by the value of the claims.

Conclusion

An understanding of tax liability generally, and of the scope of the immunities doctrine in particular, by government representatives, contractors, state and local tax officials and consumers is a basic element in facilitating prompt and effective disposition of surplus property and termination of contracts. Further, a determination of what procedures in contract termination and property disposition will best serve the national interest from a tax standpoint can obviously be made only after analysis of the impact of the immunities doctrine on procedures under study. For example, it is of obvious importance, in determining whether the United States should collect sales and use taxes for the states, to know that legal responsibility for such collection cannot be imposed by the states or disposal agencies and that, while sales of termination inventory by a contractor to private persons are taxable where the property is owned by him, the same transaction is tax exempt where property is owned by the United States. It is hoped that the foregoing discussion may serve to crystallize the scope of the immunities doctrine in these and similar problems incidental to contract termination and disposition of surplus property.

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79. As authorized by Pub. L. 395, 78th Cong., 2d Sess. (1944) § 8(d).
80. 323 U. S. 111 (1944).
81. *Id.* at 115.