the period of accrual should commence with the day the tax lien attaches under state law. The fact that the parties in the principal case prorated the taxes with reference to the period beginning with the date of assessment[20] and that such appears to be the common accounting practice[21] lends support to a rule that the period of ratable accrual shall begin with the date of assessment.

Taxation—Property Subject to Taxation—Validity of State Tax on Dividends Declared by Foreign Corporations—[Federal].—The plaintiff, a Delaware corporation doing a nation-wide business, declared a dividend payable at its main office in New York out of general corporate funds. The state of Wisconsin assessed a tax on the corporation pursuant to a state statute imposing a tax on all corporations "for the privilege of declaring and receiving dividends out of income derived from property located and business transacted in the state."[1] The tax of $2\frac{1}{2}$ per cent was to be deducted by the corporation from dividends payable to both resident and non-resident stockholders.[2] The plaintiff filed objections to the assessment claiming the statute was unconstitutional. On an appeal from a judgment of the trial court sustaining the assessment, the Wisconsin Supreme Court held the tax invalid, one judge dissenting.[3] On certiorari, to the United States Supreme Court, *held*, that the statute is to be construed as levying a supplementary income tax on the income of the corporation paid out in dividends, and is justified in view of the benefits conferred by the state on the corporation. Reversed and remanded. *Wisconsin v. J. C. Penney Co.*[4]

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exempt only income items. However, the characteristic difference between capital and income items is that the former is computed as of a given instant, the latter with reference to a period of time. 1 Paul and Mertens, Federal Income Taxation § 5.06 (1934). The court's theory makes the taxes less of a capital item only in that it makes the taxes accrue twice rather than once a year.

[20] It appears that in Cum. Bull. of Treas. Dept. Rul. 1939–1 at 168, the taxpayer-purchaser there involved also prorated the taxes from the date of assessment to the date of purchase. Whether the date of assessment shall be taken to mean the date as of which the value of the property is determined and the taxpayer lists his property or the date when the state tax commissioners fix the final values is of secondary importance. The former date is at present chosen by the Commissioner of Internal Revenue for determining when the taxpayer's liability for the tax of the fiscal year then beginning accrues. Cum. Bull of Treas. Dept. Rul. 1939–2, at 82; 1938–1, at 132; X-2, at 142 (1931).

[21] 1 Paul and Mertens, Federal Income Taxation § 11.74 (1934); United States v. Anderson, 269 U.S. 422 (1926).

[1] Wis. Stat. (1939) c. 71.60, § 3(1). The amount of corporate income attributable to Wisconsin is determined in the same manner as under the provisions of the Wisconsin income tax law. Ibid., § 3(4). See Wis. Stat. (1937) c. 71.02(3)(d).

[2] Wis. Stat. (1937) c. 71.60, § 3(1). The rate has since been raised to 3 per cent. Wis. Stat. (1939) c. 71.60, § 3(1).

[3] J. C. Penney Co. v. Wisconsin, 233 Wis. 286, 289 N.W. 677 (1940), noted in 24 Minn. L. Rev. 711 (1940).

[4] 61 S. Ct. 246 (1940). Four justices dissented. The court similarly disposed of two companion cases. Wisconsin v. Minnesota Mining & Mfg. Co., 61 S. Ct. 253 (1940); Wisconsin v. F. W. Woolworth Co., 61 S. Ct. 395 (1940). Petitions for rehearing were denied in all three cases, 61 S. Ct. 444 (1940).

The validity of the "Privilege Dividend Tax" as applied to foreign corporations was first treated by the Wisconsin Supreme Court in *State ex rel. Froedtert G. & M. Co. v. Tax Com'n.*[5] The court upheld the tax as an excise upon a transaction involving funds which, because of their local derivation, retained a "constructive situs" in the state. Two years later the United States Supreme Court in *Connecticut Gen'l Life Ins. Co. v. Johnson,*[6] declared invalid a California franchise tax on corporations licensed to do business in the state, which included in its measure reinsurance premiums received from out-of-state transactions that dealt solely with California risks on which the insurance premiums were paid in California. The court reasoned that a state may not levy an excise tax on transactions beyond its borders since the power of the state to regulate the privilege of the corporation to do business within the state does not extend to such transactions, regardless of the local source of the property involved in the extraterritorial transaction. By construing the "Privilege Dividend Tax" as an excise, the Wisconsin Supreme Court found the *Connecticut General* case authority for holding the tax invalid in the instant case since the dividends were declared in New York and the privilege of declaring dividends was granted to the corporation by Delaware, the state of incorporation, and not by Wisconsin.

If the tax were construed as a property tax the question of whether the income resulting from Wisconsin operations retained a "constructive situs" in Wisconsin would be relevant.[7] Neither the Wisconsin Supreme Court nor the United States Supreme Court adopted this interpretation of the statute however. Recent decisions indicate that local derivation of intangibles without more is not sufficient to give such intangibles a situs within the state for the purpose of property taxation.[8]

The United States Supreme Court interpreted the dividend tax as supplementary to the Wisconsin income tax program. Since it is well-settled that a state has jurisdiction to tax a foreign corporation for income earned within its borders,[9] the tax when so construed meets no constitutional barriers. In view of the provision that the amount of the tax is to be deducted from the dividends disbursed to the stockholders, however, it would appear that the income of the stockholder rather than the income of the corporation is being taxed. While a state may constitutionally tax the income of a non-resident individual earned within its borders,[10] this principle cannot be extended to cover non-resident stockholders of foreign corporations without disregarding the cor-

[5] 221 Wis. 225, 265 N.W. 672, 267 N.W. 52 (1936).

[6] 303 U.S. 77 (1938), noted in 86 U. of Pa. L. Rev. 554 (1938).

[7] See Froedtert G. & M. Co. v. Tax Com'n, 221 Wis. 225, 235, 265 N.W. 672, 676 (1936); Graniteville Mfg. Co. v. Query, 283 U.S. 376 (1931); People ex rel. Hatch v. Reardon, 184 N.Y. 431, 448, 77 N.E. 970, 975 (1906), aff'd 204 U.S. 152 (1907).

[8] Newark Fire Ins. Co. v. State Board, 307 U.S. 313 (1939); Connecticut Gen'l Life Ins. Co. v. Johnson, 303 U.S. 77 (1938); cf. Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936); Smith v. Ajax Pipe Line Co., 87 F. (2d) 567 (C.C.A. 8th 1937) where a business situs for intangibles at a place other than the owner's domicile was declared to have been established.

[9] Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920); United States Glue Co. v. Oak Creek, 247 U.S. 321 (1918). Wisconsin imposes a general corporate income tax. Wis. Stat. (1939) c. 71.01.

[10] Shaffer v. Carter, 252 U.S. 37 (1920). Where the income tax is levied on the earnings of a non-resident employee within the taxing state, provision may validly be made for collecting the tax from the employer. Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920).

porate entity.[11] The issue of whether the tax is levied against the stockholder or against the corporation is not clearly raised where, as in the present case, a corporation has only one class of stock outstanding.[12] Where, however, a corporation has a class of preferred stock outstanding the issue becomes clearer. If the tax is declared to be one on the corporation, the provision that the tax "shall be deducted and withheld from such dividends payable to residents and non-residents by the payor corporation"[13] must be construed as requiring deduction of the tax before final allocation of the dividends to the various classes of stock, so that the preferred shareholder's dividend will not be diminished.[14] Under such an interpretation the corporation and not the shareholder would be entitled to deductions under both state and federal income tax laws. If, however, the proper interpretation of this section requires the tax to be deducted after dividends have been allocated to the various classes, the tax must be deducted from the preferred dividends as well as from the common. A ruling of the United States Treasury Department so construed the tax and decided that the stockholder and not the corporation was entitled to the income tax deduction.[15] It would seem anomalous that Wisconsin should be permitted to disregard the corporate entity for the sake of imposing this tax, while at the same time continuing to recognize the corporate entity in other tax measures.[16]

To discover the purpose of this tax it is helpful to consider it in the light of the Wisconsin tax structure in which it is placed. Wisconsin imposes an income tax on all corporations doing business in the state measured by the amount of their earnings attributable to Wisconsin.[17] Wisconsin exempts from personal income taxation dividends paid to the shareholder by corporations earning 50 per cent or more of their net income in Wisconsin.[18] Until the imposition of the "Privilege Dividend Tax" stockholders of Wisconsin corporations paid no income tax on dividends although dividends paid to resident stockholders of foreign corporations were taxed. With the growing need for additional revenue, inclusion of dividends of domestic corporations as income subject to personal taxation became advisable. But if this were done, investment in local corporations would lose tax advantages over investment in foreign corporations. For this reason it appears that Wisconsin may have wished to impose an additional tax on the dividend income of resident stockholders of foreign corporations. By imposing a tax on dividends payable to non-resident stockholders of both local and foreign corporations the state could tap a source of revenue that would otherwise be lost, and at the same time spread the tax among all who ultimately profited from the protection

[11] Cases indicate that legislative attempts to trace ownership of corporate property to the shareholder for the purpose of imposing a tax on the shareholder are invalid. Rhode Island Trust Co. v. Doughton, 270 U.S. 69, 83 (1926); Domenech v. United Porto Rican Sugar Co., 62 F. (2d) 552 (C.C.A. 1st 1932), cert. den. 289 U.S. 739 (1933); Klein v. Board of Tax Supervisors, 282 U.S. 19 (1930); Beidler v. South Carolina Tax Com'n, 282 U.S. 1 (1930).

[12] Brief of respondent at 14.

[13] Wis. Stat. (1939) c. 71.60, § 3(3).

[14] Cf. Harding, State Jurisdiction to Tax Dividends and Stock Profits to Natural Persons, 25 Calif. L. Rev. 139, 158–63 (1937).

[15] Brief of respondent in support of petition for rehearing at 17; Income Tax Unit 3002 Cumulative Bulletin, XV-2, p. 142 (1936).

[16] Note 11 supra.

[17] Wis. Stat. (1939) c. 71.01.

[18] Wis. Stat. (1939) c. 71.03(5).

afforded the corporate enterprise by Wisconsin. This result could have been achieved, however, within the framework of prior decisions by providing that the tax be measured by the amount of dividends declared but that payment be made out of corporate surplus and need not be deducted from dividends.[19] By upholding the tax in its present form the Supreme Court has again indicated its tendency to refuse to invalidate any state tax which is reasonably related to benefits conferred by the state as long as discriminatory burdens are not imposed on interstate commerce.[20]

[19] Educational Films Corp. v. Ward, 282 U.S. 379 (1931); Ford Motor Co. v. Beauchamp, 308 U.S. 331 (1939). It is concededly proper for a state to use as a measure of taxation property which is itself not subject to taxation. Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412 (1937). The fact that the tax is imposed only after a transaction occurs outside the state is not a bar. Continental Assurance Co. v. Tennessee, 61 S. Ct. 1 (1940); Maxwell v. Bugbee, 250 U.S. 525 (1919).

[20] Curry v. McCanless, 307 U.S. 357 (1939); Graves v. Elliot, 307 U.S. 383 (1939); Great Atlantic & Pacific Tea Co. v. Grosjean, 301 U.S. 412 (1937).