

Cite as 153 F.Supp. 515

limited to a certain percent of "taxable income". "Taxable income" is defined by Section 63(a) 26 U.S.C.A. § 63(a) for all income tax purposes as gross income less deductions, except where the standard deduction is elected. Unless there is some compelling reason to change the general definition of "taxable income", the dividend credit is plainly limited to the specified percent of gross income less deductions, or "taxable income".

The regulation under attack, Treasury Regulator, § 1.34-2, provides that where the alternative tax on capital gains is imposed under Section 1201(b), 26 U.S.C.A. § 1201(b), "taxable income" in the dividend credit limitation means "taxable income reduced by" 50% of capital gains. However, the alternative tax provision does not redefine "taxable income" nor does it indicate that "taxable income" should be reduced by capital gains in computing the dividend credit limitation. Thus, the plain language of the statute does not provide for the reduction of "taxable income" required by the regulation.

Furthermore, Congress intended no such special reduction of "taxable income" in computing the dividend credit limitation where the alternative tax applies. The legislative history of the 1954 Code shows that Congress intended the general definition of "taxable income" in Section 63 to be applied in this situation. The Report of the House Ways and Means Committee states that a credit may be applied against the alternative tax even where it is computed solely upon capital gains. In a parallel situation affecting corporations instead of individuals, Congress has expressly indicated that it does not intend that alternative tax section to require "taxable income" to be reduced by capital gains, when the dividend received deduction limitation based on "taxable income" is computed.

[1, 2] Since the regulation attacked is in direct conflict with the statutes involved, and is contrary to the clearly expressed intent of Congress, it must be declared invalid. The statutes must be

construed as taxpayers contend, and they are entitled to recover as alleged.

In my opinion plaintiffs are entitled to judgment in an amount to be computed by the Internal Revenue Service in accordance with this order, together with interest thereon, and

It is so ordered.



CITY OF THIBODAUX, Plaintiff,

v.

LOUISIANA POWER & LIGHT COMPANY, Defendant.

Civ. A. No. 6444.

United States District Court

E. D. Louisiana,

New Orleans Division.

June 21, 1957.

Proceedings by city seeking to condemn facilities owned and operated by private power company in section of city recently acquired by extension of city limits. The District Court, J. Skelly Wright, J., held that in view of fact that there was no state interpretation of statute under which city sought to condemn facilities, action would be stayed until Supreme Court of Louisiana had been afforded an opportunity to interpret statute under declaratory judgment procedure.

Ordered accordingly.

1. Eminent Domain ¶8

Although power of eminent domain inheres in the United States and the several states as an incident to their sovereignty, grant of that power by the sovereigns to one of their subdivisions will never pass by implication.

2. Eminent Domain \Leftrightarrow 58

When power of eminent domain is granted by state to one of its subdivisions, extent to which it may be exercised is limited to the express terms or clear implication of the statute in which the grant is contained.

3. Action \Leftrightarrow 69(6)

Where Louisiana municipality, operator of a municipally owned electric utility plant, brought action in federal court based on diversity of citizenship to condemn facilities owned by private power company in that section of city recently acquired by extension of city limits, and right of city to condemn was questionable under Louisiana statute which had never been interpreted by the state courts, further proceedings would be stayed until Supreme Court of Louisiana had been afforded an opportunity to interpret statute in a declaratory judgment proceeding. LSA-R.S. 13:-4231 et seq., 19:101 et seq.; LSA-C.C. art. 699.

Wollen J. Falgout, Thibodaux, La.,
Theo F. Cangelosi, Baton Rouge, La.,
Louis Claiborne, New Orleans, La., for
plaintiff.

Harvey Peltier, Donald Peltier, Thibodaux, La.,
Monroe & Lemann, Andrew
P. Carter, J. Raburn Monroe, Melvin

1. Jurisdiction in this case is based on diversity of citizenship. It was removed by the defendant from the state court.

2. LSA-R.S. 19:101 et seq. LSA-R.S. 19:101 reads:

"Any municipal corporation of Louisiana may expropriate any electric light, gas, or waterworks plant or property whenever such a course is thought necessary for the public interest by the mayor and council of the municipality. When the municipal council cannot agree with the owner thereof for its purchase, the municipal corporation through the proper officers may petition the judge of the district court in which the property is situated, describing the property necessary for the municipal purpose, with a detailed statement of the buildings, machinery, appurtenances, fixtures, improvements,

Schwartzmann, New Orleans, La., for
defendant.

J. SKELLY WRIGHT, District Judge.

The City of Thibodaux, operator of a municipally-owned electric utility plant, seeks in these proceedings¹ to condemn facilities owned and operated by the Louisiana Power & Light Company in that section of the city recently acquired by extension of the city's limits. Act 111 of 1900² is suggested as containing the authority of the city to condemn these facilities.

In 1900, when Act 111 was passed by the Louisiana Legislature, the operations of utilities serving the cities of the State of Louisiana were usually confined to the territorial limits of the municipalities. In other words, there was a power plant in the city with sufficient conduits and lines emanating therefrom to service the homes and the industry in the area. Act 111 provides that such a plant, with its service accessories, when owned by private utility, may be condemned by the city for the operation of a public utility.

The defendant, Louisiana Power & Light Company, operates a private electric utility system servicing a large part of the state of Louisiana. Electric energy sufficient to service this large area is obtained from two plants operated by the defendant, its Sterlington plant near

mains, pipes, sewers, wires, lights, poles and property of every kind, connected therewith, and praying that the property described be adjudged to the municipality upon payment to the owner of the value of the property plus all damages sustained in consequence of the expropriation. Where the same person is the owner of both gas, electric light, and waterworks plants, or of more than one of any one kind of plant, the municipal corporation may not expropriate any one of the plants without expropriating all of the plants owned by the same person.

"All claims for damages to the owner caused by the expropriation of any such property are barred by one year's prescription, running from the date on which the property was actually taken possession of and used by the political corporation."

Monroe, Louisiana, and its plant at Nine Mile Point near New Orleans, Louisiana. The defendant operates in various parishes and municipalities through franchises obtained from those bodies. It holds a franchise from the Parish of Lafourche covering the area in suit, the area now part of the City of Thibodaux by reason of the recent extension of the city's limits. The question presented by this litigation is whether the City, under Act 111 of 1900, may condemn, not the plant or plants with their accessories operated by the defendant utility, but whether the City may condemn only that portion of the defendant's system, the poles, the lines, etc., which service the newly annexed section of Thibodaux.

[1, 2] Although the power of eminent domain inheres in the United States and several states as an incident to their sovereignty,³ the grant of that power by these sovereigns to one of their subdivisions will never pass by implication, for the power of eminent domain is one of the attributes of sovereignty most fraught with the possibility of abuse and injustice.⁴ When the power is granted by the state to one of its subdivisions, the extent to which it may be exercised is limited to the express terms or clear implication of the statute in which the grant is contained.⁵ A federal court, therefore, before recognizing the exercise of power of eminent domain by a subdivision of a state under a state statute, must make certain that that power has been granted by the state to the subdivision in the form of its attempted exercise.

There are no state court decisions to guide this court in the resolution of this

problem. In fact, it does not appear that any court at any time has ever interpreted Act 111 of 1900. The Attorney General of the State of Louisiana, in an opinion rendered October 10, 1951, in a situation identical to the one in suit, advises that a city may not expropriate a part of a utility system, in an area recently acquired by extension of the city limits, for the purpose of adding those facilities to the presently existing municipally operated utility. While the opinion of the Attorney General, of course, is not binding on this court under *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 nevertheless coming from the chief legal officer of the state whose statute is to be interpreted, it gives this court pause. It points up the fact that no authoritative interpretation of the statute has ever been made by a Louisiana court. And before a federal court, under its diversity of citizenship jurisdiction, ventures into the field of expropriation under authority of a heretofore uninterpreted Louisiana statute, the need of guidance from the Supreme Court of Louisiana becomes clear.

[3] Under these circumstances, the only way this court can determine with certainty whether the power sought to be exercised here exists in the City of Thibodaux is to have a decision of the Supreme Court of Louisiana so holding. An interpretation of the expropriation statute in suit may be obtained through the Louisiana Declaratory Judgment procedure⁶ and this court may act with assurance in these proceedings after such interpretation is obtained.⁷ Further

3. *State of Georgia v. City of Chattanooga*, 264 U.S. 472, 44 S.Ct. 369, 68 L.Ed. 796; *Kohl v. United States*, 91 U.S. 367, 23 L.Ed. 449; *Pollard's Lessee v. Hagan*, 3 How. 212, 44 U.S. 212, 11 L.Ed. 565.

4. *Delaware, Lackawanna & Western R. Co. v. Town of Morristown*, 276 U.S. 182, 48 S.Ct. 276, 72 L.Ed. 523; *City of Richmond v. Southern Bell Telephone and Telegraph Co.*, 174 U.S. 761, 19 S.Ct. 778, 43 L.Ed. 1162; *Orleans-Kenner E. Ry.*

Co. v. Metairie Ridge Nursery Co., 136 La. 968, 68 So. 93; *Breaux v. Bienvenu*, 51 La. Ann. 687, 25 So. 321; *Martin v. Patin*, 16 La. 55; LSA-C.C. Art. 699.

5. See Note 4.

6. LSA-R.S. 13:4231 et seq.

7. See *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 229, 77 S.Ct. 287, 1 L.Ed.2d 267.

proceedings herein, therefore, will be stayed until the Supreme Court of Louisiana has been afforded an opportunity to interpret Act 111 of 1900.



ZENITH RADIO CORPORATION,
Plaintiff,

v.

RADIO CORPORATION OF AMERICA,
General Electric Company, and West-
ern Electric Company, Incorporated,
Defendants.

Civ. A. Nos. 1098, 1247.

United States District Court
D. Delaware.
June 28, 1957.

Action for declaratory judgment of non-infringement, invalidity and unenforceability of defendants' pooled patents, on ground of misuse and violations of the anti-trust laws. Defendants counterclaimed for infringement. The District Court, Leahy, Chief Judge, held that patent number 1,849,651, relating to radio receiver tuning, was valid, but un-infringed.

Order accordingly.

Patents ¶328

Patent number 1,849,651, relating to radio receiver tuning, was valid, but un-infringed.

Arthur G. Connolly and Thomas Cooch (of Connolly, Cooch & Bove), Wilmington, Del., Joseph S. Wright, Francis

W. Crotty and Philip J. Curtis, Chicago, Ill., Willis H. Taylor, Jr., R. Morton Adams, Harold A. Traver and Thomas F. Reddy, Jr. (of Pennie, Edmonds, Morton, Barrows & Taylor), New York City, and Thomas C. McConnell (of McConnell, Lutkin & Van Hook), Chicago, Ill., for plaintiff.

Caleb S. Layton (of Richards, Layton & Finger), Wilmington, Del., Stephen H. Philbin (of Fish, Richardson & Neave), John W. Niels (of Cahill, Gordon, Zachry & Reindel), New York City, and Leonard Lyon, of Los Angeles, Cal., for defendant Radio Corp. of America.

John J. Morris, Jr. (of Morris, James, Hitchens & Williams), Wilmington, Del., Thomas Thacher and Delevan Smith (of Simpson, Thacher & Bartlett), New York City, for defendant General Electric Co.

William Prickett, Wilmington, Del., and John E. F. Wood, Henry R. Ashton, John Farley, Wm. Redin Woodward and Robert H. Ware, New York City, for defendant Western Electric Co., Inc.

LEAHY, Chief Judge.

This action is by Zenith Radio Corporation. Defendants are Radio Corporation of America, Western Electric Company and General Electric Company.¹ The complaint seeks a declaratory judgment of non-infringement, invalidity and unenforceability of defendants' pooled patents on the grounds of misuse and violations of the antitrust laws. Additional complaints were filed by Zenith in Civil Actions Nos. 1098 and 1247. The actions were consolidated for trial.

Defendants counterclaimed in all actions and, after amendments and withdrawals of patents, charged infringement of 23 specific patents in the plaintiff Zenith's manufacture, 11 patents being specified by RCA, 8 being specified by

Supp. 561, 109 F.Supp. 913, 121 F.Supp. 792, 121 F.Supp. 803, 16 F.R.D. 353, and unreported decisions handed down on July 8, 1949, December 12, 1950, November 15, 1955, December 30, 1955, and March 29, 1956.

Additional defendants, American Telephone and Telegraph Company, Bell Telephone Laboratories, Inc. and Westinghouse Electric Corp. have been named but not served.
For pre-trial history of this litigation, see: D.C.Del., 78 F.Supp. 591, 106 F.