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Senator Root Answers Governor Hughes on the Income Tax

Elihu Root's reasons for advocating the proposed income tax amendment and his views on the subject, as contrasted with those of Governor Hughes, who has publicly opposed the amendment, were presented to the New York legislature February 28 in the form of a letter addressed to State Senator Davenport. Senator Davenport presented the letter to the senate, and it also was read in the assembly. The letter is as follows:

"My Dear Senator: Since our conversation last month I have given much consideration to the scope and effect of the proposed income tax amendment to the constitution of the United States.

"Much as I respect the opinion of the governor of the state, I can not agree with the view expressed in his special message of January 5, and, as I advocated in the senate the resolution to submit the proposed amendment, it seems appropriate that I should state my view of its effect. The proposed amendment is in these words:

" 'Article 16. The congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states and without regard to any census of enumeration.'

"The objection made to the amendment is that this will confer upon the national government the power to tax incomes derived from bonds issued by the states or under the authority of the states, and will place the borrowing capacity of the state and its governmental agencies at the mercy of the federal taxing power.

"I do not find in the amendment any such meaning or effect. I do not consider that the amendment in any degree whatever will enlarge the taxing power of the national government or will have any effect except to relieve the exercises of that taxing power from the requirement that the tax shall be apportioned among the several states.

"The effect of the amendment will be, in my view, the same as if it said: 'The United States may lay a tax on incomes without apportioning the tax, and this shall be applicable, whatever the source of the income subjected to the tax,' leaving the question, 'What incomes are subject to national taxation?' to be determined by the same principles and rules which are now applicable to the determination of that question.

"If we were to construe the proposed amendment only by a critical examination of its words, the view upon which the objection is based would be reached by practically cutting the provision in two and reading it as if it read: 'The congress shall have power to lay and collect taxes on incomes from whatever source derived,' without the concluding words. But we are not at liberty to do this.

"The amendment consists of a single sentence and the whole of it must be read together. It expresses but a single idea, and that is that the tax to which it relates must be laid and collected 'without apportionment among the several states and without regard to any census or enumeration,' while the words 'from whatever source derived' are obviously introduced to make the exemption from the rule of apportionment comprehensive and applicable to all taxes on incomes.

"We are not left, however, to a mere critical examination of words. This provision, as Justice Bradley said of the constitution in the legal tender cases, is 'to be interpreted in the light of history and of the circumstances of the period in which it was framed.' Justice Story said of another clause of the constitution, in Briscoe against the Bank of Kentucky (11 Peters 3329):

" 'And I mean to insist that the history of the colonies before and during the revolution and down to the very time of the adoption of the constitution, constitutes the highest and most authentic evidence to which we can resort, to interpret this clause of the instrument; and to disregard it would be to blind ourselves to the practical mischiefs which it was meant to suppress, and to forget all the great purposes to which it was to be applied.'

"This view necessarily must be applied to the proposed amendment if it be adopted. It will be construed in the light of the judicial and political history which led to the proposal and which appears upon the public records of our government.

"What is that history? The constitution of 1787 conferred upon the national government the power of taxation without any limit whatever except that taxes on exports were prohibited. The method of exercising the power, however, was subjected to two limitations—one that imports, duties and excises should be uniform, and the other that direct taxes should be apportioned among the states. The apportionment provisions were as follows:

" 'Article 1. Section 2. Representatives and direct taxes shall be apportioned among the several states which may be included within this union according to their respective numbers, etc. (Amended, but not in this respect, by the Fourteenth amendment.)

" 'Article 1. Section 9. No capitation or other direct tax shall be laid unless in proportion to the census or enumeration before directed to be taken.'

"For more than a hundred years after the adoption of the constitution various tax laws of congress were from time to time brought before the courts upon objections that they imposed direct taxes in violation of the rule of apportionment. The decisions of the courts uniformly sustained these laws, from the Hylton case in 1796, which sustained an unapportionated tax on carriages (3 Dallas 171), to the Springer case in 1880, which sustained an unapportioned tax on incomes (102 U. S. 586).

"In the meantime numerous laws were passed and enforced imposing taxes on incomes without apportionment, and a great part of the means for carrying on the civil war was derived from such taxes.

"In the year 1895, however, an income tax law included in the Wilson tariff act of 1894 was brought before the supreme court in the case of Pollok against the Farmers' Loan and Trust company, and in that case the court decided against the law. The case was heard twice. On the first hearing a majority of the court held that a tax on income derived from real estate must be apportioned as a direct tax, because a tax on real estate itself would be direct, and the judges divided equally as to whether a tax on income derived from personal property must be apportioned. (157 U. S. 429.)

"Upon the second hearing of the case the court, by a majority of five to four, held that a tax upon income derived from personal property must be considered a direct tax and must be apportioned. (158 U. S. 601.) All the judges agreed, however, that taxes on incomes derived from business or occupations need not be apportioned.

"The effect of these decisions was thus described in one of the minority opinions:

" 'But the serious aspect of the present decision is that by a new interpretation of the constitution it so ties the hands of the legislative branch of the government that without an amendment of that instrument, or unless this court at some future time should return to the old theory of the constitution, congress can not subject to taxation—however great the needs or pressing the necessities of the government—either the invested personal property of the country, bonds, stocks, and investments of all kinds, or the income arising from the renting of real estate, or from the yield of personal property, except by the grossly unequal and unjust rule of apportionment among the states. Thus undue and disproportioned burdens are placed upon the many, while the few are safely intrenched behind the rule of apportionment among the states on the basis of responsibility for the support of the government ordained for the protection of the rights of all.

"It was so evidently impossible to collect an income tax by apportionment among the states according to population that the general judgment of the country confirmed the opinion that the decision in the Pollok case had practically taken away from congress a power of vital importance to the general government—a power the exercise of which had, at least in one time of peril, proved essential to the nation's life.

"The attention of the country was sharply called to the need of more government revenue for the first time after the Pollok case by the decrease of customs and internal revenue receipts and the rapidly mounting deficit which followed the financial panic of 1907, and in the extraordinary session of congress which began March 15, 1909, when the revised tariff came into the senate, an amendment to the bill was introduced reproducing in substance the old income tax provisions of 1894 which the supreme court had held to be invalid both as to income derived from real estate and as to income derived from personal property.

"The avowed and necessary effect of including such provisions in the new tariff law would be to present again to the supreme court the same questions which had been decided in the Pollok case, and to challenge a reversal of their decision. Thereupon the resolution for the submission of this amendment was introduced in the senate and was passed by congress.

"The proposal followed the suggestions of the supreme court in the Pollok case. The evil to be remedied was avowedly and manifestly the incapacity of the national government, resulting from the decision that income practically could not be taxed when derived either from real estate or from personal property, although it could be taxed when derived from business or occupation. The terms of the amendment are apt to cure that evil and to take away from the different classes of income considered by the court a practical immunity from taxation based upon the source from which they were derived.

"There was no question in congress or in the courts, or in the country about the taxation of state securities. No one claimed that the inability of the general government to tax them was an evil. The inability to tax them did not arise from the terms of the constitution, but from the fact that being necessary instruments of carrying on other and sovereign governments they were not the proper subject of national taxation, and that, therefore, no provisions of the constitution, however wide the scope of their language, could be held to apply to such securities or to the income from them. Judge Cooley, in his work on constitutional law, says:

" 'The power to tax, whether by the United States or by the states, is to be construed in the light of and limited by the fact that the states and the union are inseparable and that the constitution contemplates the perpetual maintenance of each with all its constitutional powers, unembarrassed and unimpaired by any action of the other. The taxing power of the federal government does not, therefore, extend to the means or agencies through or by the employment of which the states perform their essential functions, etc.'

"This rule or construction has been maintained for generations. It is undisputed; it was referred to with approval by the justices who wrote and delivered the opinions in the Pollok case both for and against the judgment. It has been declared again and again by the supreme court to be not open to question. It is a rule of construction just as controlling in defining the scope of the proposed amendment as it is in defining the scope of the existing provisions.

"Under it, from the earliest times of our government, the apparently unlimited taxing power conferred by the terms of the constitution has been held not to apply to the instrumentalities of the state. Under it acts of congress which, by their expressed terms appeared to include instrumentalities of state government, have uniformly been held not to include them. This uniform, long established and indisputable rule applied to the construction of our constitution—a rule which has been declared to be essential to a continuance of our dual system of government—forbids that the words of that instrument conferring the power of taxation shall be deemed to apply to anything but the proper subjects of national taxation. Under it we are forbidden to apply the words 'from whatever source derived' in the proposed amendment to any of the instrumentalities of state government.

"This amendment will be no new grant of power. The congress already has power to impose taxes on incomes from whatever source derived, subject to the rule of construction which excluded state securities from the operation of the power; but the taxes so imposed must be apportioned among the states. Under the proposed amendment there will be the same and no greater power to tax incomes from whatever source derived, subject to the same rule of construction, but relieved from the requirement that the tax shall be apportioned.

"It appears, therefore, that no danger to the powers or instrumentalities of the state is to be apprehended from the adoption of the amendments.

"It would be cause for regret if the amendment were rejected by the legislature of New York. It is said that a very large part of any