

**A CRITICAL STUDY OF THE LAW OF PERCENTAGE TAX
ON MERCHANTS' SALES (SECTION 1459 OF
ACT No. 2711)**

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It is a truism to state that the political emancipation of a people must of necessity be preceded by and grounded on their economic emancipation, evidenced both by the welfare of the people individually and collectively as well as by the solvency of the public treasury. The Government will, of course depend, for its income on its revenue laws. And in this jurisdiction, there is no one factor more potent as a source of revenue than the subject we propose to discuss in the work, namely, *the percentage tax on merchants' sales*. Over 30% of the total annual collection of the Bureau of Internal Revenue, out of numerous sources, is derived from the merchants' sales tax. To substantiate this we submit the following extracts from the corresponding annual reports of the Collector of Internal Revenue for the Philippine Islands:

<i>Year.</i>	<i>Tax on merchants and manufacturers.</i>	<i>Total Collections, Bureau of Internal Revenue.</i>
1918	P12,803,640.29	P48,063,665.55
1919	12,831,980.26	53,282,756.67
1920	15,889,481.98	59,371,259.44

Important as this source of revenue may appear, many economists as well as lawyers and jurists have sought its repeal on various grounds of constitutionality and public policy. But with others no less profound in the study of economics and law, we contend—

1. That the merchants' sales tax law as it now stands is constitutional;
2. That it is a tax on sales and transactions, not on property;
3. That it is not based on profits realized or losses sustained;
4. That the subject matter of the transaction is personal property;
5. That the transaction must have its *situs* in the Philippine Islands;
6. That it is a uniform, indirect and highly expedient source of revenue;

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7. That the law does not create or impose a system of double taxation;

8. That by virtue of its ratification by the Congress of the United States it does not now violate the provisions of the Jones Law, prohibiting the imposition of export taxes, or the interstate commerce clause provision of the United States Constitution; and,

9. That the merchants' sales tax responds harmoniously and proportionately to the progress of persons and entities subject to it.

While several cases touching phases of our subject have already been adjudicated by the Supreme Court of these Islands, yet they have not been found sufficient to answer all questions and to dispel every doubt naturally concomitant with the administration of a comparatively recent law. An attempt will be made to discuss and solve questions of a doubtful nature which have daily come up in the enforcement of the Internal Revenue Law, so far as the imposition of, or exemption from, the percentage tax on merchants' sales is concerned, so that this work may be of practical utility to the great majority of our inhabitants, native or foreign, engaged in one form or another in some industrial or commercial pursuit, from the humble Chinese peddler of bottles, old shoes and rags and the Filipino street vendor of native "sampaguita" to the biggest factory, bazaar, and other industrial establishments dedicated to the purchase and sale of goods, wares, and merchandise in the Philippine Islands. And in doing this, we were constrained to embody in this study the procedure and practice followed for their adjudication which are supported in the main by the authoritative opinion of the Collector of Internal Revenue.

CHAPTER I.

SECTION 1. *History of the Law in the Philippines.*—Legislation on internal revenue in the Philippines is in general of American origin, but the particular subject, object of this study, has not been inspired or patterned after any revenue law of the United States, though its enactment in this jurisdiction has been initiated by American administrators. The Internal Revenue Law of 1904 (Act No. 1189) of the Philippine Commission (Volume III Public Laws, p. 388 et seq.) contains the first embodiment of the law we propose to discuss in this modest work. This law was designed to provide a system of inland taxation in lieu of the industrial and other tax laws in vogue under the Spanish regime.

In treating of the tax on business, manufacture, and occupation, section 139 of the Internal Revenue Law of 1904 reads:

“SEC. 139. Except as hereinafter specifically exempted, there shall be paid by each merchant and manufacturer a tax at the rate of one-third of one per centum on the gross value in money of all goods, wares, and merchandise sold, bartered, or exchanged for domestic consumption in the Philippine Islands, and this tax shall be paid whether such commodities consist of raw materials or manufactured or partially manufactured products, and whether of domestic production or imported. This tax shall be assessed on the actual selling price at which every such merchant or manufacturer disposes of his commodities, and shall be paid at the end of each quarter in the sum lawfully due on the gross amount in money of the sales made by every such merchant or manufacturer during each such quarter. And each such merchant or manufacturer shall, on the first of January, 1905, or on the date thereafter on which any such merchant or manufacturer engages in any such mercantile or manufacturing pursuit, pay a tax of two pesos.” (III Public Laws, 428.)

The Internal Revenue Law of 1904 took effect on August 1, 1904, and its provisions, particularly that referring to our subject, were incorporated without any substantial alternation as section 40 of the Internal Revenue Law of 1914 (Act No. 2339). It will be noted that in both of these Acts (Nos. 1189 and 2339) the tax imposed is only one-third of one per cent on the gross value of the merchandise sold, bartered or exchanged for domestic consumption, and that there is no tax levied on exports or the so-called “consignment tax.”

At the outbreak of the World's War when the economic condition of the country was far from being satisfactory, there was felt the necessity of providing additional taxes to meet any deficiency in current revenue that might result from the possible paralyzation of business and, for this purpose, Act No. 2432 increasing the merchants' sales tax from one-third of one per cent to one per cent, along with other taxes on business and occupation, was enacted by the Philippine Legislature effective January 1, 1915.

One year later, new sources of revenue were created and the Revenue Law of 1914 was amended by Acts Nos. 2541 and 2622 so as to provide an export tax on merchandise, the growth and product of the Philippine Islands, exported from the Phi-

lippines to persons and firms outside of the Islands, and which were effective for the period from January 1, 1916, to June 30, 1916.

Subsequently Act No. 2657 (the Administrative Code of 1916) was enacted and became effective on July 1, 1916. Section 1614 of this Act is an amendment of former Acts (sec. 40 of Act No. 2339; sec. 2 of Act No. 2541; and sec. 3 of Act No. 2622). The important part of the amendment is the addition of the term "consigned abroad".

Section 1614 of Act No. 2657 was finally amended by section 1459 of Act No. 2711 (the Administrative Code of 1917) which became effective on October 1, 1917. Act No. 2711 expressly repealed section 1614 of Act No. 2657, but made no important changes in this section.

Subsequently the Philippine Legislature passed Act No. 3065 which imposes a tax of one-half of one per cent upon the gross value in money of goods, wares and merchandise sold, bartered, exchanged, or consigned abroad by merchants in addition to the one per cent tax imposed on them under section 1459 of the Administrative Code. Said Act took effect on February 26, 1923, and sales and other allied transactions effected from that date became subject to the 1/2% additional sales tax. This law was in force up to December 31, 1924, but the imposition of the 1/2% additional sales tax was authorized and continued in 1925 by Act No. 3183. With a view to making the collection of the 1/2% sales tax a permanent part of our tax system, the Philippine Legislature enacted Act No. 3243 which took effect on January 1, 1926. Hence the percentage tax on merchants' sales collectible in this jurisdiction amounts to one and one-half per cent (1-1/2% in accordance with section 1459 of the Administrative Code and Act No. 3243 of the Philippine Legislature. It is this tax of 1-1/2% on merchants' sales which we propose to discuss in this work.

SEC. 2. *Fixed tax upon business subject to percentage tax.*
—Every person before engaging in a business on which the percentage tax is imposed shall pay a fixed annual tax of two pesos. This tax shall be payable for each calendar year or fraction thereof in which such person shall engage in said business. If his receipts do not come up to the minimum limit of P200.00 each quarter established for the percentage tax, he may continue in business without further tax until the first day of the next following year. In any case the amount of his business must be reported during the first twenty days of every quarter and pay

the sales tax due thereon as provided by law. (Section 1457 of the Administrative Code.)

The payment of the fixed tax shall be evidenced by issuing to the taxpayer an internal revenue tax-receipt (license) under Bureau of Internal Revenue administrative schedule C, paragraph 1, on which shall be affixed internal revenue stamps to the value of the initial tax of P2.00 and the percentage taxes due and paid by the merchant. (B.I.R. Regulations No. 11; Administrative Order No. 41; XVI Off. Gaz., 29; Regulations No. 53; XXIV Off. Gaz., p. 382.)

SEC. 3. *Payment of percentage taxes—Quarterly report of earnings.*—The percentage taxes on business shall be payable at the end of each calendar quarter in the amount lawfully due on the business transacted during each quarter; and it shall be the duty of every person conducting a business subject to such tax, within the first twenty days of every quarter, to make a true and complete return of the amount of the receipts of earnings of his business during the preceding quarter and pay the tax due thereon; *Provided, However,* That it shall be the duty of any person retiring from a business subject to the percentage tax before the expiration of the calendar quarter to notify the nearest internal revenue officer thereof, file his declaration and pay the tax due on his business immediately after closing the same.

If the percentage tax on any business is not paid within the time prescribed above, the amount of the tax shall be increased by twenty-five per centum, the increment to be a part of the tax.

In case a false or fraudulent return is made, the Collector of Internal Revenue shall add to the tax a surcharge of 100% of its amount. The amount so added to any tax shall be collected at the same time and in the same manner and as part of the tax unless the tax has been paid before the discovery of the falsity or fraud, in which case the amount so added shall be collected in the same manner as the tax. (Section 1458, Act No. 2711 as amended by section 2 of Act No. 2892 and section 1 of Act No. 3074.)

CHAPTER II.

The Law, Its Nature, Constitutionality and Relation to Other Laws

SEC. 4. *Basis of our study.*—The basis of our study is section 1459 of the Administrative Code which reads, as follows:

“SEC. 1459. *Percentage tax on merchants' sales.*—

All merchants not herein specifically exempt shall pay a tax of one per centum on the gross value of the money of

the commodities, goods, wares, and merchandise sold, bartered, exchanged or consigned abroad by them, such tax to be based on the actual selling price or value of the things in question at the time they are disposed of or consigned, whether consisting of raw material or of manufactured or partially manufactured products, and whether of domestic or foreign origin. The tax upon things consigned abroad shall be refunded upon satisfactory proof of the return thereof to the Philippine Islands unsold.

The following shall be exempt from this tax:

(a) Persons engaged in public market places in the sale of food products at retail, and other small merchants whose gross quarterly sales do not exceed two hundred pesos.

(b) Peddlers and sellers at fixed stands of fruit, produce, and food, raw or otherwise, the total selling value whereof does not exceed three pesos per day and who do not renew their stock oftener than once every twenty four hours.

(c) Producers of commodities of all classes working in their homes, consisting of parents and children living as one family, when the value of each day's production by each person capable of working is not in excess of one peso.

'Merchant', as here used, means a person engaged in the sale, barter, or exchange of personal property of whatever character. Except as specially provided, the term includes *manufacturers* who sell articles of their own production and *commission* merchants having establishments of their own for the keeping and disposal of goods of which sales or exchanges are effected, but does not include merchandise broker."

It is to be observed, however, that the rate of tax imposed on merchants' sales is now equivalent to 1-1/2% in view of Act No. 3243 which establishes a permanent additional one-half of one per cent sales tax in addition to the one per cent tax prescribed in the above quoted section 1459 of the Administrative Code.

SEC. 5. *Basis of the tax.*—In accordance with the law just quoted, the merchants' sales tax of 1-1/2% on the gross value in money of the merchandise sold, bartered, exchanged or consigned abroad, is to be based on the actual selling price or value

of the things in question at the time they are disposed of or consigned. (Sec. 1459 of Act No. 2711.)

SEC. 6. *The term "price" construed.*—The Supreme Court of these Islands in the case of Inchausti & Co. vs. Cromwell, (20 Phil. 345) states the following in construing the term "price" as used in the Internal Revenue Law:

"Where it is admitted by the parties that it is customary to sell hemp in the market baled and not loose, it will be presumed that the price at which hemp is quoted in the market is the price of baled hemp; and that prices stipulated in contracts for the purchase and sale of hemp include the cost and expense of baling where the contracts are silent upon that subject. Under such conditions the cost and expense of baling the hemp is a part of the purchase price and subject to a tax imposed by law on the gross amount of sales of the dealers." (Inchausti & Co. vs. Cromwell, 20 Phil. 345.)

In the same case, the word "price" has been construed to mean "that value, that sum which the purchaser pays to the vendor * * * and every item which enters into such price." (Inchausti & Co. vs. Cromwell, 20 Phil. 345.)

SEC. 7. *Basis of the percentage tax on domestic sales.*—The law being silent on this point, the basis of the tax on domestic sales is the gross value in money of the articles sold which represents the value of all sales, credit and cash, and on installment. Merchants who sell goods and pay such charges as freight, loading and discharging, baling, sacking, etc. should include these expenses in the selling price, although they are charged against the purchaser. If the sale is accomplished and the vendor holds no further responsibility for the goods before the expense charges just indicated occur, and the loading, baling, etc. are done merely as a convenience to the purchaser, then these charges should not be included; but, if the contract of sale requires these expenses to be met prior to the consummation of the sale, or, if the vendor continues to hold responsibility for the delivery of the goods after the expense charges occur, then these expense charges should be included in the selling price.

The amount of interest added to the purchase price of goods sold on a term forms part of such purchase price and should be returned for taxation if it is to accrue as of the date of the sale and payable absolutely. If the interest is made payable only upon failure to pay the price of the goods on the date stipulated, it should not be considered as part of the price, or value of the things sold. The reason is that the tax is to be based on the

actual selling price or value of the goods sold at the time they are disposed of or consigned. (B.I.R. Ruling No. 16, 22 Off. Gaz. 411.)

SEC. 8. *Basis of the tax on exchanges.*—The basis of the tax on exchanges of goods made between two merchants would be the actual market value of the goods taken or received at the time the exchange was made. If the parties to the contract are merchants, both should be required to pay the tax based on the market value of the goods taken or received in exchange. But if one party is not a merchant, then only the party who is a merchant should be required to pay the tax. The tax should be collected on exchanges only when the goods given or taken in exchange are commercial goods or if the exchange is made in pursuance of a commercial act or transaction, otherwise, the contract would be civil in nature and no tax would be due on the exchange even if the parties are merchants.

SEC. 9. *Bases of the percentage tax on goods consigned abroad.*—The bases of the merchants' sales tax on goods exported from the Philippine Islands may be summarized as follows:

(a) Upon all merchandise consigned abroad unsold, the merchant's consignment tax of 1-1/2% should be computed and paid upon the actual market prices or value of the things in question prevailing in the port of shipment on the date of consignment, plus the expenses of placing it aboard the exporting vessel, such as cartage, lighterage and stevedoring charges.

(b) Upon all merchandise shipped f.o.b. or c.i.f. pursuant to contracts theretofore entered into for the sale thereof, the tax will be computed and paid upon the actual gross selling price, without any deductions for brokerage or commission paid in effecting the sale; provided that as to c.i.f. contracts, under the terms of which the seller is required to make delivery of the merchandise to the buyer in the foreign port, the seller's disbursements for port dues, bank discount, ocean freight, marine insurance, customs bill of lading, and United States stamps may be deducted from the gross selling price for the purpose of computing the tax.

(c) With respect to sales made under terms c.i.f. delivery to the buyer in the foreign market, the price to be determined upon landed weights, the percentage tax should be assessed upon the actual market value of the goods at the time of shipment.

(d) With respect to sales made f.o.b. a vessel in a Philippine port, where title passes to the buyer by delivery to the carrying vessel, the tax will be paid upon the actual gross selling

price, plus the expenses of placing it aboard the exporting vessel such as cartage, lighterage and stevedoring charges.

SEC. 10. *Basis of the tax in case of shipment postpaid or c.o.d.*—In the case of shipments postpaid or c.o.d. of goods sold within the Philippine Islands, the percentage tax is computed on the selling price of the goods including the postage and other charges, postal or otherwise.

However, in shipments abroad, the tax on consignment is based upon the actual value of the goods until they are placed at the Post Office ready for shipment or alongside the exporting vessel. The report for tax purposes should include charges for packing, and transportation to the Post Office or to the vessel, but not those for postage, freight or insurance.

SEC. 11. *Should the money value of good-will be included in the sale of a business in determining the amount of tax due from a retiring taxpayer?*—When a merchant retires from business and sells his entire establishment including good-will, effects, credits, etc., the merchants' sales tax becomes immediately due upon and simultaneously with the acceptance of the offer of sale; and, the tax in such case is based on the actual value of the stock only, excluding good-will, fixtures, and credits.

SEC. 12. *Construction of revenue laws.*—Revenue laws are not, like penal laws, to be construed strictly in favor of the individual and against the State. They are rather to be regarded as remedial in their character, enacted for the promotion of the public welfare, and as such to be given, where possible, a construction which will tend to carry out the manifest intention of the legislator in placing them upon the statute book. (Cliquot's Champagne, 3 Wall., 114; U. S. vs. Stowell, 133 U. S., 1; Cited in Muñoz & Co. vs. Hord, 12 Phil. 628.) The internal revenue laws should be construed reasonably and fairly so as not to be made a trap to deceive or catch the innocent and well-intentioned who endeavor to render full obedience to the law. (U. S. vs. 36 Barrels of High Wines, 12 Int. Rev. Rec., 40; Cited in 12 Phil. 629.)

In case of ambiguity in a statute, contemporaneous and uniform executive construction is regarded as decisive. (Brown vs. U. S., 113 U. S. 568.)

As stated by Judge Cooley in his great work on taxation: "The underlying principle of all construction is that the intent of the legislature should be sought in the words employed to express it, and that when found it should be made to govern, * * * If the words of the law seem to be of doubtful import, it may then perhaps become necessary to look beyond them in order to

ascertain what was in the legislative mind at the time the law was enacted; what the circumstances were, under which the action was taken; what evil, if any, was meant to be redressed; * * *. And where the law has contemporaneously been put into operation, and in doing so a construction has necessarily been put upon it, this construction, especially if followed for some considerable period is entitled to great respect, as being very probably a true expression of the legislative purpose, and is not lightly to be overruled, altho it is not conclusive." (Cooley on Taxation, Vol. I, p. 450, 3d. Ed.)

SEC. 13. *Nature of taxation.*—Taxes are not contracts between party and party, either express or implied; they are the positive acts of the Government, through its various agents, binding upon the inhabitants, and to the making and enforcing of which their personal consent, individually, is not required. (Cooley on Taxation, Vol. I, p. 19; citing *Johnson vs. Howard*, 41 Vt. 122; *Morris vs. Lalaurie*, 29 La. An., 47.)

It is but a truism to restate that taxation is an attribute of sovereignty. It is the strongest of all the powers of government. It involves, as Chief Justice Marshall in his historical statement said, the power to destroy. (*McCulloch vs. Maryland*, 1819, 4 Wheat., 316; *Loan Association vs. Topeka*, 1875, 20 Wall., 655.) "The right of taxation where it exists," the court said in *Austin vs. Alderman* (1868, 7 Wall., 694), "is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy." (*Sarasola vs. Trinidad*, 40 Phil. 262-3.)

SEC. 14. *Legality of business as affected by payment of tax; scope of the term "privilege-tax receipt" issued to taxpayers.*—The payment of a business or occupation tax shall not exempt any person from any tax, penalty, or punishment provided by law or ordinance in places where such business or occupation is prohibited or regulated by municipal law, nor shall the payment of any such tax be held to prohibit any municipality from placing a tax upon the same business or occupation, for local purposes, where the imposition of such tax is authorized by law. (Sec. 1454 of Act No. 2711.)

The term "privilege-tax-receipt," which is issued to the taxpayer every time he pays an internal revenue tax, has been held by the Supreme Court of the United States to be merely a receipt for the tax and not a license. The term "taxpayer" is to be interpreted in the same sense, that is, it does not mean a person or entity invested with right or authority by the state, but is merely the term used to express "holder of" a tax-certificate, or tax-receipt, or, in other words, the person to whom

such instrument was issued. (B.I.R. Administrative Order No. 41, XVI Off. Gaz., 29; Regulations No. 53; XXIV Off. Gaz. 382.)

SEC. 15. *Relation of internal revenue laws to other laws.*—

From what has been stated in the preceding section, we may infer that, if a person holds himself out and practices the profession of a lawyer, with its due authority, we submit that he could be compelled to pay the occupation tax of P50.00 per annum provided for in section 1473 of Act No. 2711 and still be amenable to prosecution for engaging in the practice of law without authority.

The possible contention that the payment of internal revenue taxes amounts to encouraging violations of the law in that it makes other provisions of the law a justification for the violation is untenable.

This question is fully discussed by the Supreme Court of the United States in "The License Tax Cases" (4 Wall 462, 18 L. Ed., 497) and the principles therein enunciated are equally applicable here, as the Internal Revenue Law of this country is based on the revenue laws of the United States. The United States Supreme Court said:

"The power to tax is not questioned, nor the power to impose penalties for the nonpayment of taxes. The granting of a license, therefore, must be regarded as nothing except that the licensee shall be subject to no penalties under national laws if he pays it. * * *

There is nothing hostile or contradictory, therefore, in the Acts of Congress to the legislation of the States. What the latter prohibits, the former, if the business is found existing, notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction, and tend to the same result. It would be a judicial anomaly, as singular as indefensible, if we would hold a violation of the laws of the state to be a justification for the violation of the laws of the Union." (The License Tax Cases, 4 Wall, 462, 18 L. Ed., 497.)

Consequently if a person engages in any occupation or business subject to internal revenue taxation, he must pay the internal revenue tax due, irrespective of any violation of another law which he may have committed. The law taxes business, occupation and objects, and such tax must be paid by every person subject thereto. The payment of any internal revenue tax does not grant a license; it simply protects the holder of a tax-receipt (license) from prosecution for a violation under the internal

revenue law. The payment of internal revenue taxes is, therefore, no defense for the violation of any other law of the land and, vice versa, the failure to pay internal revenue taxes due cannot be justified by pleading a violation of another law.

SEC. 16. *Basic principles concerning the imposition of the merchants' sales tax.*—The following are the basic principles for the imposition of the merchants' sales tax:

(a) That the merchants' sales tax is a tax on sales and transactions, not on property;

(b) That the tax is not based on profits or losses;

(c) That the subject matter of the transactions must be personal property, not real property; and

(d) That the transaction on which the tax is assessed must have taken place within the territorial limits of the Philippine Islands.

SEC. 17. *That the merchants' sales tax is a tax on sales and transactions, not on property.*—The Supreme Court of the Philippine Islands, in the case of *Gil Hermanos vs. Hord* (10 Phil. 220-221) holds, as follows:

“It is very apparent that the tax under discussion (the merchants' sales tax) is not a tax upon property. It is rather a tax upon the occupation or industry in which a person is engaged. The internal revenue percentage tax is in no sense a tax upon the property sold; it is merely a method of deciding how much the person who makes the sale shall pay as a tax upon the business in which he is engaged. It is true that the tax to be paid by commission merchants for carrying on their business and the tax to be paid by merchants for carrying on their business is determined in the same way, but that does not constitute in any sense double taxation.”

The merchants' sales tax is an indirect tax upon the sales and other allied transactions effected by merchants as contradistinguished from the specific taxes imposed upon certain articles, domestic or imported. (See sections 1478 to 1498 of the Administrative Code.) It is not a tax upon the property itself for the reason that the mere possession thereof does not render its owner or possessor subject to the tax.

SEC. 18. *That the merchants' percentage tax is not based on profits or losses.*—Section 1459 of Act No. 2711 expressly states that all merchants, not specifically exempted, shall pay the sales tax on the gross value in money of the commodities, goods, and merchandise sold, bartered, exchanged, or consigned

abroad by them. The tax in question is not a tax on income, dependent on profits or losses. The law does not discriminate between sales made with profit and those made with no profit at all. If a person holds himself out to be engaged in the pursuit of a certain taxable business, he takes by himself alone whatever risks are liable to be encountered and the law does not take such considerations into account.

The test of liability to the sales tax, we submit, does not lie in the profits made or losses sustained by the taxpayer but in the fact that he is engaged in a taxable business or transaction, which he conducts subject to all hazards.

SEC. 19. *That the subject-matter of the transaction must be personal property, not real property.*—The law under consideration expressly states that the tax shall be paid on the sale, exchange, barter or consignment abroad of commodities, goods, wares, and merchandise, all of which are personal property. The term “merchant” as used in the Internal Revenue Law, “means a person engaged in the sale, barter, or exchange of personal property of whatever character.” (Sec. 1459, Act No. 2711.)

SEC. 20. *That the transaction on which the tax is assessed must have taken place within the territorial limits of the Philippine Islands.*—When a merchant in Manila buys goods from another in Japan, and the contract of purchase and sale is perfected in the latter country, the goods having been delivered to an agent of the buyer in Japan, the transaction is not subject to the sales tax for the reason that the internal revenue law does not contemplate taxing transactions had and accomplished in a foreign jurisdiction.

Except in certain special cases, persons or property to be subject to tax must be within the territorial limits. In one case, the United States Supreme Court said: “It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. The fact that such property is visible, easily found, and difficult to conceal, and the tax readily collectible, is so cogent an argument for its taxation at its situs that of late there is a general consensus of opinion that it is taxable in the state where it is permanently located and employed, and where it receives its entire protection, irrespective of the domicile of the owner.” (Union Refrigerator Transit Co. vs. Kentucky (1905) 199 U. S. 194, 50 L. Ed. 150, 25 Sup. Ct. Rep. 36, 4 Ann. Cas. 493; Malcolm Philippine Constitutional Law, 355.)

SEC. 21. *Grounds for contesting the validity of section 1459 of Act No. 2711.*—Having determined the cardinal principles for the imposition of the merchants' sales tax, we shall now proceed to determine the reasons adduced by writers on law and political economy for contesting the validity of section 1459 of the Administrative Code. They are:

(a) That section 1459 of Act No. 2711 constitutes double taxation;

(b) That the merchants' sales tax is not uniform;

(c) That section 1459 of Act No. 2711 is contrary to the provisions of section 11 of the Jones Law, (Act of Congress of August 29, 1916); and

(d) That said section is repugnant to the interstate commerce clause provision of the United States Constitution.

SEC. 22. *The merchants' sales tax as constituting double taxation.*—We have already established in one of the foregoing sections that the merchants' sales tax is a tax on sales, business, or transactions, and not on property, hence, there cannot be double taxation in the tax under consideration. The Supreme Court of these Island in the case of Gil Hermanos vs. Hord, (10 Phil. 220-221) holds, in speaking of the merchants' tax, that "it is not a tax upon property. It is rather a tax upon the occupation or industry in which a person is engaged. The internal revenue percentage tax is in no sense a tax upon the property sold; it is merely a method of deciding how much the person who makes the sale shall pay as a tax upon the business in which he is engaged. It is true that the tax to be paid by commission merchants for carrying on their business and the tax to be paid by merchants for carrying on their business is determined in the same way, but *that does not constitute in any sense double taxation.*" (Italics ours.)

In another case, our Supreme Court says:

"If a merchant in Manila buys rice from a dealer in Pampanga, and barter or exchanges this rice for hemp with a hemp factor in Albay, the law clearly imposes a tax upon the Pampanga rice dealer of one per cent (now 1½%) of the value of the rice sold to the merchant in Manila; a tax on the merchant in Manila of one per cent of the value of the rice delivered by him in exchange with the hemp factor in Albay; and a tax on the hemp factor in Albay of one per cent of the value of the hemp delivered to the merchant in Manila in exchange for rice. If the hemp merchant in Manila elects, as a matter of convenience, to pay not only the tax im-

posed upon him, but the tax payable by one or both of the other parties, for and on their behalf, this fact by no means changes the nature of the transaction, nor does it justify a complaint on the ground that the merchant in Manila has paid taxes twice or thrice upon the same series of transaction or because each of the three parties to the transaction has been compelled to pay a separate tax for his respective participation therein." (Muñoz vs. Hord, 12 Phil. 637-638.)

SEC. 23. *The merchants' sales tax, as not uniform.*—"Uniformity" in taxation means that all taxable articles or kinds of property of the same class shall be taxed at the same rate. (De Villata vs. Stanley (1915) 32 Phil. 541, 555) (Malcolm, Philippine Constitutional Law, Vol. 1, p. 359.)

The Supreme Court of these Islands in the case of Molina vs. Rafferty, (37 Phil. 546) said that "the Internal Revenue Law in imposing a tax on merchants is uniform for all of a class, and so valid."

SEC. 24. *Section 1459 of Act No. 2711, as repugnant to section of the Jones Law.*—Section 11 of the Jones Law states "that no export duties shall be levied or collected on exports from the Philippine Islands."

The term "export," as used in the Constitution and laws of the United States, means the goods transported from the United States to a foreign country. (Dooley vs. U. S. (1901) 183 U. S. 151.) (Malcolm, Philippine Constitutional Law, Vol. 1, p. 363.)

It is, therefore, clear that the consignment tax imposed by the Philippine Legislature upon merchandise which is sold and exported from the Philippine Islands to various persons and firms without the Philippine Islands, is an export tax, is prohibited by section 11 of the Jones Law and is illegal. (Crew Levick Co. vs. Pennsylvania, 245 U. S. 292; Macleod and Cromwell, R. G. No. 7444.)

However, an act of the Congress of the United States has expressly ratified and confirmed the consignment tax imposed by section 1459 of Act No. 2711, in the following language:

"The taxes imposed by the Philippine Legislature in section fourteen hundred and fifty-nine of Act Numbered Twenty-seven hundred and eleven, enacted by that body on March tenth, nineteen hundred and seventeen, are hereby legalized and ratified, and the collection of all such taxes heretofore or hereafter is legalized, rati-

fied and confirmed hereby as fully to all intents and purposes as if the same by prior Act of Congress specifically had been authorized and directed." (Approved June 4, 1918, Public No. 164, 40 Stat. L., p. 594.)

Consequently, by reason of the express ratification of the law by the Congress of the United States, the collection of the consignment tax has become legal and valid. In this connection our Supreme Court said:

"An Act of the Philippine Legislature which has been ratified and legalized by Congress cannot be held invalid for infringement of the restrictions placed by our organic law on legislation of the Philippine Legislature." (Mitsui Bussan Kaisha vs. Manila E. R. R. & L. C., 39 Phil. 624.)

"Congress is possessed with full authority to ratify, subject perhaps to certain Constitutional limitation, the Acts of the Philippine Legislature." (U. S. vs. Heenszen & Co., 206 U. S., 307, cited in Smith Bell & Co., vs. Rafferty, 18 Off. Gaz., 742-3.)

SEC. 25. *That article, 1, section 8, of the Constitution of the United States, relative to interstate commerce, operates in full rigor not only upon the several states of the American Union but also upon the territories including the Philippines Islands.* As to this contention, it can be said without fear of overriding any legal principle, that the same can be disposed of by a mere reference to the oft-quoted doctrine of Constitutional law as applied to existing constitutional relations between the United States and the Philippines, *that the Constitution does not follow the flag.*

By way of elucidation, attention may be drawn to the doctrine laid down in the so-called Insular Cases in which the question as to whether or not the Constitution of the United States was extended *ex proprio vigore* and *ex vi termini* to the territories, was squarely put before the Supreme Court of the United States for determination. This Court came to the conclusion "that when a territory is annexed by the United States, it ceases to be foreign but does not become completely domestic." Commenting on this decision, Magoon cited incidents from United States history and finally declared "that the Constitution and laws of the United States do not extend *ex proprio vigore* over newly acquired territory." (See Malcolm, Philippine Government, 320.) In the case of Downes vs. Bidwell, 182 U. S. 289, one of the Insular Cases, the Supreme Court of the United States held:

"The Constitution of the United States does not by its own force operate within such territory although the liberality of Congress in legislating the Constitution into contiguous territory tended to create an impression upon the minds of many people that it went there by its own force."

Mr. Justice Brown in his concurring opinion in *Rasmussen vs. U. S.* (1905), 197 U. S. 516-531, 49 L. Ed. 862-868, explained his position in the case of *Downes vs. Bidwell* by saying:

* * * that the Constitution does not apply to territories acquired by Treaty until Congress has so declared, and that in the meantime, under its power to regulate the territories, it may deal with them regardless of the Constitution, except in so far as concerns the natural rights of their inhabitants to life, liberty, and property."

Again, in the case of *U. S. vs. Bull*, 15 Phil. 7, it was held:

"The Constitution confers upon the United States the power to make war and treaties, and to acquire territory by conquest or treaty. Territory thus acquired belongs to the United States, but does not become a part of the United States until formally incorporated therein by Congress. Until this is done, it is the duty of Congress to provide all needful rules and regulations for its government, and in legislating in reference thereto, Congress is limited only by those provisions of the Constitution which go to the very root of its power to act at all irrespective of time or place."

This being the case, the Constitution of the United States, except those provisions of universal application as the Thirteenth Amendment to the United States Constitution, (*Tan Te vs. Bell*, 27 Phil., 354) does not and cannot be extended to this country until Congress so direct. In the same case the Court also held:

"The Government of the Philippine Islands is not that of a State or Territory, although its form and organization somewhat resembles that of both. It stands outside of the constitutional relation which unites the States and Territories into the Union. The authority for its creation and maintenance is derived from the Constitution of the United States, which, however, operates on the President and Congress, and not on the inhabitants of the Philippines and the Philippine Government.

"For its power and the limitations thereon, the Government of the Philippine Islands looks to the orders of the President before Congress acted, and the Acts of

Congress after it assumed control. Its organic laws are derived from the formally and legally expressed will of the President and Congress, instead of the sovereign constituency which lies back of American constitutions.

"This power (referring to the power of Congress to govern a territory) has been exercised by Congress throughout the whole history of the United States, and legislation founded on the theory was enacted long prior to the acquisition of the present Insular possessions. Section 1891 of the Revised Statutes of 1878 provides that 'the Constitution and all laws of the United States which are not locally applicable shall have the same force and effect within all the organized territories, and in every territory hereinafter organized, as elsewhere within the United States.' *When Congress organized a civil government for the Philippines it expressly provided that this section of the Revised Statutes should not apply to the Philippine Islands.*" (Section 1 of the Act of Congress of July 1, 1902.)

All the foregoing inevitably enforces the conclusion that Article 1, section 8, of the Constitution of the United States does not operate upon the Philippine Islands, it not being of universal application, these Islands not being an incorporated territory of the United States, and Congress not having chosen to extend it formally to this jurisdiction.

(To be continued)