

**A CRITICAL STUDY OF THE LAW ON PERCENTAGE TAX  
ON MERCHANT'S SALES**

*(Continued)*

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While there is some truth in the statement that the act of the government in seizing all of the stocks of rice in the hands of merchants is not a sale in the strict sense of the word, inasmuch as the element of mutual consent on the part of the parties, or of voluntary disposal, is lacking, it is nevertheless believed that there is no inconsistency or repugnancy between the provisions of the Internal Revenue Law regarding the collection of taxes and those of the executive orders above mentioned such as would warrant the conclusion that the collection of the taxes on the sales made by the merchants on the transfer of their stock of rice to the Government has been waived. In this connection proper consideration should be given to that well known rule of statutory construction that, in the absence of an express provision, a repealing statute cannot be considered as suspending the effects of a previous law unless the provisions of the latter are clearly inconsistent with or repugnant to those of the former. The rice seized by the Government are to be paid for at the prices fixed in Executive Order No. 56, and although a certain amount of compulsion has been exerted in forcing the merchants to dispose of their stock to the Government, yet it is believed that no real inconsistency exists between this seizure and the imposition of the merchants' percentage tax.

It cannot of course be denied that the principle underlying the imposition of the percentage tax on merchants' sales is contrary to the principle upon which the seizure of the articles is based. At the root of the sales contemplated to be taxed by the Internal Revenue Law is the element of contractual freedom, which element is lacking in the case of the seizure of rice by the government. The absence of this element does not, however, constitute a sufficient reason for declaring that the tax on merchants' sales has been temporarily suspended, in the absence of a specific, clear, or express provision in the law, or in the executive orders promulgated thereunder, exempting such sales from the percentage tax. Repugnancy in principle between the law imposing the tax of one per cent and the seizure in question, forms no reason why both may not stand. The repugnant spirit of a subsequent law is not sufficient, in the absence of an *express* or *evident intention* of the Legislature, to *suspend the effects of a previous statute*. (Smith, Ex Parte, 40 Cal. 419; Section 246,

Sutherland on Statutory Construction, Vol. 1, p. 460, and cases therein cited.)

The power of taxation is an attribute of sovereignty as fundamental as the police power itself, under which the act of seizure has evidently been performed, and in the absence of a clear provision in the law or an evident intention in the legislature, we submit that the collection of the sales tax has not been waived or suspended by such seizure; and that the seizure by the government of stocks of rice, palay, and corn in the hands of merchants constitutes, nevertheless, a sale from said merchants to the government, subject to the merchants' percentage tax. (Ruling of Collector of Internal Revenue.)

SEC. 45. *Liability to consignment tax of goods imported and returned to country of origin; Refund of tax on goods consigned abroad and returned.*—As a general rule, goods, wares, and merchandise imported into this country but subsequently re-exported to the same companies from which they are bought because of some defects therein or because they do not conform in some way or other to the specifications agreed upon between the parties, are not subject to the consignment tax imposed in section 1459 of the Administrative Code. But where imported goods are merely reshipped to the country of origin after sale thereof has been perfected in these Islands, the merchants' tax on consignments abroad becomes due and payable, even though the goods were not actually put in trade.

In this connection, it may be observed that the tax upon things consigned abroad shall be refunded upon satisfactory proof of the return thereof to the Philippine Islands unsold. (Sec. 1459, Act 2711.)

SEC. 46. *Are goods sent to the Philippine Islands from a foreign country to be reshipped to another foreign country, its final destination, considered as goods consigned abroad from the Philippines within the purview of section 1459 of the Administrative Code?*

We submit the answer to the foregoing question in the negative.

The statute is couched in the following terms:

"SEC. 1459. *Percentage tax on merchants sales.*— All merchants \* \* \* shall pay a tax of one per centum of the gross value in money of the commodities, goods, \* \* \* consigned abroad by them, such tax to be based on \* \* \* the actual value of the things in question at the time they are disposed of or consigned, \* \* \*."

The question, therefore, is whether the reshipment constitutes a consignment subject to tax. "To consign" means "to send or address (by bill of lading or otherwise) to an agent or correspondent in another place to be cared for or sold." (Webster's International Dictionary.)

It is to be noted that goods cannot be consigned from these Islands unless said goods are here. This necessarily raises the question as to the nature and character of the shipment of the goods to the Philippines for the purpose of reshipment, i.e., whether or not their coming into the Islands *physically*, legally brings them within the Philippines Islands for the purpose of taxation.

We assume that at the time the goods were being sent to the Islands, their ultimate destination is not the Philippines, but that they are being sent here for the purpose of reshipment. In this case, the goods are merely in "transit" in the Islands and will therefore be exempt from taxation.

"A cargo of corn purchased in Iowa for the purpose of shipment to Canada was removed to the railway and temporarily stored in cribs to await transportation. *Held*, while so stored for a reasonable time, *to be in transit and exempt from taxation*, provided the purchaser intended to ship immediately, or as soon as transportation could be conveniently obtained." (Ogilvie vs. Crawford County, 7 F. 745; Vol. IV Fed. Rep. Digest, p. 9126.)

"In order that property within a county may be regarded as *in transitu*, so as to be exempt from taxation therein, there must be, at least, an intention and fixed purpose to remove it within a reasonable time; and an intention to remove it at some future time depending upon certain contingencies, which may not or may happen, is insufficient. (State Trust Co. vs. Chevalis County, 79 F. 282, 24 C. C. A. 584, Fed. Rep. Dig. Vol. IV, p. 9126.)

While the consignment of the goods takes place when the same are sent from a Philippine port upon reshipment, in the literal sense of the word, yet, for the purpose of taxation, the goods sent here for reshipment can hardly be considered as consignment from these Islands. The tax seems to be imposed upon goods sent abroad from the Islands, and not merely in transit over the Islands.

In construing the intent of the Legislature as to the tax on consignment, consideration should be placed upon the fact that if the goods are merely in transit here, there is no such legal jurisdiction over them as to bring them under the general terms of the taxing statute. Undoubtedly, if the law were explicit,

there would be no question that the tax may be collected, but when the law is silent and uses the word "abroad," it would seem that it meant to include only goods coming out of the Philippine Islands, excluding goods in transit in Philippine ports.

SEC. 47. *Desired amendment to section 1459, Act No. 2711, so as to make Manila the distributing center for the Far East.*—Section 1459 of the Administrative Code should be amended so as to exempt goods of foreign manufacture from the consignment tax. It is believed that the exclusion of goods of foreign manufacture from the said tax will not materially affect the revenues of the Government but on the contrary it will eventually be beneficial to the country making it the distributing center for the Far East.

SEC. 48. *Percentage tax on tobacco products exported.*—On all tobacco products exported, no specific tax should be collected but such tobacco products exported to countries other than the United States are subject to the merchants' sales tax. When removals of tobacco products intended for export are made from the factory to the establishment of a commission merchant who subsequently actually exports said products, two taxes are due, one from the owner of the products as merchants for whom the exportation is effected, and another from the commission merchants who exports the same. If the removals are made from the factory to any person within the Philippine Islands, not a commission merchant, even where the products so removed are intended for exportation, the specific taxes on the tobacco products removed are collectible, but no sales tax need be collected on this exportation. (B. I. R. Ruling to 13, 22 Off. Gaz. 46.)

SEC. 49. *Sales of denatured alcohol.*—As denatured alcohol is exempt from the specific tax imposed on distilled spirits, the sales thereof are subject to the merchants' sales tax.

SEC. 50. *Tax due on persons engaged in embroidery business.*—Persons engaged in embroidery business are manufacturers in that they, by a physical process, alter the substance of the raw material in such a manner as to prepare it for special use to which it could not have been put in its original condition. The percentage tax shall be based on the actual selling price or value of the things in question at the time they are disposed of or consigned. In the case of embroidery manufactured and consigned abroad unsold, the tax should be assessed on the market value of the product at the time of consignment, includ-

ing all the charges incurred up to placing the product alongside the exporting vessel, and including all the elements of value that enter into the finished product. (Murphy vs. Trinidad, 44 Phil. 649.)

*Hypothetical Case:* A is a domestic embroidery company doing embroidery work exclusively for B, a foreign corporation in the United States. B furnishes the cloth used by A, of the cloth, A makes the necessary embroidery thereon and sends the finished product to B. A recharges against B the value of the cloth, labor, overhead and 1% commission for all his troubles.

Quaere: Should the sales tax be based on the amount A charged B for labor, overhead and commission or should A pay tax on the value of the materials received from B which was later on recharged by A against B?

In the light of existing law on the subject, the tax is due on the gross value in money of the commodities, goods, wares, and merchandise consigned abroad, the value of the things in question being that determined at the time they are consigned. This value is necessarily the market value of the product on the day the consignment is made as above indicated.

SEC. 51. *Terms "f.o.b." defined; sales made f.o.b. ship at Manila, Cebu, Iloilo, Zamboanga or Jolo subject to tax as consignments abroad.*—In mercantile transactions of American origin, the letters "f.o.b." standing for the words "Free on Board," are frequently used. The meaning is that the seller shall bear all expenses until the goods are delivered where they are to be "f.o.b." According as to whether the goods are to be delivered "f.o.b." at the point of shipment or at the point of destination determines the time when property passes. (Behn Meyer & Co., Ltd. vs. Yangco, 38 Phil. 602.)

When a dealer sells goods f.o.b. ship at Manila, Cebu, Iloilo, Zamboanga, or Jolo to be exported to a foreign country, that is, if the articles sold are delivered to the purchaser on the ship within the territorial jurisdiction of the Philippine Islands, so that title to the goods passed to the vendee within Philippine territorial waters, two taxes become due and collectible from the apparently single transaction. On the one hand, the merchants' percentage tax becomes collectible from the dealer himself on the sale made in the Philippine Islands, and on the other, a similar tax on consignments abroad is due from the vendee himself, said vendee being considered the consignor of the goods sold. It should be noted that the two taxes are collectible from

two different persons, one from the dealer or seller of the goods, and the other from the consignor of the same goods, so that no double taxation at all is imposed as at first sight it would seem to be. As can be seen from the wording of section 1459 of the Administrative Code, the merchants' tax is assessed not only from all sales made in the Philippine Islands but also from all consignments abroad.

There is nothing in the law to warrant the interpretation that if the tax is collected on merchandise sold or bartered in the Philippine Islands, no further tax can be collected on the same merchandise upon their being exported or consigned abroad. The law authorizes the imposition of the tax every time the merchandise changes hands, and generally speaking title passes upon delivery of merchandise to the vendee. It would seem, therefore, that the payment of the consignment tax in case of goods bought for exportation, would depend upon the question, Who is the exporter, the vendor, or the vendee? And this question in turn depends upon whether delivery is made by the vendor inside the Philippine Islands or outside thereof. If goods are delivered to the vendee within this jurisdiction, he ceases to be the owner thereof and, therefore, he cannot very well be the consignor or exporter of the goods. The vendee who in that case acquires property to the goods before they leave the Philippine Islands becomes the true consignor or exporter and is subject to the payment of the tax on exports or consignment abroad. (Opinion of the Attorney-General, dated December 27, 1920.)

No general rule can be laid down for determining the place of delivery. This is a question which must be resolved according to the facts of each individual case. If the contract be silent as to the person or mode by which the goods are to be sent, delivery by the vendor to a common carrier in the usual and ordinary course of business, transfers the property to the vendee. A specification in the contract relative to the payment of freight can be taken to indicate the intention of the parties in regard to the place of delivery. If the buyer is to pay the freight, it is reasonable to suppose that he does so because the goods become his at the point of shipment. On the other hand, if the seller is to pay the freight, the inference is equally strong that the duty of the seller is to have the goods transported to their ultimate destination and that title to property does not pass until the goods have reached their destination. (Behn Meyer & Co., Ltd., vs. Yangco, 38 Phil. 602; B. I. R. General Circular No. 69.)

**SEC. 52.** *Terms "c.f." or "c.i.f." construed; sales made under c.f. or c.i.f. terms.*—The letters "c.f." or "c.i.f." found in British contracts stand for costs and freight or costs, insurance, and freight, respectively. They signify that the price fixed covers not only the cost of the goods, but the expense of freight and insurance to be paid by the seller. (Ireland vs. Livingstone, L. R., 5 H. L. 395.)

If the goods are sold by a dealer in the Philippine Islands to be exported in turn to a foreign country under c.f. terms, that is, the price paid by the buyer includes both the cost of the goods sold and the freight charged in carrying said goods from this jurisdiction to a foreign port, or under c.i.f. terms, that is, the price paid by the buyer includes cost, insurance, and freight, and the dealer or seller in reality makes delivery of the goods at a foreign port, then only ONE TAX is due, and it is due from the seller who, in this case, is the exporter or consignor at the same time. The difference between this transaction and the one under the f.o.b. ship Manila, Cebu, Iloilo, Zamboanga, or Jolo, is that under the latter, delivery is made in the Philippine Islands and title to the goods sold, therefore, passed to the buyer in the Philippine Islands, which fact necessarily implies that another person than the seller must be the exporter or consignor, against whom the consignment tax should be assessed. (Opinion of the Attorney-General, dated December 27, 1920; B. I. R. General Circular No. 69.)

**SEC. 53.** *Rules in case sales are made under c.f. or c.i.f. terms in bad faith.*—If, however, the sale is made under c.f. or c.i.f. terms, simply to evade the payment of the percentage tax, and that the parties, by private or undisclosed stipulation, have agreed that delivery should, in fact, be made in the Philippine Islands, the liability of the parties to tax will, it is believed, be the same as in sales made under terms f.o.b. ship Manila, Cebu, Iloilo, Zamboanga, or Jolo.

Delivery, as used in connection with transactions subject to the merchants' tax, should be understood as that delivery which passes the title to the goods sold from the vendor to the vendee. Of course, this rule may be subject to modification if it is applied to transactions which are an evasion of the Internal Revenue Law. (Opinion of the Attorney-General, dated December 27, 1920; B. I. R. General Circular No. 69.)