

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

(Continued)

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CHAPTER IV.

**PERSONS AND TRANSACTIONS EXEMPT FROM THE
MERCHANTS' SALES TAX**

SEC. 54. *General statement.*—Having determined the persons and transactions subject to the merchants' sales tax, we shall now proceed to ascertain the persons and transactions exempt from the percentage tax on merchants' sales.

SEC. 55. *Persons exempt from the merchants' percentage tax.*—In accordance with section 1459 of Act No. 2711, the following shall be exempt from the merchants' sales 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 own 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.

SEC. 56. *Is it legal to require a person who is exempt from the payment of an internal revenue tax to prove his exemption by certificates, documents, or otherwise?*—We submit the answer to this question in the negative. It is well established that if a person is exempt from taxation, nothing else more is necessary upon his part. The Government cannot force him to prove his exemption himself. The duty resolves upon the Government to prove that he is subject to taxation. As a person cannot be compelled to be a witness against himself (Sec. 15, General Orders No. 58) so the Government cannot throw the burden on him to prove his innocence. In accordance with the principles just enunciated, if a person is exempt from the merchants' tax, he cannot be compelled to prove his right to exemption.

SEC. 57. *Sales at wholesale and at retail, distinguished.*—The law exempts from the merchants' sales tax persons engaged in public market places in the sale of food products at retail.

To "retail" is to sell in small quantities. (Commonwealth vs. Paulin, 73 N. E. 655; 4 Words and Phrases, 370.) "Retail" means the sale of commodities in small quantities or parcels. (Katzman vs. Commonwealth, 130 S. W. 990, 30 L. R. A. 519.) The definition of the word "retail," as applied to sales, is to sell in small quantities, as by the yard, pound, gallon, etc., to sell directly to the consumer, in small quantities, such as are immediately called for by consumers. As a rule, wholesale merchants deal only with persons who buy to sell again, while retail merchants deal with consumers. (In re Metz Bros. Brewing Co. 32 L. R. A. 622.) Hence, a sale is at retail when it is done in small quantities and to a consumer, and a sale is at wholesale if made in big quantities and to those who buy for the purpose of reselling it at a profit.

SEC. 58. *Tax liability of vendors in public market places.*—A person engaged in public market places in the sale of food products at retail is exempt from taxation irrespective of the volume of trade he handles. If he sells both at wholesale and at retail in public market places, he is not exempt and the percentage tax is due to be paid on all his transactions, wholesale and retail. If he sells food products at retail in public market places and also outside thereof, he should also be considered subject to the percentage tax on all his sales. He will likewise be subject to the tax if he sells other products besides food products in the public markets.

SEC. 59. *Are sales of food products in the market to hotel and restaurant keepers considered sales at wholesale?*—We submit the answer to this question in the negative. It is submitted that sales of food products in public market places to keepers of hotels, restaurants and "carinderias" should be considered as sales at retail and consequently the vendor should be held exempt from the merchants' sales tax. To be considered wholesale, a sale of food products must be made for the purpose of resale. Sales made to hotel or restaurant keepers cannot be considered as wholesale sales for while these places serve meals in which food products of various kinds are included, they do not actually engage in reselling the food products they buy. (See Buenaventura vs. Collector of Internal Revenue, R. G. No. 22175.)

SEC. 60. *Who are small merchants?*—In the absence of an express definition in the law, a small merchant may be defined

as one whose gross sales do not exceed ₱200 a quarter. A small merchant is exempt from the merchants' fixed and percentage taxes.

SEC. 61. Terms "peddler" and "fixed stands" construed; Exemption from tax of peddlers and sellers at fixed stands.—A "peddler" has been defined in the Internal Revenue Law, as any person who either for himself or on commission travels from place to place in town or country and sells his goods or offers to sell and deliver the same. (Section 1455 (n) of Act No. 2711 as amended by Act No. 2835.)

A "fixed stand" is a certain and definite place where articles may be bought or sold, as a store or establishment of known location. In the case of peddlers of merchandise, temporary booths, stall, stands, or areas in markets, cockpits, or elsewhere where goods are displayed for sale by person traveling from place to place who have no fixed establishment and who carry their entire stock in trade with them, are not deemed to be "fixed stands." (B.I.R. Cir. Lett., 479.)

The Internal Revenue Law provides that merchants who travel and peddle their goods from place to place in the Philippine Islands should take out a merchants' tax-receipt (license) under Schedule C, paragraph 5 and pay the percentage tax of 1-1/2% on the value of sales made by them. Merchants selling cattle, and sheep, or goats, traveling from place to place, are not considered peddlers of foodstuffs and, therefore, not exempt from the merchants' sales tax.

A peddler or seller at fixed stands of fruit, produce and food, raw or otherwise, is exempt from the merchants' tax only when he does not renew his stock oftener than once a day and when the gross value of his sales does not exceed ₱3 a day.

SEC. 62. Conditions for tax exemption of persons engaged in household industries.—Persons selling the products of their industry, as that of a wife, husband, father, mother or 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, provided that the articles produced are sold in the home of the producers, are exempt from the sales tax.

In the same manner, sellers of flowers and food products carrying a stock of goods, the total selling value whereof does not exceed ₱3.00 a day and which is not renewed oftener than once in twenty-four hours are also exempt from the merchants' tax. (B.I.R. Circular Letter No. 513.)

SEC. 63. *Transactions not subject to the merchants' tax.*—Section 1460 of the Administrative Code, as amended by Act No. 3293 provides that in computing the tax on merchants' sales, transactions in the following commodities shall be excluded:

(a) Things subject to a specific tax.

(b) Agricultural products and the ordinary salt when sold by the producer or owner of the land where produced, or by any other person other than a merchant or commission merchant, whether in their original state or not.

SEC. 64. *Things subject to specific taxes, enumerated.*—The Internal Revenue Law provides that specific internal revenue taxes apply to things manufactured or produced in the Philippine Islands for domestic sale or consumption and to things imported from the United States or foreign countries, but not to anything produced or manufactured here which shall be removed for exportation and is actually exported without returning to the Islands, whether so exported in its original state, or as an ingredient or part of any manufactured article or product. Among the things subject to the specific internal revenue taxes are:

(a) Distilled spirits—Sec. 1481 of Act 2711 as amended by Act 2925. (b) Wines and imitation wines—Sec. 1486 of Act 2711 as amended by Act 2925. (c) Fermented liquors—Sec. 1487 of Act 2711 as amended by Act 2925. (d) Tobacco products (cigars, cigarettes and chewing and smoking tobacco)—Sections 1490—1492 of Act 2711 as amended by Acts 2733 and 2835. (e) Matches—Sec. 1493 of Act 2711 as amended by Act 2775. (f) Skimmed milk—Sec. 1494 of Act 2711. (g) Manufactured oils—Sec. 1495 of Act 2711, as amended by Acts 3248 and 3274. (h) Coal—Sec. 1496 of Act 2711. (i) Cinematographic films—Sec. 1497 of Act 2711. (j) Playing cards—Sec. 1498 of Act 2711 as amended by Acts Nos. 2835 and 3246.

The transactions in or sales of the foregoing things and articles which are subject to specific taxes are to be excluded in computing the merchants' percentage tax. If in a grocery store, for instance, one sells ₱5000.00 worth of gasoline, petroleum, wines, distilled or fermented liquors in a quarter, the same need not be entered in the sales record of the grocery dealer for the purpose of computing the sales tax, but the sales made of commodities other than those on which specific taxes are paid must be entered in the sales book for the purpose of the sales tax.

SEC. 65. *When specific taxes do not apply, the merchants' sales tax accrues.*—Section 1478 of the Administrative Code provides that specific internal revenue taxes do not apply to any-

thing produced or manufactured here which shall be removed for exportation and is actually exported without returning to the Islands, whether so exported in its original state or as an ingredient or part of any manufactured article or product. But in this case the gross value in money of such exports must be declared for the purpose of paying the consignment tax.

Where, therefore, articles subject to specific taxes are actually exported either by the local manufacturer or through a commission merchant, the products are not subject to specific taxes but their gross selling or market value must be declared by the exporter for the purpose of assessing the consignment tax. But if the articles were actually put in trade subsequent to their removal from the factory premises, the specific taxes due thereon must be paid even if the same should be exported at a later date, but in this case, the consignment tax need not be paid. Hence, articles on which the corresponding specific taxes were paid need not be returned for the imposition of the consignment tax even if the products are exported or consigned abroad.

SEC. 66. *Goods exempt from specific tax sold to United States Army and Navy are subject to merchants' tax; sales made to Post Exchanges of United States Army and Navy.*—No specific tax is collected on any article sold and delivered directly to the United States Army or Navy for actual use or issue by the Army or Navy, or on any article sold to the Bureau of Coast and Geodetic Survey, purchased with funds furnished by the Government of the United States, and any taxes which have been paid on articles so sold and delivered for such use or issue shall be refunded upon such sale and delivery. (Sec. 1478 of Act 2711.)

It is seen, therefore, that goods and merchandise sold direct to the United States Army and Navy in the Philippines and purchased with funds belonging to the United States Government are exempt from the internal revenue specific tax but the selling price thereof is subject to the merchants' tax.

As the funds used by the Post Exchange of the United States Army or Navy belong to private persons in the Army or Navy and as they do not form part of the Army or Navy, the exemption from specific tax created by section 1478 of the Administrative Code will not apply. Hence, matches, tobacco products, liquors and other articles sold to the Army or Navy Post Exchanges in the Philippines are subject to the specific tax, but exempt from the percentage tax on merchants' sales.

SEC. 67. *When are sales of agricultural products exempt from tax; when subject.*—Section 1460 of the Administrative

Code, as amended by Act No. 3293, provides that transactions in, or sales of, agricultural products are not subject to the sales tax when the products are sold (a) by the producer himself or by the owner of the land where produced or (b) when the sale is made by any person who is not a merchant or a commission merchant.

From the foregoing we infer that a farmer or producer is exempt from the merchants' tax on the value of agricultural products sold, bartered or consigned abroad by him. He is not subject to the sales tax not only when he sells his products himself or when the sale is made for him by one who is not a merchant or a commission merchant but also when the sale is made by a merchant or a commission merchant. But in the latter case, that is, when the sale of agricultural products is made by a merchant or a commission merchant, the latter is subject to the merchants' sales tax although the owner or producer of the products is exempt therefrom. The exemption of the farmer, owner or producer from the sales tax subsists whether the agricultural products are sold in their original state or not. A farmer raising sugar cane may sell the cane itself or he may sell the sugar after the canes have been milled. A rice producer may sell the unhusked rice (palay) immediately after harvest or he may sell the milled rice ready for the market. In both cases the farmer or producer is exempt from the sales tax.

SEC. 68. *Sale of share of agricultural products received by laborers or tenants.*—The principles enunciated in the preceding section relative to exemption from the sales tax apply also to sales of agricultural products received by laborers or tenants as their share or compensation for their work or service. In other words, a laborer or tenant is exempt from the sales tax on the sale of agricultural products constituting his share in the produce, or compensation for his labor. The exemption is predicated on the fact that such sales, being civil in nature, are not invested with any mercantile character as they constitute the only means whereby the fruits of one's labor could be converted into money.

SEC. 69. *Term "agriculture" defined and construed.*—“Agriculture” is an English word made up of the Latin words “ager,” a field, and “culture,” cultivation. It is defined by Webster's New International Dictionary as meaning in its broader sense, “The science and art of the production of plants and animals useful to man * * *.” In the case of *Mayor vs. Davis* (6 Watts and Segeant (Penn. Rep.), 269) the court said:

"Swine, horses, meat, cattle, sheep, manure, cordwood, hay, * * * vegetables, fruits, eggs, milk, butter, lard, * * * are strictly produce of the farm * * *."

Courts and lexicographers are in accord in holding that the term "agricultural products" is not limited in its meaning to vegetable growth, but includes everything which serves to satisfy human needs which is grown upon the land, whether it pertains to the vegetable kingdom, or to the animal kingdom, embracing domestic and domesticated animals, animal products, and fish grown in ponds. In a real sense, the fish are just as truly a product of the land as are poultry or swine, living upon its vegetable growths, aquatic or terrestrial. (Molina vs. Rafferty, 38 Phil. 167, 172-173.)

In this connection, it may be noted that the term "producer" as used in section 1460 (b) of Act No. 2711 means a person who raises agricultural products, and puts them in a condition for the market.

SEC. 70. *Reason of the law in exempting agricultural products especially fish raised in artificial ponds from the merchants' tax.*—The Supreme Court of these Islands in the case of Molina vs. Rafferty (38 Phil. 169-170) advances the following arguments for exempting agricultural products from percentage taxation. It says:

"It seems reasonable to assume that it was due to the belief on the part of the law-making body that by exempting agricultural products from this tax the farming industry would be favored and the development of the resources of the country encouraged. It is a fact, of which we take judicial cognizance, that there are immense tracts of public land in this country, at present wholly unproductive, which might be made fruitful by cultivation, and that large sums of money go abroad every year for the purchase of food substances which might be grown here. Every dollar's worth of food which the farmer produces and sells in these Islands adds directly to the wealth of the country. On the other hand, in the process of distribution of commodities to the ultimate consumer, no direct increase in value results solely from their transfer from one person to another in the course of commercial transactions. It is fairly to be inferred from the statute that the object and purpose of the Legislature was, in general terms, to levy the tax in question, significantly termed the "merchants' tax," upon all persons engaged in making a profit upon goods produced

by others, but to exempt from the tax all persons directly producing goods from the land. In order to accomplish this purpose, the Legislature, instead of attempting an enumeration of exempted products, has grouped them all under the general designation of "agricultural products."

"It seems to require no argument to demonstrate that it is just as much to the public interest to encourage the artificial propagation and growth of fish as of corn, pork, milk or any other food substance. If the artificial production of fish is held not to be included within the exemption of the statute this conclusion must be based upon the inadequacy of the language used by the Legislature to express its purpose, rather than the assumption that it was actually intended to exclude producers of artificially grown fish from the benefits conferred upon producers of other substances brought into the store of national wealth by the arts of husbandry and animal industry." (Molina vs. Rafferty, 38 Phil. 169-170.)

SEC. 71. *Fish raised in artificial ponds are agricultural products; Sales of fish caught in the sea are subject.*—As may be inferred from the preceding section, the Supreme Court of these Islands has held in the case of Molina vs. Rafferty, (16 Off. Gaz., 835) that fish raised in artificial fish ponds is an agricultural product. It follows from this decision that sales of such kind of fish when made by the person who raised it or the owner of the pond where it was grown or by any other person who is not a merchant or commission merchant, are exempt from the sales tax. It is also evident that sales of fish caught in the sea, lakes, rivers, or any place other than an artificial fish pond are subject to the merchants' sales tax.

SEC. 72. *Plants called "bakawan" raised in mangrove swamps are agricultural products.*—It has been held that the raising of the plant or shrub known locally as "bakawan" and the gathering of its trunk and branches for use as firewood constitute a genuine agricultural labor, and, consequently, sales of bakawan firewood raised in mangrove swamps, which are classified as agricultural land are exempt from the merchants' sales tax. It is not necessary that a person should personally have planted bakawan shrubs and cut them into firewood in order to be classed as an agriculturist. It is sufficient that he was the owner of the land from which the material of the firewood was taken and that his workmen should have performed the work on his own account and in his name, in order that he be exempt from

the payment of the merchants' sales tax. (*Mercado vs. Collector of Internal Revenue*, 32 Phil. 271.)

SEC. 73. *Tax liability of owners of domestic or domesticated animals for sale.*—Persons who engage in the business of raising and selling domestic or domesticated animals as cattle, hogs, pigs, cats, dogs, chickens, doves, horses and oxen are exempt from the payment of the percentage tax on merchants' sales for the reason that they are considered as agricultural products in the contemplation of section 1460 of Act No. 2711.

SEC. 74. *When cattle and other animals are considered agricultural products and when not.*—The Attorney-General of the Philippine Islands has stated that the decision of our Supreme Court in the case of *Molina vs. Rafferty*, (38 Phil. 167) holds that fish produced artificially in ponds are to be deemed "agricultural products" for the purposes of exemption from the merchants' tax, but gives no definite information as to when cattle and other animals may be so regarded. It is broadly asserted that the term "agricultural products" includes "everything which serves to satisfy human needs and which is grown upon the land." However, the following distinctions are made:

Honey produced by one who devotes his land to apiculture might be so regarded, even if we were to admit that wild honey gathered in the forest is not. Pigeons kept in domestication and fed by the owner would fall within this definition. Wild pigeons obtained by a hunter would not. Firewood gathered in a natural forest is not an agricultural product, but firewood cut from *bacauan* trees planted for that purpose has been held to be such a product, and its owner exempt from the merchants' tax. (*Mercado vs. Collector of Internal Revenue*, 32 Phil. 271.)

Keeping these distinctions in mind, we may safely state without fear of overriding any principle that cattle let loose on uncultivated land where they find their own food without the intervention of man, are on much the same footing as wild animals that roam on said land, and their owner can no more be said to be an agriculturist than can the hunter who goes after the wild animals.

Therefore, stockmen, that is, owners of herds of cattle placed upon uncultivated land where the cattle find their own food until such time as the owner receives an order, rounds the required number up, and ships to destination, are not agriculturists and,

therefore, not exempt from the merchants' percentage tax. (Opinion of the Attorney-General, June 20, 1919.)

SEC. 75. *Are producers of salt subject to the merchants' sales tax?*—Before the promulgation of Act No. 3293 amending section 1460 of the Administrative Code, a proprietor of salt beds is considered a manufacturer and, hence, subject to the sales tax. (Pascual vs. Nolting, 33 Phil. 154.) But since the enactment of the law just referred to, producers of salt have been exempted from the sales tax. In order, however, that a sale of the ordinary salt may be exempt from the tax, the sale should be made (a) by the producer himself or by the owner of the land where it is produced or (b) by any person who is not a merchant or a commission merchant. If the sale is made by a merchant or a commission merchant, the producer of the salt will continue to be exempt, but the merchant or commission merchant will be liable to the tax.

SEC. 76. *Sales of the output of mines subject to ad valorem tax are exempt from the sales tax.*—Section 1534 of the Administrative Code provides for the imposition and collection on the gross output of each mine an *ad valorem* tax equal to 1½% of the equal market value of such output. Partly to encourage the mining industry in these Islands, it has been held that the sales of mining products on which the *ad valorem* tax has been paid are not subject to the merchants' sales tax. We may, however, find sufficient reason in the law in support of the contrary view. The supporters of the latter opinion rely principally on the fact that the *ad valorem* tax collected on the output of mines is a tax different and distinct from the specific tax; and inasmuch as only things subject to the specific tax are exempt from the sales tax under certain conditions, it follows that the sales of the output of mines which are not subject to the specific tax are liable to the sales tax. For instance, the sale of forest products are subject to the sales tax notwithstanding that forest products are liable to the payment of forest charges.

SEC. 77. *Is a commission merchant who, as a salaried agent of a producer, sells the agricultural products of the latter, liable to the merchants' sales tax?*—We submit our answer to this question in the affirmative. According to section 1460 of the Administrative Code, the sale of agricultural products is exempt from the tax only when they are sold by the producer himself or by any person other than a merchant or a commission merchant. Where, therefore, a producer appoints an agent and pay him a fixed monthly or annual salary because he is a commission

merchant and, as such, was in a position to sell his products advantageously, said commission merchant becomes liable to the payment of the sales tax. The mere fact that he receives a fixed salary, instead of a commission, for his services does not alter his status as a commission merchant. The form in which the compensation is paid, whether by a fixed salary or by a certain per cent of the sales made, is immaterial, although the latter form is the more common. If a commission merchant, simply because he receives a fixed monthly compensation instead of a certain per cent of the proceeds of the sale, should not be obliged to pay the tax in question, then it would be very easy to evade the payment of the sales tax and mock the law with merely collecting the commission in the form of a fixed salary or remuneration. (Joaquin Perez vs. Rafferty, 41 Phil. 74.)

SEC. 78. *Liability of a person who sells goods for another without compensation.*—If a person is appointed by another to act as a particular mandatory, agent or "apoderado" for the purpose of selling merchandise, and, for his services, does not receive any compensation whatever, such agent or apoderado cannot be considered as a commission merchant. Compensation is of the very essence of the commission business. (Lopez vs. Trinidad, R. G. No. 16757.)

SEC. 79. *Liability of traveling salesmen working at a fixed salary.*—Traveling salesmen who are *bona fide* salaried employees of the firms for whom they work and who receive only a small commission in addition to their salary are considered exempt from the merchants' tax. But traveling salesmen working at a fixed salary in addition to a commission on all the sales made are considered as commission merchants and should pay the merchants' tax. (Ruling of Collector of Internal Revenue.)

SEC. 80. *Are persons employed by foreign firms to solicit orders for goods in the Philippine Islands subject to the sales tax?*—We propose to answer this query in the negative. A person who is employed by a foreign firm to solicit orders for goods in these Islands cannot be considered a merchant or a commission merchant, for the reason that he does not buy or sell merchandise. He merely solicits orders, that is, he acts as a sort of middle-man or go-between to bring about the sale or purchase of goods between local dealers on the one hand and foreign concerns on the other. As such he is exempt from the merchants' tax but liable to the tax imposed on commercial brokers of ₱80.00 per annum, payable quarterly in advance, and 4% of the gross com-

compensation received by him in excess of ₱500 a quarter. (Sections 1464 (w) and 1466, Act No. 2711.)

In case the agent is paid a fixed salary by the foreign firms he represents, it is submitted that he is not liable to the payment of either the merchants' tax or the commercial brokers' tax, inasmuch as the definition of the term "commercial broker" as contained in the Internal Revenue Law excludes salaried employees. (See 1465 (s) of Act No. 2711, as amended by Act No. 2835.)

SEC. 81. *Liability of tax of a person who is not a merchant for making consignments abroad.*—If a person, not a merchant, consigns abroad goods and merchandise, it is submitted that in such case he is not subject to the consignment tax. It is believed to be the intent and purpose of the law to subject merchants only to the consignment tax. The requisite for the collection of the consignment tax is that the consignor or shipper must be a merchant, so that if the shipper is not a merchant, he is not liable to the consignment tax upon his exportations abroad. On the other hand, if the exporter is a merchant, all his exportations of merchandise are subject to the consignment tax regardless of its ultimate destination or disposition. (Vegetable Oil Corporation vs. Trinidad, 45 Phil. 822.)

SEC. 82. *Are purchases of merchandise made by one merchant for another for a compensation or commission subject to the sales tax?*—This question has been answered in the negative by our Supreme Court. It has been held that section 1459 of the Administrative Code provides, among other things, that merchants shall be liable for a tax calculated at a certain per centum on the value of merchandise sold by them. It is not the purchase but the sale that is intended to be the subject of taxation. Where a commission merchant had intervened only in the purchase of goods and had nothing whatever to do with the sale which alone is the subject of taxation, he is not subject to the sales tax on the purchases he might have made for another merchant. (Sy Yoco vs. Collector of Internal Revenue, R. G. No. 24942.)

SEC. 83. *There cannot be two consignments abroad by one person of one and the same thing.*—The Supreme Court of these Islands has ruled that a shipper is not liable for a double sales tax on consignments abroad under the following circumstances: Where under an express contract A as the agent of B agreed to purchase copra for and on account of B who furnished all the money and paid all expenses of the purchase, and A did purchase copra for, and on account of, and in the name of B, and received,

stored and insured it in the name of B, and where A paid the sales tax on the copra which was reimbursed to A by B as part of the expenses of purchase of the copra, and where A was to receive 20 centavos for each picul of copra purchased, and where the copra was shipped direct from Davao by A on bills of lading which were delivered to and indorsed in blank by A and delivered to B for transmission to B's representative abroad, and where after the purchase by A there was no change of possession or sale of the copra in the Philippine Islands, B is not liable for the payment of another sales tax on the copra which was purchased by A.

In the very nature of things, there cannot be two different consignments abroad of the same thing by two different persons; and hence, a local exporter is not liable for a double consignment tax on one consignment abroad on one shipment of the same goods. In legal effect, any other construction of the law would require a local exporter to pay a double sales tax, and would permit a foreign exporter to purchase goods in the Philippine Islands by the payment of one sales tax only. That was never the purpose or intent of the law. (*Atkins Kroll & Co. vs. Collector of Internal Revenue*, 24 Off. Gaz. 807.)

SEC. 84. *Other persons and institutions exempt from the merchants' sales tax, enumerated.*—Other persons and institutions may also be exempted from taxation by reason of the fact either that they discharge functions of governmental nature or that they subserve ends of humanity and religion. It is a general principle of taxation that the government will not tax its own instrumentalities. To be entitled of this exemption, it must, however, clearly appear that the instrumentality or agency is strictly governmental and that the profits or losses accrue solely to the government agency. The test should be, Is the undertaking authorized or required by the government and confined strictly to a government project? The following have been held exempt from the payment of the merchants' sales tax: (a) *The Culsion Leper Colony store*, so long as its operations are confined strictly to the members of the colony. (b) *The Iwahig Penal Colony store*, if the operations are confined strictly to the members of the colony. (c) *Constabulary Post Exchanges*, if they are not financed by the members of the Constabulary in their private capacity, and if their operations are confined to sales to members of the Constabulary. If sales are made to the public, such exchanges are subject to internal revenue taxation.

(d) *Sales of Bibles and other religious literature without profit* in an establishment solely for that purpose or in the home

of the vendor need not be declared for internal revenue taxation. This exemption applies to itinerant missionaries, to persons soliciting orders and to persons making deliveries of Bibles or other religious books. In order to be entitled to this exemption no other business transactions should be conducted in connection therewith by the person selling, soliciting or delivering Bibles or religious literature. (e) *Public school entertainments.*—*Bona fide* school entertainments given occasionally for the purpose of raising funds exclusively for educational, charitable, or similar purposes, including the establishment of libraries, promotion of athletics, etc., no part of the funds derived inures to the benefit of any private person or firm, are not subject to internal revenue taxation as not being a business. (f) *Exchange stores established by Act No. 2528.*—Exchange stores established under the provisions of Act No. 2528 are not subject to any internal revenue tax by reason of their governmental character, and this exemption extends to every sort of enterprise undertaken by them falling within the scope of their authorized business as generally outlined in section 1 of said Act. (g) *Rural credit cooperative associations* are exempt from taxation in accordance with section 42 (b) of Act No. 2508 as amended. (h) *Sale by order of the Court.*—An auctioneer who sells goods, wares, or merchandise by order of a court is not subject to internal revenue taxation as a merchant; consequently such sale need not be declared for internal revenue taxation. (B. I. A. adm. Order No. 37, p. 63.) (i) *Merchants appointed as agents of the Government in selling Government property as rice, etc.*—Said merchants when duly appointed for the purpose of distributing and selling Government property as rice in accordance with the regulations promulgated by the Secretary of Commerce and Communications are agents of the Government and are consequently exempt from the payment of the percentage tax imposed in section 1459 of Act No. 2711. (j) *A person employed by the Bureau of Customs to sell on commission at public auction private property to satisfy claims for duties is exempt from the sales tax.* The sales thus made by him do not constitute mercantile transactions, or transactions made in the ordinary course of business, nor do said sales constitute a business enterprise as contemplated by the law. (3 Op. Atty. Gen. 156.) (k) *Magazine representatives soliciting subscriptions are exempt from tax.*—A representative of a review or periodical edited in a foreign country who is entrusted with securing subscriptions in the Islands is not subject to any tax under the Internal Revenue Law. (l) *Agents in Manila of American publishing houses who*

are employed merely to work up trade by commending the publications of these houses to the officials who make the requisition for supplies, are not liable to taxes by reason of sales made by the firms they represent to the Insular Government through the representative of the Insular Purchasing Agent in New York. (3 Op. Atty. Gen. 167.) (m) *A person employed at a fixed salary by a merchant whose duties are confined and limited to the supervision and control of his employer's buying agents and to the supervision and the weighing of the copra purchased by such agents is not subject to the merchants' tax as a commission merchant. (Facundo vs. Collector of Internal Revenue, R. G. No. 23244.)*

CHAPTER V.

REMEDIES OF THE TAXPAYER.

SEC. 85. *Remedies in general; right of the taxpayer to recover taxes paid under protest; injunction not available to restrain collection of tax.*—The Philippine Legislature determines the method of assessment and collection of taxes. Philippine law zealously safeguards the rights of taxpayers, especially those delinquent. The state in levying and collecting a tax, and the citizen in paying the tax, stand on reasonably equal terms. The power of the state and the remedies of the citizen are, and should be, reciprocal. (Roxas vs. Rafferty, 37 Phil. 957.) Every taxpayer has a right to a remedy for any actual wrong he may have suffered in the collection of taxes. (Malcolm's Philippine Constitutional Law, Vol. I, p. 363-364.)

When the validity of any tax is questioned, or its amount disputed, or other question raised as to liability therefor, the person against whom or against whose property the same is sought to be enforced may pay the tax *under instant protest* or *upon protest within ten days* counted from the day when the tax was paid. The taxpayer may thereupon request the decision of the Collector of Internal Revenue, and, if the decision of this official is adverse, or if no decision is made by him within six months from the date when his decision was requested, the taxpayer may proceed, at any time *within two years* after the payment of the tax, to bring an action against the Collector of Internal Revenue for the recovery without interest of the sum alleged to have been illegally collected. (Sec. 1579 of Act No. 2711.) But a person who has not made a previous and timely effort to have the appropriate officer or board correct an alleged error while the matter was yet in their hands and under their control, and who has paid voluntarily and without objection or

protest of any kind, can not maintain an action to recover the tax paid. (Fernandez vs. Shearer, 19 Phil. 75; Roxas vs. Rafferty, 37 Phil. 957.) If the taxpayer, therefore, fails either to pay his taxes under protest or if protest was made but neglects to maintain an action for its recovery within two years after the payment of the tax, he will thereby be completely barred from instituting any action looking to its recovery.

In this connection it may be observed that section 1578 of the Administrative Code provides that no court shall have authority to grant an injunction to restrain the collection of any internal revenue tax. This section of the Internal Revenue Law has been declared by the Supreme Court of these Islands as constitutional and valid, the same not being opposed to the due process and equal protection of the law clauses of the Bill of Rights of the Organic Act. (Churchill vs. Rafferty, 32 Phil. 580; Sarasola vs. Trinidad, XVII Off. Gaz., 1872.) (Vol. I, Malcolm's Philippine Constitutional Law, p. 365.)

SEC. 86. Authority of the Collector of Internal Revenue to refund taxes erroneously or illegally received or penalties imposed without authority.

Question: Under section 1582 of the Administrative Code, as amended by section 14 of Act 2835, can the Collector of Internal Revenue refund taxes erroneously or illegally received or penalties imposed without authority, even if said taxes or penalties were paid voluntarily and without protest and under a mistake of law? Or, is the authority granted to the Collector of Internal Revenue, under section 1582 of Act 2711, as amended by Act 2835, to refund taxes erroneously or illegally received, subject to the condition imposed by section 1579 of the same Act, that the said taxes must be paid under protest?

Section 1579 of the Administrative Code provides:

"Recovery of tax paid under protest.—When the validity of any tax is questioned, or its amount disputed, or other question raised as to liability therefore, the person against whom or against whose property the same is sought to be enforced shall pay the tax under instant protest, or upon protest within ten days, and shall thereupon request the decision of the Collector of Internal Revenue. If the decision of the Collector of Internal Revenue is adverse, or if no decision is made by him within six months from the date when his decision was requested, the taxpayer may proceed, at any time within two years after the payment of the tax, to bring an

action against the Collector of Internal Revenue for the recovery without interest of the sum alleged to have been illegally collected, the process to be served upon him, upon the provincial treasurer, or upon the officer collecting the tax."

Section 1582 of the same Code, as amended by section 14 of Act 2835, prescribes:

"Authority of Collector to make compromises and to refund taxes.—The Collector of Internal Revenue may compromise any civil or other case arising under this chapter (Internal Revenue Law) or other law or part of law administered by the Bureau of Internal Revenue; may refund taxes erroneously or illegally received, or penalties imposed without authority, and may remit before payment any tax that appears to be unjustly assessed or excessive.

"He shall refund the value of internal revenue stamps when the same are returned in good condition by the purchaser, and may in his discretion redeem or exchange unused stamps that have been rendered unfit for use, and may refund their value upon proof of destruction."

Said section 1582 of the Administrative Code just quoted is derived from, and is similar to, section 3220 of the Revised Statutes of the United States, and the latter section has already been construed by the Attorney-General of the United States, as follows:

"The Commissioner of Internal Revenue has no power under section 3220, Revised Statutes, to refund taxes voluntarily paid without protest, under a mutual mistake of law." (26 Op. Atty. Gen. U. S. 472.)

The opinion of the Attorney General of the United States is based upon the rule "firmly established and unqualified that protest is indispensable to the right to recover taxes claimed to have been illegally exacted," and as a reason for applying this rule to claims for refund made to the Commissioner, the Attorney-General says:

"It should be held that in all cases arising under section 3220 of the Revised Statutes, claims might be allowed by the Commissioner whether or not there had been any protest, the result would seem to follow that where a tax is held by the courts to be unconstitutional but the particular claim is barred for lack of protest, other claimants who likewise had failed to protest could

nevertheless apply to the Commissioner for refund of the same taxes and have their claims allowed. I can not think there should be one rule in this respect for claimants in court and another for claims before the Commissioner of Internal Revenue."

The same authority, however, also concedes in the following opinion that "there are cases where a showing of protest need not be made to warrant the Commissioner in assuming jurisdiction and granting the refund, *but such cases arise under a misapprehension of fact and not of law:*"

"The Commissioner of Internal Revenue has no power, under section 3220, Revised Statutes, to reopen and allow the claim of the New York and Cuba Mail Steamship Company for taxes voluntarily paid under a mutual mistake of law, as the judgment of the Supreme Court, in sustaining the ruling of the Commissioner that the Company had no legal claim against the Government deprived the Commissioner of jurisdiction to again entertain the claim. The Commissioner may, however, allow similar claims where no legal protest has been made; *but such cases must arise under a misapprehension of fact and not of law.*" (25 Op. Atty. Gen. U. S. 605.) (Italics ours).

Again, our Supreme Court in the following case sustains the same view:

"A person who has paid a tax voluntarily, and without objection or protest of any kind, can not maintain an action to recover the tax so paid." (Fernandez vs. Shearer, 19 Phil. 75.)

And, finally, Judge Cooley, in his great work on Taxation, states:

"That a tax or assessment voluntarily paid cannot be recovered back, the authorities generally agree. And it is immaterial in such a case that the tax or assessment has been illegally laid, or even that the law under which it was laid was unconstitutional. The principle is an ancient one in the common law, and is of general application. Every man is supposed to know the law, and if he voluntarily makes a payment which the law would not compel him to make, he cannot afterwards assign his ignorance of the law as a reason why the state should furnish him with legal remedies to recover it back. Especially is this the case when the officer receiving the money, who is chargeable with no more knowledge of the

law than the party making payment, is not put on his guard by any warning or protest, and the money is paid over to the use of the public in apparent acquiescence in the justice of the exaction. Mistake of fact can scarcely exist in such a case except in connection with negligence; as the illegalities which render such a demand a nullity must appear from the records, and the taxpayer is just as much bound to inform himself what the records show, or do not show, as are the public authorities. The rule of law is a rule of sound public policy also; it is a rule of quite as well as of good faith and precludes the courts being occupied in undoing the arrangements of parties which they have voluntarily made, and into which they have not been drawn by fraud or accident, or by any excusable ignorance of their legal rights and liabilities." (2 Cooley on Taxation, 1495-1499.)

In view of the foregoing authorities, the Collector of Internal Revenue is not authorized under section 1582 of the Administrative Code, as amended, to refund taxes voluntarily paid without protest, under a mutual mistake of law; but protest is not necessary to authorize a refund under said section if the taxes were paid under a misapprehension of fact. (Opinion of the Attorney-General, P. I., dated July 21, 1921; Opinion of Insular Auditor, December 8, 1921.)

CHAPTER VI.

CONCLUSION

The percentage tax on merchants' sales tax is one of the most stable, safest, surest, least burdensome, and most important source of inland taxation for the Government of the Philippine Islands. Its stability lies in the fact that so long as persons engage in the immemorial practice of barter or exchange, or the commonplace experience of buying and selling goods, wares, and merchandise, or consigning them abroad, the one and one-half per cent tax will continue to be collected on the gross value of the sale, barter or exchange or consignment abroad made by them. The tax is not difficult either of assessment or collection by the Government or payment by the taxpayer for the latter is given by law a period of twenty days following each calendar quarter during which the tax may be paid without penalty. Its importance as a source of revenue is manifest, as has been stated, in the fact that over thirty per cent of the total annual collections of the Bureau of Internal Revenue is derived from this item of revenue alone.

In the preceding chapters of this work, we have stated the law of percentage tax on merchants' sales, traced the legislative changes it has undergone since the implantation of American sovereignty in these Islands, discussed its nature and relation to other laws, construed its terms and meaning, determined the persons and transactions subject to the tax and those exempt from it, and set forth the legal remedies of the taxpayer who may question its validity, dispute its amount, or raise other question as to his liability therefor. We have also defined the basic principles governing the collection and imposition of the tax to be.

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

(b) That the tax is not conditioned on profits realized, or losses sustained;

(c) That the subject matter of the transaction must be personal property; and

(d) That the transaction must have its situs in the Philippine Islands.

And finally in the light of said cardinal principles, we have established the validity and constitutionality of the law and proved—

(a) That it does not create or impose a system of double taxation;

(b) That the tax is uniform;

(c) That while the consignment tax is prohibited by section 11 of the Jones Law, yet by reason of the express ratification of the law by the Congress of the United States, the collection of the tax has become legal and valid; and

(d) That it does not violate the interstate commerce provision clause of the United States Constitution.

In view of all the foregoing considerations, the law of percentage tax on merchants' sales is assured of a permanent chapter in the history and progress of Philippine revenue laws.
