RECENT DOCUMENT

OPINION OF THE SECRETARY OF JUSTICE

Opinion No. 211, s. 1958

2nd Indorsement
September 16, 1958

Respectfully returned to the Secretary of Foreign Affairs Manila.

Opinion is requested on "whether or not the Third Secretary of the Argentine Legation may sell his personally owned automobile which entered the Philippines, free of duty and tax, on March 8, 1955, after using it for three years, without the payment of duty and tax on his part nor on the part of the buyer who may not be tax-exempt, on the ground of reciprocity." In the negative, opinion is further requested as to whether "an executive agreement could be validly entered into between the two Governments with a view to providing for reciprocal treatment on the matter along the same lines permitted by Argentine law".

Existing law in Argentina exempts, so we are informed, both buyer and seller from the payment of taxes and duties on the sale of a car which had been in use thereat for a period of at least two years from the date of its importation free of duty.

On the other hand, Section 183 of the National Internal Revenue Code, as amended by Republic Act No. 1612, provides that —

> "In case the tax-free articles brought or imported into the Philippines by persons, entities or agencies exempt from tax which are subsequently sold, transferred, or exchanged in the Philippines to non-exempt private persons or entities, the purchasers shall be considered the importers thereof. The tax due on such articles shall constitute a lien on the article itself superior to all other charges or liens, irrespective of the possessor thereof."

In view of the unqualified phraseology of the quoted provision, the first query must necessarily be answered in the negative. It is well settled that no executive or administrative officers may read into a tax statute an implied exemption unless the intendment of the law to create such exemption is plain. (51 Am. Jur. 526) The taxing power of the state is exclusively a legislative function and upon this domain, the executive may not encroach either by repealing or modifying in any respect the will of the legislature as declared in statutes. (11 Ibid. 900; 84 CJS 51, 216. The rule of reciprocity does not, in my opinion, create an exception to the above principles.

In respect of the second query, what seems to be contemplated is the type of executive agreement in the negotiation and conclusion of which the lawmaking body does not intervene, appropriately labeled Presidential agreements, in contradistinction with those authorized by the Congress, properly denominated Congressional-Executive agreements.

We have it on good authority that the subject matter which may be dealt with through the instrumentality of an executive agreement, not authorized by Congress, is limited in scope (See 2 Hyde, International Law [1945] 1416-1417; Borchard, Shall the Executive Agreement Replace the Treaty? [1944] 53 Yale Law Journal 664 at 675; Treaties and Executive Agreements — A Reply (1945) 54 Ibid. 616 at 621.) and encompasses only such as are within the normal powers vested in the President as Commander-in-Chief and principal diplomatic officer. (Op. cit., at 628.) And even in such cases, the executive agreement must yield to and cannot repeal an Act of Congress. (Op. cit., at 623, 629, 643.) Otherwise, an anomalous situation would arise whereby the Executive would be permitted to govern the country without the assistance of Congress. (Op. cit., at 635.)

Even the more passionate proponents of Presidential omnipotence in the realm of external relations have conceded, though with reservation, the validity of the above proposition. Thus—

> "Agreements with other governments made pursuant to the President's authority alone, when within the scope of his independent powers, have, furthermore, substantially the same status as treaties under both international and the municipal law of the United States, except in some cases where there is contradictory legislation." (McDougal & Lans, Treaties & Congressional-Executive or Presidential Agreements: Interchangeable Instrument of Foreign Policy [1945] 54 Yale Law Journal 181 at 199. Emphasis supplied.)

> "The making of international commitments by Congressional-Executive agreement would appear to be as free from the restraint of previously enacted legislation as is the treaty-making process. x x x The problem is less susceptible of succinct summarization in the case of a direct Presidential agreement. x x x A direct Presidential agreement will not ordinarily be valid if contrary to previously enacted legislation." (Ibid. at 316-317. Emphasis supplied.)

Indeed, an exhaustive search for precedents failed to yield any judicial decision by which a direct Presidential agreement was held to modify or alter previously enacted statutes in general or revenue laws in particular. In point of fact, the modification of revenue acts, specifically tariff acts, in the United States have been accomplished through reciprocity agreements expressly or explicitly authorized by statutes. (See Barnett, International Agreements Without the Advice and Consent of the Senate, 15 Yale Law Journal 63 at 64.) And reciprocal tax-exemption agreements have been entered into in the United States in pursuance of the provisions of the Revenue Act 1920 and its successors. (See McDougal & Lans supra, at 279-280.)

In view of all the foregoing and considering that the proposed executive agreement is not even made to appear as predicated upon a specific constitutional power of the President; considering further that the proposal suffers from want of Congressional authorization; and considering finally that the agreement, if entered into and given effect, will alter or repeal the aforequoted Section 183 of the National Internal Revenue Code to the extent that an exception thereto will be made, where none has been prescribed or envisaged by the statute, I am of the opinion that the second query should be answered in the negative.

There is no reason, however, why the President may not, if he so desires, enter into an executive agreement with the Government of Argentina to take effect upon the approval thereof by the Philippine Congress, at least for the purpose of avoiding the needless danger of raising a regretable issue with the Legislative Department.

(SGD.) JESUS G. BARRERA
Secretary of Justice