

SY KIONG, PETITIONER-APPELLEE, VS. MARCELINO SARMIENTO, IN HIS CAPACITY AS TREASURER OF THE CITY OF MANILA, RESPONDENT AND APPELLANT.

G. R. No. L-2934. November 29, 1951

Ponente: BAUTISTA ANGELO, J.

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BAUTISTA ANGELO, J.:

This is an action for declaratory relief filed in the Court of First Instance of Manila for the purpose of determining if petitioner is liable to pay the municipal license tax upon his sales of flour to bakeries under Ordinance No. 2723 of the City of Manila, as amended.

Petitioner is the owner of a duly licensed grocery store located in the City of Manila and an importer of flour who sells it either to bakeries or to retail dealers for purposes of resale. Sometime in September 1948, the Treasurer of the City of Manila assessed against him the sum of P566.50 which, it is claimed, represents the alleged deficiency municipal license tax due from him on his gross sales of flour to bakeries after deducting the sales made to retail dealers for purposes of resale. Petitioner, Instead of honoring the demand, filed the present action for declaratory relief.

In his answer, respondent admitted all the factual allegations of the complaint, but contended that the sales in question are sales at retail and in this sense are subject to the provisions of Ordinance No. 2723, as amended. As the pleadings only raised questions of law, the case was submitted for decision after the parties had submitted their respective memoranda. And on March 4, 1949, the court rendered judgment upholding the content ion of the petitioner and declaring that he is not liable to pay the tax in question. From this decision respondent appealed.

The only issue involved In this appeal is whether the sales of flour made by petitioner to bakeries to be manufactured Into bread are retail or wholesale. If retail, they are subject to tax; if wholesale, they are not.

In the case of City of Manila vs. Manila Blue Printing Co. Court had occasion to determine when a sale of a commodity should be considered retail or wholesale. It was there said that there are two criteria by which this can be determined, "one is by the quantity, whether small or large; and the other is by the nature of the buyer, whether he is a consumer or a merchant who resells at a profit. The Court followed the second criterion and held that it is the character of the purchaser and not the quantity of the commodity sold that determines if the sale is wholesale or retail. If the purchaser buys the commodity, for his own consumption, the sale is considered retail, irrespective of the quantity of the commodity sold. If the purchaser buys the commodity for resale, the' sale is deemed wholesale regardless of the quantity of the transaction.

Now, having this criterion in mind, the next question to be determined is, is the sale of flour to a bakery retail or wholesale? Is a bakery who purchases flour to be manufactured into bread a consumer? Can a sale of flour to a bakery be considered wholesale for the simple reason that the flour after its conversion into bread is resold to the public? The answer to these questions will depend largely upon the consideration that may be given to the incidence touching on the manufacture of flour into bread before it is resold to the public. This is the main point

that should be determined in order that we may have a basis for the determination of this novel controversy.

The Ordinance under which the municipal license tax in question has been assessed does not contain any definition of what is retail gross sale. Said ordinance merely provides that the retail gross sales of a grocery store shall be subject to a license fee to be fixed by the City Treasurer in accordance with certain schedule therein specified, but is silent as to what are considered "retail gross sales". The National Internal Revenue Code does not also furnish any lead as regards the nature of a retail sale for purposes of taxation. It does not give any definition nor pattern as to how a sale to a bakery or a Manufacturer should be considered. This is a loophole that our Congress has not foreseen.

It is true that said Code gives the definition of a "manufacturer" and in so defining it includes every person who manufactures by any of the processes therein specified subject only to the limitation that the finished products shall be "for the purpose of their sale or distribution to others and not for his own use or consumption"(Section 194[x]); but this definition in our opinion merely gives an idea of who are the persons who should be considered manufacturers for purposes of paying the specific tax provided for therein, and does not state when a manufacturer should be considered a retail dealer or wholesale dealer of the raw materials he uses in the process of manufacture. It cannot be denied that many materials or ingredients are used in the manufacture of a finished product and the question whether the purchase of these materials for the purpose intended is retail or wholesale is not clarified. We have failed to find any legal provision in this jurisdiction that may be invoked to solve this important issue.

But we find one lead that may guide us in the case of *Buenaventura vs. Collector of Internal Revenue* (50 -Phil. 875), wherein a similar question was raised and decided. In that case this Court ruled that the sale of fish to a hotel by a vendor in a public market during certain period of time and for a certain value is a sale at retail and, therefore, is subject to the retail sales tax law. And then the Court added: "even the isolated case of those made to the Hotel de Francia cannot be considered as transactions for resale of fish, because it has not been proved, nor is it probable, that said hotel, as such, although it supplies food for payment and among it fish, cannot be said or considered to be a reseller of fish". The implication of this ruling is that the sale of fish to a hotel is retail even if the same is to be sold later in the form of food.

We believe this ruling to be in point and one of persuasive force in the present case in the absence of any express provision of law on the matter. The parallelism between that case and the one we are considering is apparent. In one case, the fish is converted into food through certain physical process, and, therefore, it suffers an alteration in form before it is sold. In such case the fish is resold in different form. A similar situation obtains in the case of a bakery. The flour is converted into bread through a physical or chemical process and later is sold to the public in the form of bread.

We have taken notice of the fact that in many states of the American Union, sales of tangible property to manufacturers, producers or processors, or "sales of goods which as ingredients or constituents go into and form part of tangible personal property sold by the buyer are not taxable" as retail transactions because they are considered wholesale transactions upon the theory that they have to be resold even in a different form or condition. But we have noted that if these transactions are so treated it is not by judicial interpretation but by express statutory provisions. As well stated by counsel for the appellee, these transactions are considered wholesale either because they are so declared by retail sales statutes of different American States, by administrative rules and regulations promulgated thereunder, or by Judicial decisions construing and applying them. If there is an express provision of the law on the matter, there is no room for Judicial interpretation. Our duty is to apply the law. But, as we have already pointed out, such is not the situation obtaining in the Philippines. Our law on the point is silent, and being silent we do not feel Justified to extend the force and effect of American

statutes to our Jurisdiction. To do so would be to incorporate into our statutes some legislative matter by Judicial ruling which is certainly beyond our province to do.

The decision appealed from should be reversed, with costs against the appellee.

Paras, C.J., Feria, Pablo, Benzon, Padilla, and Jugo JJ., concur.

Tuason and Reyes, JJ., reserve their votes.

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