

**SMITH, BELL & CO. (LTD.), PLAINTIFF AND APPELLANT, VS.
JAMES J. RAFFERTY, AS COLLECTOR OF INTERNAL REVENUE FOR
THE PHILIPPINE ISLANDS, DEFENDANT AND APPELLANT.**

G.R. No. 14466. January 26, 1920

Ponente: JOHNSON, J.

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JOHNSON, J.:

The only question presented by this appeal is, was the tax levied and collected by the defendant from the plaintiff upon certain merchandise, the produce of the Philippine Islands, which has been sold and exported from the Philippine Islands to various persons and firms without the Philippine Islands during the period from October 1, 1916, to December 31, 1917, legally levied and collected?

There is no dispute about the facts. They are admitted, and may be stated as follows:

That the defendant, in his capacity as Collector of Internal Revenue for the Philippine Islands, collected of the plaintiff, under protest, a 1 per cent tax on merchandise, the produce of the Philippine Islands, which the latter had sold and exported from the Philippine Islands to various persons and firms without the Philippine Islands. The total amount of such taxes is the sum of P413,180.05. The different periods covered by said collections were: (a) From October 1, 1916, to December 31, 1916; (b) from January 1, 1917, to March 31, 1917; (c) from April 1, 1917, to June 30, 1917; (d) from July 1, 1917, to September 30, 1917; (e) from October 1, 1917, to December 31, 1917.

Said five periods constitute, for the purposes of this decision, but two; namely: (1) from October 1, 1916, to September 30, 1917 and (2) from October 1, 1917, to December 31, 1917.

The collections for the periods (a), (b), (c) and (d) (or the first period) above were made under the provisions of section 1614 of Act No. 2657, while that for the period (e) (or the second period) was made under the provisions of section 1459 of Act No. 2711.

Upon a consideration of the above facts and the law, the Honorable James A. Ostrand, judge, rendered a judgment, the dispositive part of which is as follows:

"The tax in question is a duty on exports, and was unlawfully levied and collected. However, Congress, by the urgent deficiency Appropriation Act of June 4, 1918, has ratified and confirmed the collection of taxes imposed by Act No. 2711 (Administrative Code of 1917). Plaintiff may, therefore, recover only such taxes as were levied and collected under the provisions of Act No. 2657 (Administrative Code of 1916), which are admitted to amount to the sum of P306,716.43."

A judgment was rendered for said amount, without the allowance of interest and costs.

From that judgment both the plaintiff and defendant appealed. The plaintiff-appellant alleges that the lower court committed an error (a) in not allowing the recovery of the taxes collected by the defendant for the period from

October 1, 1917, to December 31, 1917 (or the second period); and (b) in not giving a judgment in favor of the plaintiff for interest and costs. The defendant-appellant alleges that the lower court committed an error in not holding that the taxes collected under section 1614 of Act No. 2657, covering the period from October 1, 1916, to September 30, 1917 (the first period) were valid, for the reason that section 1614 of said Act (No. 2657) had been ratified, confirmed and validated by the Act of Congress of June 4, 1918.

Said section 1614 of Act No. 2657 provides among other things the following:

"SEC. 1614. Percentage tax on merchants' sales.—All merchants not herein specifically exempted shall pay a tax of one per centum on the gross value in 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 at which the things in question 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."

Said quoted provision of section 1614 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 said amendment, involved in the present case, is found in the parts italicized in the above quotation. Said section (1614) became effective July 1, 1916.

Said section 1614 of Act No. 2657 was amended by sec. 1459 of Act No. 2711, which became effective on the first day of October, 1917. Act No. 2711 (sec. 1459) expressly repealed section 1614 of Act No. 2657. The amendment of section 1459 of Act No. 2711 made no important changes in section 1614 of Act No. 2657.

The plaintiff-appellant contended in the court below that all taxes collected under section 1614 of Act No. 2657 and section 1459 of Act No. 2711 were illegally collected, upon the theory that said tax was a tax upon exports which is expressly prohibited by section 11 of the Jones Law (Act of Congress of August 29, 1916, Vol. 12, Public Laws, p. 237). The lower court sustained the contention of the plaintiff except as to the taxes collected under section 1459 of Act No. 2711 (October 1st to December 31st, 1917) for the reason that Congress had expressly ratified the provision of said section, notwithstanding the said provisions of the Jones Law.

With the contention of the plaintiff we fully agree not only because of the provisions of section 11 of the Jones Law but as well for the reasons given by the Supreme Court of the United States in the case of *Crew Levick Company vs. Commonwealth of Pennsylvania* (245 U. S., 292 [256 Pa. St., 508]), as well as the decision of this Court in the case of *Macleod & Co. vs. Cromwell* (R. G. No. 7444 [decided March 28, 1913, not published]). In the case of *Crew Levick Co. vs. Pennsylvania* the Supreme Court of the United States said: "The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution. Although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms. And there is no suggestion that the tax is limited to the necessities of inspection, or that the consent of Congress has been given. We are constrained to hold that the answer must be in the affirmative."

The doctrine announced in that decision is in conformity not only with the commerce clause of the Constitution of the United States (par. 2, sec. 10, Art. I, Const. of the U. S.) but with many other decisions of the Supreme Court of the United States. (*Patapsco Guano Co. vs. North Carolina Board of Agriculture*, 171 U. S., 345, 350; *Brown vs. Maryland*, 12 Wheat., 419; *Nathan vs. Louisiana*, 9 How. [U. S.], 73; *Cook vs. Pennsylvania*, 97 U. S., 566; *Pittsburg etc., Co. vs. Louisiana*, 156 U. S., 590; *Trade-Mark Cases*, 100 U. S., 82; *Almy vs. California*, 12 How.,

169; *McCulloch vs. Maryland*, 4 Wheat., 316.)

The right to regulate inter-state commerce is expressly reserved to the Congress of the United States by the Constitution. The Congress exercised the right reserved to it in section 11 of the Jones Law.

Section 1614 of Act No. 2657, which provided for an export tax, was in force in the Philippine Islands during the period from October 1, 1916, until September 30, 1917. An export tax is expressly prohibited by section 11 of the Jones Law. The Jones Law was in force during that period (October 1, 1916, to September 30, 1917). Considering the provisions of the Jones law, we must conclude that the collections for that period (October 1, 1916, to September 30, 1917), which amounted to P306,716.43 were illegal and must be returned as ordered by the lower court.

The question whether or not the collections made by the defendant during the period from October 1, 1917, to December 31, 1917, were legal, presents some difficulties not presented in relation to the period of October 1, 1916, to September 30, 1917.

Section 1614 of Act No. 2657 was amended by section 1459 of Act No. 2711. Act No. 2711 was adopted by the Philippine Legislature on the 10th day of March, 1917, but did not become effective until October 1, 1917. At the time said section (1459) became effective (October 1, 1917) the provision, prohibiting an export tax, of the Jones Law was still in force, and in the absence of other conditions the taxes collected for that period (from October 1, 1917, to December 31, 1917) would be equally illegal with the taxes collected under the provisions of section 1614 of Act No. 2657 (from October 1, 1916, to September 30, 1917). We find, however, that section 1459 of Act No. 2711 was expressly ratified by an Act of Congress of June 4, 1918, in the language following: "The taxes imposed by the Philippine Legislature in section 1459 of the Act numbered 2711, enacted by that body on March 10, 1917, are hereby legalized and ratified, and the collections of all such taxes heretofore or hereafter, legalized, ratified and confirmed hereby as fully to all intents and purposes as if the same by a prior act of Congress specifically had been authorized and directed."

Said Act (June 4, 1918) being an Act of Congress—the same authority which adopted the Jones Law—must be taken and accepted as an amendment or a repeal of the Jones Law so far as the latter affected said section 1459. We must conclude, therefore, that the authority for the collections of the taxes under section 1459 of Act No. 2711 having been fully ratified and confirmed by the Congress of the United States, that said collections were made in accordance with law. 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).

The defendant-appellant contends that the Act of Congress of June 4, 1918, had the effect of ratifying section 1614 of Act No. 2657. There might be some merit in that contention if Congress had ratified or recognized the authority of the Philippine Legislature to impose an export tax. Upon the contrary, however, we find (a) that Congress, in section 11 of the Jones Law, expressly deprived the legislature of such power and (b) by said Act of June 4, 1918, ratified only the particular Act (No. 2711) by mentioning the particular section in question. The ratification can only be held to be a ratification of the law mentioned in it. If Congress had intended to ratify the general power in the Philippine Legislature and that specific Act, it would have so stated and would not have ratified and legalized a specific section of a specific law. The ratification cannot be held to go beyond its terms.

Our conclusions are:

- That the tax of one per cent imposed by the Philippine Legislature upon merchandise, the produce of the Philippine Islands, which is sold and exported from the Philippine Islands to various persons and firms without the Philippine Islands, is an export tax;

- That an export tax in the Philippine Islands is expressly prohibited by section 11 of the Jones Law;
- That said section 11 of the Jones Law was in force and effect in the Philippine Islands from the 29th day of August, 1916, until the 30th day of September, 1917, thereby covering the entire period (October 1, 1916, to September 30, 1917) during which the taxes were collected under the provision of section 1614 of Act No. 2657;
- That while the taxes provided for and collected under section 1459 of Act No. 2711 during the period of October 1, 1917, to December 31, 1917, were expressly prohibited by the Jones Law, yet nevertheless, by reason of the express ratification of said section (1459) by the Act of Congress of June 4, 1918, said collections were ratified, legalized and confirmed;
- That the taxes collected for the period of October 1, 1916, to September 30, 1917, being illegally collected, the plaintiff is entitled to a judgment for the return of the same, together with interest at six per cent on the following amounts from the following dates until paid: (a) On P48,532.36, from the 18th day of January, 1917; (b) on P58,844.38, from the 19th day of April, 1917; (c) on P94,067.50, from the 19th day of July, 1917, and (d) on P105,272.19, from the 19th day of October, 1917. (H. E. Heacock Co. vs. Collector of Customs, 37 Phil., 970; Hongkong & Shanghai Banking Corporation vs. Rafferty, 39 Phil., 145; Erskine vs. VanArsdale, 15 Wall., 75; National Home vs. Parrish, 229 U. S., 494; section 144 of the Internal Revenue Act of 1914; article 1108, Civil Code.)
- With reference to the costs, section 487 of Act No. 190 provides that: "Costs shall ordinarily be allowed to the prevailing party as a matter of course, but the court shall have power for special reasons, to adjudge that either party shall pay the costs of an action, or that the same be divided as may be equitable." We have, as a matter of practice, always imposed costs upon the appellant who has failed in this court to obtain a reversal or a modification of the judgment of the lower court. There seems to be no good reason in the present case for changing or modifying that rule.

Therefore, and for the foregoing reasons, the judgment of the lower court is hereby affirmed, with interest and costs as above indicated. So ordered.

Arellano, C. J., Torres, and Araullo, JJ., concur.

CONCURRING AND DISSENTING

MALCOLM, J., with whom concur STREET and AVANCEÑA, JJ.:

I agree with so much of the decision as relates to the main question. I disagree with so much thereof as relates to the minor question of costs. My reasons follow:

In the United States the rule is well established that, unless expressly authorized by statute, a judgment for costs either in a civil or criminal case cannot be rendered against the United States or a State. The question was early presented to the United States Supreme Court and Chief Justice Marshall dismissed it in a decision which reads as follows: "The United States never pay costs." (U. S. vs. Barker [1817], 2 Wheat [U. S.], 395.) In the *Antelope* ([1827], 12 Wheat. [U. S.], 546, the court held that: "It is a general rule, that no court can make a direct judgment or decree against the United States, for costs and expenses, in a suit to which the United States is party, either on behalf of any suitor, or any officer of the government." (See to the same effect, U. S. vs. Ringgold [1834], 8 Pet. [U. S.], 150; U. S. vs. McLemore [1846], 4 How. [U. S.], 286; U. S. vs. Boyd [1847], 5 How. [U. S.], 29; *Stanley vs. Schwalby* [1895], 162 U. S., 255; U. S. vs. Verdier [1896], 164 U. S., 213; *Pine River Logging, etc., Co. vs. U. S.* [1901], 186 U. S., 279; *Marine vs. Lyon* [1894] 62 Fed. Rep., 153 [10 C. C. A., 315]; *Nabb's Case*, 1 Ct CL,

173; Henry's Motion 15 Ct. Cl., 162; U. S. vs. Warren [1903], 12 Okla., 350 [71 -Pac. Rep., 685].) Likewise, a state is not liable for court costs in the absence of an express statute creating such liability. (Greer County vs. Watson [1898], 7 Okla., 174; Collier vs. Powell [1853], 23 Ala., 579; People vs. Pierce [1844], 6 111., 553; Turner vs. Com. [1859], 2 Met. [Ky.], 619; Com. vs. Todd [1873], 9 Bush [Ky.], 708; State vs. Taylor [1881], 33 La. Ann., 1270; Townsend's Succession [1888], 40 La. Ann., 66 [3 So Rep., 488]; State vs. Greenwell [1832], 4 Gill & J. [Md.], 407; State vs. Williams [1905], 101 Md., 529 [4 Ann. Cas., 970] ; State vs. Kinne, 41 N. H., 238; State vs. Harrington [1802], 2 Tayler [Vt], 44; State vs. Bradford Sav. Bank, etc., Co. [1898], 71 Vt., 234 [44 Atl. Rep., 349]; Beachy vs. Lamkin [1866], 1 Idaho, 50; Stone vs. Falconer [Ky. 1900], 54 S. W. Rep., 712; Prince vs. State [1846], 7 Humph. [Tenn.] 137; State vs. Montgomery [1883], 74 Ala., 226; People vs. Madison County, 23 111. App., 386, affirmed 125 111., 334 [17 N. E. Rep., 802] ; State vs. Wagner [1890], 42 La. Ann., 54 [8 So. Rep., 209] ; State vs. Watson [Tenn. Ch. 1896] 39 S. W. Rep., 536; State vs. Bradford [1859], 32 Vt, 50; Stephens vs. State [1872], 47 Ala., 696; State vs. Brewer [1877], 59 Ala., 130; Dawson vs. Matthews [1894], 105 Ala., 485 [17 So. Rep., 19]; Moore vs. People, 37,111. App., 641; State vs. Wormick [1878], 1 Lea [Tenn.], 559; Morgan vs. Pickard [1887], 86 Tenn., 208 [9 S. W. Rep., 690]; Noyes vs. State [1879], 46 Wis., 250 [1 N. W. Rep., 1] ; Boykin vs. People [1896], 23 Colo., 183 [46 Pac. Rep., 635]; District of Columbia vs. Lyon, 7 Mackey [D. C], 222; Kitchell vs. Madison County [1843], 5 111., 163; Rawley vs. Vigo County [1830], 2 Blackf. [Ind.], 355; Miami County vs. Blake [1863], 21 Ind., 32.) As emphasising the general rule, special statutes creating a liability on the part of the State for court costs in civil cases have been passed in certain States. If there is added to the foregoing the further principle that an official who is sued by a private individual is not liable personally for costs, the absoluteness of the rule which in effect is a subsidiary proviso of the main proposition, making the government immune from suit, is demonstrated. (Hammond vs. The People [1863], 32 111., 446.)

In the Philippines, the question of costs against the Government appears to have been first raised directly in the case of The Hongkong & Shanghai Banking Corporation vs. Rafferty, ([1918], 39 Phil., 145). In an action instituted by the Hongkong & Shanghai Banking Corporation against James J. Rafferty as Collector of Internal Revenue of the Philippine Islands, the recovery of certain taxes was asked by the plaintiff. In resolving the assignment of error of the plaintiff-appellant, the subject of costs against the Government was fully considered and it was held without dissent that no costs should be allowed against the Government of the Philippine Islands, in cases in which the Government of the Philippine Islands or a nominal representative of the Government is the unsuccessful party. It is this rule, predicated as it is on the jurisprudence of the United States and England, which should here again be applied, and should continue to be applied until the Philippine Legislature shall see fit by special statute to make the Government liable for costs.

Judgment should be affirmed, with interest since this action was instituted and accrued before the Administrative Code of 1917 went into effect, but without costs in either instance.

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