

**SANTOS LUMBER COMPANY, ET AL., PLAINTIFFS AND APPELLEES,
VS. CITY OF CEBU, ET AL., DEFENDANTS AND APPELLANTS.***G.R. No. 14618. May 30, 1961*

Ponente: PADILLA, J.

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On 22 January 1958 this Court rendered judgment in G.R. No. L-10196, Santos Lumber Company et al., plaintiffs-appellants vs. City of Cebu et al., defendants-appellees, declaring that ordinances Nos. 92, series of 1950, and 116, series of 1951, of the Municipal Board of the City of Cebu, imposing upon every person, individual, company or corporation engaged in the sale of lumber a tax of P2 "for every first local sale of one thousand board feet of lumber sold during the month," payable within the first twenty days of the succeeding month, and a surcharge of 20% added to the tax should the taxpayer fail to pay it within the period provided, are ultra vires; reversing the judgment rendered by the Court of First Instance of Cebu that upheld their validity; and ordering the "appellees to return to appellants the sum of P97,542.57 and all such sums as may have been paid by the latter after February, 1953, by virtue of said ordinances," without pronouncement as to costs.[1]

On 14 April 1958 the plaintiffs filed in the Court of First Instance of Cebu a "petition for the issuance of a writ of execution against defendants City of Cebu et al." to recover the total sum of P97,542.57, which this Court had ordered the latter to refund to the former, and the total sum of P221,564.83 which the former had paid to the latter after February 1963. In support of their petition, they alleged that the judgment of this Court already had become final and executory and that it was the ministerial duty of the trial court to issue the writ of execution including therein not only the sum of P97,542.57 but also the total sum of P221,564.83 paid by them after February 1953. Attached to the petition were the affidavits of Nicanor E. Santos, manager of Santos Lumber Company (Annex A), Jose Carvajal, owner or manager of Lu Tai Lumber Company (Annex B), Jose Ngo Chua, manager of Cebu Liberty Lumber Company (Annex C), Sy Quia, general manager of Royal Lumber Company (Annex D), G. Biban Kian, manager of Cebu-Manila Sawmill Company (Annex E), Dy Shui Sheng, manager of the Katipunan Lumber Company (Annex F), See Chuan, owner of Cebu Victory Lumber Co., Ltd. (Annex G), Gervasio Go, owner or manager of Visayan Lumber Company (Annex H), Claro Go Kee, attorney-in-fact of Luzon Lumber Company (Annex I), Guillermo Go, owner or manager of Southern Lumber Company (Annex J), Chua Key Ho alias Manuel Ong, owner of City Lumber & Furniture Supply (Annex K), Co Lu, owner of Central Lumber (Annex L), Apolonio Gopuco, Jr., assistant manager of Oriental Saw Mill, Cebu Branch (Annex M), Fulvio C. Pelaez, owner or manager of Mabuhay Lumber Co., Ltd. (Annex N), Vicente C. Perales, owner of Malayan Lumber (Annex O), and Choa Say, manager of Continental Lumber Company (Annex P), plaintiffs and appellants in G. R. No. L-10196 referred to at the beginning of this opinion, wherein they stated the sums they had paid after February 1953, the dates of payment and the numbers of the official receipts issued for such payments. The defendants objected to the petition.[2] On 8 May 1958 the plaintiffs replied alleging that the defendant's objection was merely for the purpose of delaying execution of the judgment and harassing them; that the judgment of the Supreme Court already had become final and executory; and that contrary to the defendants' claim, the Court of Tax Appeals, created by Republic Act No. 1125, has no jurisdiction over cases involving the legality of taxes

imposed by a municipal or city ordinance.

On 7 June 1958 the Court of First Instance entered an order setting the petition for hearing on 16 June 1958 at 2:30 o'clock in the afternoon for the purpose of determining the correctness of the amount paid by the plaintiffs after February 1953.

On 16 June 1958 the plaintiffs filed a supplement to their petition for a writ of execution so as to include the amount of P1,431.87 paid by Mindanao Saw Mill and P5.95 paid by Cebu Asia Lumber, thereby bringing the total amount paid by the plaintiffs after February 1953 and sought to be recovered and included in the writ of execution prayed for by them, to P223,002.65. Attached to the supplemental petition were the affidavits of Vicente Ong Tue Cheng, the owner of Cebu Asia Lumber (Annex Q), and Esteban Gochan, attorney-in-fact of Mindanao Saw Mill (Annex R), both plaintiffs in the case already mentioned, wherein they stated the sums they had paid after February 1953, the dates of payment and the numbers of the official receipts issued for such payments.

After hearing, on 26 June 1958 the defendants filed a memorandum advancing the theory that "in order that a refund for the taxes paid may be validly had, it is necessary that the same be paid under protest," the reason being that "taxes are imposed and collected to support the government," and were this requirement not imposed, "the government is exposed to instability and there is the consequent danger of impairment to collective security for which the government is constituted." Since the plaintiffs in some instances had paid under protest and in others not under protest, only those amounts paid under protest should be refundable. Moreover, the fact that they had paid under protest the total sum of P97,542.57 did not amount to a continuing protest as regards those paid after February 1953 without protest. Furthermore, the recovery of all sums paid after February 1953 should have been made the subject of another action, where the defendants could set up all defenses available to them.

On 2 July 1958 the trial court entered an order holding that the charter of the City of Cebu does not "require that the taxpayer should pay the tax under protest before he can file the suit or proceeding for the recovery of the tax" hence, the defendants "can recover not only the taxes paid under protest but also those paid voluntarily during the pendency of the appeal;" that the judgment of the Supreme Court in G. R. No. L-10196 "makes no distinction between taxes paid under protest and those made voluntarily by the plaintiffs; and where no distinction is made we ought not to make a distinction," and ordering the defendants to pay to the plaintiffs the total sum of P223,002.05, of which the total sum of P59,108.88 were paid under protest and the total sum of P163,893.77 without protest.

On 11 July 1958 the defendants filed a notice of appeal to this Court "on questions of law," and the appeal bond. On 14 July 1958 the trial court entered an order giving due course to the defendants' appeal and denying the plaintiffs' petition for a writ of execution. On 22 August 1958 the appellants filed an amended record on appeal.

On 27 October 1958 the appellee filed in this Court an "urgent motion to dismiss appeal," on the ground that in their answer to the plaintiffs' (herein appellees) complaint, the defendants (herein appellants) had not set up the defense that only those amounts paid under protest were refundable to the appellees, notwithstanding the fact that the latter had alleged in their complaint that some amounts had been paid under protest whereas others had not been paid under protest; that in rendering judgment for the appellees herein in G. R. No. L-10196, this Court had made no distinction in the amounts refundable—whether paid under protest or not under protest; that the judgment of the Supreme Court already had become final and executory and was *res adjudicata* as between the parties; that the order dated 2 July 1958 of the trial court was not appealable; and that this appeal was interposed by the appellants merely for delay. On 28 October 1958 the appellants filed an "answer to motion to dismiss appeal" professing seriousness in interposing their appeal.

On 10 November 1958 this Court resolved to defer consideration of the appellees' motion to dismiss the appeal

and the appellants' objection thereto, "until the date when this appeal can be deliberated upon on the merits."

The appellants are willing to refund to the appellees the total sum of P97,542.57, which this Court in G.R. No. L-10196 had ordered the former to pay to the latter, and the total sum of P59,108.88 paid by the appellees under protest after February 1953, but refuse to refund to them the total sum of P163,893.77 which they had paid without protest.

McQuillin on "Municipal Corporations" says:

The right to recover municipal taxes which have been wrongfully exacted is, generally speaking, governed by the rules relating to state and county taxes. In the absence of statute there can be no recovery of taxes which have been voluntarily paid, where there is no such statute, the general rule constantly adhered to by judicial decisions early and late is that if the payment is involuntary, municipal taxes wrongfully exacted may be recovered. Recovery of taxes paid and refunding taxes paid generally depend upon the particular facts involved, as whether the payment of taxes was voluntary or involuntary, whether by mistake of law or fact and whether paid under protest. * * *. (3rd ed., Vol. 16, pp. 454-458.) Italics supplied.

For the recovery of taxes paid, later on held by the courts to have been illegally imposed by a municipal corporation, a protest is a condition precedent when the charter so requires. Commonwealth Act No. 58, as amended, the charter of the City of Cebu, does not provide for and require such condition, unlike the charters of the City of Dumaguete (section 57 [b], Republic Act No. 327) and of Quezon City (section 63, Republic Act No. 537). Moreover, inasmuch as the appellees, had paid to the appellants the total sum of P97,542.57 under protest, which they had sought to recover and succeeded to recover by a judicial declaration of nullity of ordinances Nos. 92, series of 1950, and 116, series of 1951, of the Municipal Board of the City of Cebu, and during the pendency of the case the appellees had paid in some instances under protest and in others without protest, they may be deemed to have continued to pay under protest even without expressly stating so. Considering that the appellees had filed suit for a declaration of nullity of the ordinances in question and for the recovery of what they had paid thereunder, and that during the pendency of the suit, they had paid under protest some of the taxes due thereunder, subsequently declared unlawful by the Court, it is reasonable and logical to deem the tax payments made by the appellees as done under protest.

The order of the Court of First Instance of Cebu dated 2 July 1958 ordering the appellants to pay the appellees the total sum of P223,002.65 is final and executory, hence appealable.

The order appealed from is affirmed, with costs against the appellants.

Bengzon, C.J., Bautista Angelo, Labrador, Concepcion, Reyes, J.B.L., Paredes, Dizon, De Leon, and Natividad, JJ., concur.

[1] 102 Phil., 870; 54 Off. Gaz., 5327.

[2] Their objection is not set forth in the record on appeal.

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