

PHILIPPINE ACETYLENE CO., INC., PETITIONER, VS. COMMISSIONER OF INTERNAL RE-VENUE AND COURT OF TAX APPEALS, RESPONDENTS.

G.R. No. 19707. August 17, 1967

Ponente: CASTRO, J.

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CASTRO, J.:

The petitioner is a corporation engaged in the manufacture and sale of oxygen and acetylene gases. During the period from June 2, 1953 to June 30, 1958, it made various sales of its products to the National Power Corporation, an agency of the Philippine Government, and to the Voice of America, an agency of the United States Government. The sales to the NPC amounted to P145,866.70, while those to the VOA amounted to P1,683, on account of which the respondent Commissioner of Internal Revenue assessed against, and demanded from, the petitioner the payment of P12,910.60 as deficiency sales tax and surcharge, pursuant to the following provisions of the National Internal Revenue Code:

"SEC. 186. Percentage tax on sales of other articles. - There shall be levied, assessed and collected once only on every original sale, barter, exchange, and similar transaction either for nominal or valuable considerations, intended to transfer ownership of, or title to, the articles not enumerated in sections one hundred and eighty-four and one hundred and eighty-five a tax equivalent to seven per centum of the gross selling price or gross value in money of the articles so sold, bartered, exchanged, or transferred, such tax to be paid by the manufacturer or producer: * * *."

"SEC. 183. Payment of percentage taxes. - (a) In general. - It shall be the duty of every person conducting a business on which a percentage tax is imposed under this Title, to make a true and complete return of the amount of his, her or its gross monthly sales, receipts or earnings, or gross value of output actually removed from the factory or mill warehouse and within twenty days after the end of each month, pay the tax due thereon: Provided, That any person retiring from a business subject to the percentage tax shall notify the nearest internal revenue officer thereof, file his return or declaration and pay the tax due thereon within twenty days after closing his business.

"If the percentage tax on any business is not paid within the time specified above, the amount of the tax shall be increased by twenty-five per centum, the increment to be a part of the tax."

The petitioner denied liability for the payment of the tax on the ground that both the NPC and the VOA are exempt from taxation. It asked for a reconsideration of the assessment and, failing to secure one, appealed to the Court of Tax Appeals.

The court ruled that the tax on the sale of articles or goods in section 186 of the Code is a tax on the manufacturer and not on the buyer with the result that the "petitioner Philippine Acetylene Company, the manufacturer or producer of oxygen and acetylene gases sold to the National Power Corporation, cannot claim exemption from the payment of sales tax simply because its buyer -- the National Power Corporation -- is exempt from the payment of all taxes." With respect to the sales made to the VOA, the court held that goods

purchased by the American Government or its agencies from manufacturers or producers are exempt from the payment of the sales tax under the agreement between the Government of the Philippines and that of the United States, provided the purchases are supported by certificates of exemption, and since purchases amounting to only P558, out of a total of P1,683, were not covered by certificates of exemption, only the sales in the sum of P558 were subject to the payment of tax. Accordingly, the assessment was revised and the petitioner's liability was reduced from P12,910.60, as assessed by the respondent Commission, to P12,812.16.[1]

The petitioner appealed to this Court. Its position is that it is not liable for the payment of tax on the sales it made to the NPC and the VOA because both entities are exempt from taxation.

I

The NPC enjoys tax exemption by virtue of an act[2] of Congress, which provides as follows:

"SEC. 2. To facilitate the payment of its indebtedness, the National Power Corporation shall be exempt from all taxes, except real property tax, and from all duties, fees, imposts, charges, and restrictions of the Republic of the Philippines, its provinces, cities and municipalities."

It is contended that the immunity thus given to the NPC would be impaired by the imposition of a tax on sales made to it because while the tax is paid by the manufacturer or producer, the tax is ultimately shifted by the latter to the former. The petitioner invokes in support of its position a 1954 opinion of the Secretary of Justice which ruled that the NPC is exempt from the payment of all taxes "whether direct or indirect."

We begin with an analysis of the nature of the percentage (sales) tax imposed by section 186 of the Code. Is it a tax on the producer or on the purchaser? Statutes of the type under consideration, which impose a tax on sales, have been described as "act[s] with schizophrenic symptoms,"[3] as they apparently have two faces -- one that of a vendor tax, the other, a vendee tax. Fortunately for us the provisions of the Code throw some light on the problem. The Code states that the sales tax "shall be paid by the manufacturer or producer,"[4] who must "make a true and complete return of the amount of his, her or its gross monthly sales, receipts or earnings or gross value of output actually removed from the factory or mill warehouse and within twenty days after the end of each month, pay the tax due thereon."[5]

But it is argued that a sales tax is ultimately passed on to the purchaser, and that, so far as the purchaser is an entity like the NPC which is exempt from the payment of "all taxes, except real property tax," the tax cannot be collected from sales.

Many years ago, Mr. Justice Oliver Wendell Holmes expressed dissatisfaction with the use of the phrase "pass the tax on." Writing the opinion of the U.S. Supreme Court in *Lash's Products v. United States*,[6] he said: "The phrase 'passed the tax on' is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone. The purchaser does not really pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all. * * * The price is the sum total paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else. Therefore it is part of the price * * *."

It may indeed be that the incidence of the tax ultimately settles on the purchaser, but it is not for that reason alone that one may validly argue that it is a tax on the purchaser. The exemption granted to the NPC may be likened to the immunity of the Federal Government from state taxation and vice versa in the federal system of government of the United States. In the early case of *Panhandle Oil Co. v. Mississippi*[7] the doctrine of intergovernmental tax immunity was held as prohibiting the imposition of a tax on sales of gasoline made to the Federal Government. Said the Supreme Court of the United States:

"A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the state. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. * * * The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States, of its constitutional powers to operate the fleet and hospital. * * * To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale. * * * And that is to tax the United States -- to exact tribute on its transactions and apply the same to the support of the state."

Justice Holmes did not agree. In a powerful dissent joined by Justices Brandeis and Stone, he said:

"If the plaintiff in error had paid the tax and added it to the price the government would have nothing to say. It could take the gasoline or leave it but it could not require the seller to abate his charge even if it had been arbitrarily increased in the hope of getting more from the government than could be got from the public at large. * * * It does not appear that the government would have refused to pay a price that included the tax if demanded, but if the government had refused it would not have exonerated the seller. * * *

"* * * I am not aware that the President, the Members of the Congress, the Judiciary or to come nearer to the case at hand, the Coast Guard or the officials of the Veterans' Hospital [to which the sales were made], because they are instrumentalities of government and cannot function naked and unfed, hitherto have been held entitled to have their bills for food and clothing cut down so far as their butchers and tailors have been taxed on their sales; and I had not supposed that the butchers and tailors could omit from their tax returns all receipts from the large class of customers to which I have referred. The question of interference with Government, I repeat, is one of reasonableness and degree and it seems to me that the interference in this case is too remote."

But time was not long in coming to confirm the soundness of Holmes' position. Soon it became obvious that to test the constitutionality of a statute by determining the party on which the legal incidence of the tax fell was an unsatisfactory way of doing things. The fall of the bastion was signalled by Chief Justice Hughes' statement in *James v. Dravo Constructing Co.*[8] that "These cases [referring to *Panhandle* and *Indian Motorcycle Co. v. United States*, 283 U.S. 570 (1931)] have been distinguished and must be deemed to be limited to their particular facts."

In 1941, *Alabama v. King & Boozer*[9] held that the constitutional immunity of the United States from state taxation was not infringed by the imposition of a state sales tax with which the seller was chargeable but which he was required to collect from the buyer, in respect of materials purchased by a contractor with the United States on a cost-plus basis for use in carrying out its contract, despite the fact that the economic burden of the tax was borne by the United States.

"The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see *Panhandle Oil Co. v. Mississippi* and *Graves v. Texas Co.*, supra, we think it no longer tenable."

Further inroads into the doctrine of *Panhandle* were made in 1943 when the U.S. Supreme Court held that immunity from state regulation in the performance of governmental functions by Federal officers and agencies did not extend to those who merely contracted to furnish supplies or render services to the Government even though as a result of an increase in the price of such supplies or services attributable to the state regulation, its ultimate effect may be to impose an additional economic burden on the Government.[10]

But if a complete turnabout from the rule announced in *Panhandle* was yet to be made, it was so made in 1952 in *Esso Standard Oil v. Evans*[11] which held that a contractor is not exempt from the payment of a state privilege

tax on the business of storing gasoline simply because the Federal Government with which it has a contract for the storage of gasoline is immune from state taxation.

"This tax was imposed because Esso stored gasoline. It is not * * * based on the worth of the government property. Instead, the amount collected is graduated in accordance with the exercise of Esso's privilege to engage in such operations; so it is not 'on' the federal property. * * * Federal ownership of the fuel will not immunize such a private contractor from the tax on storage. It may generally, as it did here, burden the United States financially. But since *James v. Dravo Contracting Co.*, 302 U.S. 134, 151, 82 L. ed. 155, 167, 58 S. Ct. 208, 114 ALR 318, this has been no fatal flaw. * * *"[12]

We have determined the current status of the doctrine of intergovernmental tax immunity in the United States, by showing the drift of the decisions following the announcement of the original rule, to point up the fact that even in those cases where exemption from tax was sought on the ground of state immunity, the attempt has not met with success.

As Thomas Reed Powell noted in 1945 in reviewing the development of the doctrine:

"Since the *Dravo* case settled that it does not matter that the economic burden of the gross receipts tax may be shifted to the Government, it could hardly matter that the shift comes about by explicit agreement covering taxes rather than by being absorbed in a higher contract price by bidders for a contract. The situation differed from that in the *Panhandle* and similar cases in that they involved but two parties whereas here the transaction was tripartite. These cases are condemned in so far as they rested on the economic ground of the ultimate incidence of the burden being on the Government, but this condemnation still leaves open the question whether either the state or the United States when acting in governmental matters may be made legally liable to the other for a tax imposed on it as vendee.

"The carefully chosen language of the Chief Justice keeps these cases from fore-closing the issue. * * * Yet at the time it would have been a rash man who would find in this a dictum that a sales tax clearly on the Government as purchaser is invalid or a dictum that Congress may immunize its contractors."[13]

If a claim of exemption from sales tax based on state immunity cannot command assent, much less can a claim resting on statutory grant.

It may indeed be that the economic burden of the tax finally falls on the purchaser; when it does the tax becomes a part of the price which the purchaser must pay. It does not matter that an additional amount is billed as tax to the purchaser. The method of listing the price and the tax separately and defining taxable gross receipts as the amount received less the amount of the tax added, merely avoids payment by the seller of a tax on the amount of the tax. The effect is still the same, namely, that the purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all and the amount added because of the tax is paid to get the goods and for nothing else.[14]

But the tax burden may not even be shifted to the purchaser at all. A decision to absorb the burden of the tax is largely a matter of economics.[15] Then it can no longer be contended that a sales tax is a tax on the purchaser.

We therefore hold that the tax imposed by section 186 of the National Internal Revenue Code is a tax on the manufacturer or producer and not a tax on the purchaser except probably in a very remote and inconsequential sense. Accordingly its levy on the sales made to tax-exempt entities like the NPC is permissible.

II

This conclusion should dispose of the same issue with respect to sales made to the VOA, except that a claim is here made that the exemption of such sales from taxation rests on stronger grounds. Even the Court of Tax Appeals appears to share this view as is evident from the following portion of its decision:

"With regard to petitioner's sales to the Voice of America, it appears that the petitioner and the respondent are in agreement that the Voice of America is an agency of the United States Government and as such, all goods purchased locally by it directly from manufacturers or producers are exempt from the payment of the sales tax under the provisions of the agreement between the Government of the Philippines and the Government of the United States, (See Commonwealth Act No. 733) provided such purchases are supported by serially numbered Certificates of Tax Exemption issued by the vendee-agency, as required by General Circular No. V-41, dated October 16, 1947. * * *"

The circular referred to reads:

"Goods purchased locally by U.S. civilian agencies directly from manufacturers, producers, or importers shall be exempt from the sales tax."

It was issued purportedly to implement the Agreement between the Republic of the Philippines and the United States of America Concerning Military Bases,[16] but we find nothing in the language of the Agreement to warrant the general exemption granted by that circular.

The pertinent provisions of the Agreement read:

"ARTICLE V. - Exemption from Customs and Other Duties

"No import, excise, consumption or other tax, duty or impost shall be charged on material, equipment, supplies or goods, including food stores and clothing, for exclusive use in the construction, maintenance, operation or defense of the bases, consigned to, or destined for, the United States authorities and certified by them to be for such purposes."

"ARTICLE XVIII. - Sales and Services Within the Bases

"1. It is mutually agreed that the United States shall have the right to establish on bases, free of all licenses; fees; sales, excise or other taxes, or imposts; Government agencies, including concessions, such as sales commissaries and post exchanges, messes and social clubs, for the exclusive use of the United States military forces and authorized civilian personnel and their families. The merchandise or services sold or dispensed by such agencies shall be free of all taxes, duties and inspection by the Philippine authorities. * * *"

Thus only sales made "for exclusive use in the construction, maintenance, operation or defense of the bases," in a word, only sales to the quartermaster, are exempt under article V from taxation. Sales of goods to any other party even if it be an agency of the United States, such as the VOA, or even to the quartermaster but for a different purpose, are not free from the payment of the tax.

On the other hand, article XVIII exempts from the payment of the tax sales made within the base by (not sales to) commissaries and the like in recognition of the principle that a sales tax is a tax on the seller and not on the purchaser.

It is a familiar learning in the American law of taxation that tax exemption must be strictly construed and that the exemption will not be held to be conferred unless the terms under which it is granted clearly and distinctly show that such was the intention of the parties.[17] Hence, in so far as the circular of the Bureau of Internal Revenue would give the tax exemptions in the Agreement an expansive construction it is void.

We hold, therefore, that sales to the VOA are subject to the payment of percentage taxes under section 186 of the Code. The petitioner is thus liable for P12,910.60, computed as follows:

Sales to NPC.....	
Sales to VOA.....	
Total sales subject to tax	
7% sales tax due thereon.....	
Add: 25% surcharge.....	
Total amount due and collectible.....	
P145,866.70	
P 1,683.00	
P147,549.70	
P 10,328.48	
2,582.12	
P 12,910.60	

ACCORDINGLY, the decision a quo is modified by ordering the petitioner to pay to the respondent Commission the amount of P12,910.60 as sales tax and surcharge, with costs against the petitioner.

Reyes, Makalintal, Bengzon, Zaldivar, Sanchez, Angeles, and Fernando, JJ., concur.
Concepcion, C.J., and Dizon, J., did not take part.

[1] Petitioner's liability was computed as follows:

Sales to NPC	
	P 145,866.70
Sales to VOA	
	P 558.00
Total sales subject to tax	
	.P 146,424.70

7% sales tax due thereon

P 10,249.73

Add: 25% surcharge

P 2,562.41

Total amount due and collectible..... P 12,812.16

[2] Rep. Act No. 987, 9 Laws & Res. 45 (1954), amending Rep. Act No. 358, 4 Laws & Res. 14 (1949).

[3] Oxford v. J.D. Jewell, Inc., 215 Ga. 616, 112 So. 2d 601(1960).

[4] Nat. Int. Rev. Code sec. 186.

[5] Id. sec. 183.

[6] 278 U.S. 175 (1928).

[7] 277 U.S. 218 (1928). As a matter of legal history, it is pertinent to note here that the ruling in Panhandle was applied in Standard Oil Co. v. Posadas, 55 Phil. 715 (1931).

[8] 302 U.S. 134 (1937).

[9] 314 U.S. 1 (1941).

[10] Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261 (1943).

[11] 347 U.S. 495 (1952).

[12] Id., at 499-500.

"The case [Esso Standard Oil v. Evans] shows a further retreat from, if not a complete repudiation of the case of Panhandle Oil Co. v. Mississippi * * * in which the doctrine of implied immunity was employed as the basis for holdings that a state excise or privilege tax upon gasoline dealers, though nondiscriminatory, was invalid in so far as it was sought to collect the tax with respect to sales of gasoline directly to the United States. No tenable distinction seems to be possible between a state privilege tax on sales of gasoline to the United States and such a tax on storage of gasoline owned by the United States." Annot., 97 L. Ed. 1182 (1953).

[13] Powell, The Waning of Intergovernmental Tax Immunity, 58 Harv. L. Rev. 633, 659-660 (1945).

[14] Western Lithograph Co. v. State Bd. of Equal., 78 P. 2d 731 (1938); see also Philippine Acetylene Co. v. Blaquera, G.R. No. L-13728, Nov. 30, 1962.

[15] "In the long run a sales tax is probably shifted to the consumer, but during the period when supply is being adjusted to changes in demand it must be in part absorbed. In practice the businessman will treat the levy as an added cost of operation and distribute it over his sales as he would any other cost, increasing by more than the amount of the tax prices of goods demand for which will be least affected and leaving other prices unchanged." 47 Harv. L. Rev. 860, 869 (1934).

[16] March 26, 1947, 1-2 DFA TS 144, 43 UNTS 271, 43 O.G. 1020 (1947).

[17] E. g., Cherokee Brick & Tile Co. v. Redwine, 209 Ga. 691, 75 S.E. 2d 550 (1953).

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