

EMILIO BOADA, PLAINTIFF AND APPELLEE, VS. JUAN POSADAS, COLLECTOR OF INTERNAL REVENUE, DEFENDANT AND APPELLANT.

G.R. No. 36994. March 30, 1933

Ponente: OSTRAND, J.

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OSTRAND, J.:

This is an appeal to determine whether or not the appellee is a merchant and is therefore liable to pay internal revenue taxes imposed and collected by the Collector of Internal Revenue.

It appears in the record that Emilio Boada, Pedro Boada, and Jose Boada were partners of "Los Catalanes de Pedro Boada". They were engaged in the sale of merchandise until February 1, 1927, when the partnership was dissolved in order to merge it into the corporation known as "Boada, Castro & Peñafiel", which merger resulted in a new corporation of which Emilio Boada was a stockholder. The interest of Emilio consisted of P57,112.51, inventoried value of certain merchandise of the partnership "Los Catalanes de Pedro Boada", and was turned over to the corporation. The payment of said merchandise was guaranteed by a reserve fund of the corporation which was to be made by way of a yearly amortization of not less than 15 per cent of the profits, with interest at 8 per cent per annum, the reserve fund to be cancelled as the said amount was being paid. It also appears that the partnership "Los Catalanes de Pedro Boada" has been doing business for fifteen years, and as such has paid the corresponding internal revenue taxes and that Emilio Boada has never paid any tax.

Emilio Boada contends that he has not been engaged in commerce in recent years, and in accordance with the decision of the Supreme Court in the case of Whitaker vs. Rafferty (38 Phil., 508), he cannot very well be regarded as a merchant. The partnership "Los Catalanes de Pedro Boada" having paid its merchant tax as a de facto partnership, Emilio Boada cannot be subjected under any law to pay the merchant tax of 1 per cent on the sale only because, desiring to retire from the business, he decided to sell his interest in said partnership to the new corporation "Boada, Castro & Peñafiel".

Judge de la Rama has very well stated as follows:

"There is no question that a single commercial act does not constitute a merchant. In contemplation of the Code of Commerce and other laws on the subject, a merchant is one who executes various acts of commerce. A person who sells his house in order simply to dispose of it is not a merchant, if he is not engaged in the business of selling houses. Therefore, the transfer made by Emilio Boada of his capital in the unregistered partnership 'Los Catalanes de Pedro Boada' to the new corporation 'Boada, Castro & Peñafiel', it being a single act of sale, does not make him a merchant within the meaning of the law, but certainly he would be, if the commercial acts performed by the unregistered partnership 'Los Catalanes de Pedro Boada', of which he was one of the partners, could be imputed to him as his own acts. The Government contends that an unregistered mercantile partnership is not an independent legal entity distinct from that of each of its partners: or, in other words, it means to say that the partners are the same persons who continue to manage the business as in a simple community and that, therefore, each of them becomes a merchant. If this theory is correct, then Emilio

Boada, by the commercial acts executed by the partnership 'Los Catalanes de Pedro Boada', was a merchant, and, in selling his interest to the new corporation 'Boada, Castro & Peñafiel', should be subjected to pay the tax of one per cent. It is true that an unregistered mercantile partnership cannot recover, for lack of personality independent from that of each of the partners thereof, property in its own name, unless the complaint is made in the name of all and each of the partners. The theory of lack of personality of an unregistered partnership, however, has not been, in practice, applied to all cases. Thus, a person who has swindled the property of an unregistered partnership, cannot deny its personality. In like manner, one who has negotiated with an unregistered partnership, cannot allege in defense that the same cannot collect from him the debt for not being a registered partnership (*U. S. vs. Asensi*, 34 Phil., 674). These deviations from the rule are due to the theory of estoppel. In the case at bar, it is admitted by both parties that the partnership 'Los Catalanes de Pedro Boada' has never been registered. The said partnership existed and carried out its business, however, as a registered partnership, although it has never been so. The Bureau of Internal Revenue has considered 'Los Catalanes de Pedro Boada' as a registered partnership for purposes of taxation, and it is now asked if it could be permitted to allege that said partnership has no juridical personality because it has not been registered. It seems to the court somewhat anomalous to sustain the contention that the Bureau of Internal Revenue could do it after having collected the tax from 'Los Catalanes de Pedro Boada' as a partnership with juridical personality, instead of collecting from all and each of the partners. This is important. 'Los Catalanes de Pedro Boada' could have paid the income tax on the basis of its profit in lump sum as a partnership, which all and each of the partners should not have been obliged to do, had the profit been considered as distributed and simply added to the individual income of each partner.

"Under the circumstances of the case, the court is of the opinion that, for purposes of taxation, the partnership 'Los Catalanes de Pedro Boada', although not registered, was a de facto corporation, whose personality could not be questioned by the Bureau of Internal Revenue. This being so, the transfer of the interest of Emilio Boada to the new corporation, 'Boada, Castro & Peñafiel', was not a commercial act, as there is no evidence to the effect that he had executed other commercial acts which would constitute him a merchant in the legal sense."

The following administrative decisions of the Collector of Internal Revenue are relied upon by the plaintiff: Ruling No. 6, 1922, Bur. Int. Rev. 105.02, wherein a partner who transferred his interest to another partner was not subject to pay the merchant tax of one per cent; Ruling of June 23, 1921, Bur. Int. Rev. 105.02, that neither is a partner subject to such tax who sells his interest to another partnership constituted by the same partners; Ruling of February 3, 1924, Bur. Int. Rev. 105.02, wherein if capital is transferred to a corporation simply for the purpose of taking advantage of the benefits of the Corporation Law, the sale is not subject to the tax of one per cent.

In the case of *Whitaker vs. Rafferty*, supra, the court said that "it will be seen that a 'merchant' in order to be subjected to the necessity of paying the tax, must be 'engaged in the sale, barter, or exchange of personal property.' The words in said section which are important for a proper understanding of the same are, 'engaged', 'sale', 'barter', and 'exchange'. By the definition which the law gives us, a person to be a merchant must be 'engaged, etc'. To be 'engaged' as the word is used here, a person must be occupied or employed in the sale, barter, etc., of personal property. We can hardly say that a person is occupied or employed in the sale, barter or exchange of personal property when he has made one purchase and sale only."

In our opinion the appealed judgment must be affirmed, without costs. So ordered.

Villamor, Villa-Real, Vickers, and Imperial, JJ., concur.

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