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TAXATION - SALES - RECOVERY OF PROCESSING TAXES - REMEDIES OF THE BUYER

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TAXATION — SALES — RECOVERY OF PROCESSING TAXES — REMEDIES OF THE BUYER — Defendant, a flour milling company, was subjected to payment of processing taxes under the Agricultural Adjustment Act. It entered into contracts with plaintiffs, by the terms of which the amount of such taxes was included in the purchase price of flour. The contracts provided that the amount of any decrease in processing taxes levied against defendant would inure to the benefit of the buyers and be credited against the contract price.

Meanwhile, defendant, contesting the validity of the tax, had deposited in court a sum equal to the amount of accrued taxes. After the Supreme Court invalidated the A. A. A. and ordered the impounded sums returned to taxpayers, defendant recouped its deposits. Plaintiffs, denied the right to intervene in the first proceeding, brought a class suit in equity for an accounting and declaration of a trust in the funds. *Held*, the amount of the tax passed by defendant to plaintiffs was buried in the contract price. The contracts did not provide for refunds to plaintiffs if the tax was held illegal. Defendant holds no specific funds in which plaintiffs have any right. *O'Connor Bills, Inc. v. Washburn Crosby Co.*, (D. C. Mo. 1937) 20 F. Supp. 460.

Where the sale price of an article is understood by both buyer and seller to exclude the amount of a tax, and the buyer agrees to put the seller in funds for payment thereof, and later the seller is relieved of the duty of paying the tax, the buyer is entitled to recover the amount paid in excess of the sale price.[1] But where the article is sold for a sum in which the amount of the tax is absorbed, no recovery may be had by the purchaser, even though the price paid includes an invalid tax later refunded to the seller.[2] The courts have rigorously applied the latter rule to deny relief to buyers seeking recovery of processing taxes shifted to them by processors who received refunds after the Supreme Court declared the A. A. A. invalid [3] and the processing taxes thereunder illegal.[4] The federal courts consistently denied the rights of buyers to intervene in suits by processors attacking the tax, on the ground that the processor, not the buyer, paid the tax, and the buyer had no equitable interest in the litigation.[5]

[1] "This is a case where the promise of the buyer is to pay a stated price, and to put the seller in funds for the payment of a tax besides. In such a case the failure of the tax reduces to an equivalent extent the obligation of the promise." Cardozo, C. J., in Wayne County Produce Co. v. Duffy-Mott Co., 244 N. Y. 351 at 353, 155 N. E. 669 (1927). Accord: Friend v. Rosenwald, 124 App. Div. 226, 108 N. Y. S. 701 (1908), where an importer who received back the amount of an overpayment of duties from the government was held liable to his vendee who had borne the duty, in an action for money had and received. Benzoline Motor Fuel Co. v. Bollinger, 353 Ill. 600, 187 N. E. 657 (1933), permitted refunds to a claimant who had kept accurate records of each customer's tax contributions and had agreed with such customers to make proper refunds. See also Casey Jones, Inc. v. Texas Textile Mills, Inc., (C. C. A. 5th, 1937) 87 F. (2d) 454.

[2] "The price is the total sum 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." Lash's Products Co. v. United States, 278 U. S. 175 at 176, 49 S. Ct. 100 (1929); Heckman Co. v. I. S. Dawes & Son Co., (App. D. C. 1926) 12 F. (2d) 154; Moore v. Des Arts, 1 N. Y. 359 (1848); Texas Co. v. Harold, 228 Ala. 350, 153 So. 442 (1934).

[3] United States v. Butler, 297 U. S. 1, 56 S. Ct. 312 (1936).

[4] Rickert Rice Mills v. Fontenot, 297 U. S. 110, 56 S. Ct. 374 (1936).

[5] Acme-Evans Co. v. Smith, (D. C. Ind. 1936) 13 F. Supp. 356; Washburn-Crosby Co. v. Nee, (D. C. Mo. 1936) 13 F. Supp. 751; Perry Mill & Elevator Co. v. Jones, (D. C. Okla. 1936) 13 F. Supp. 241. In the Acme-Evans case, the court remarked, 13 F. Supp. at 358: "The fact that such baking company may have paid . . . a sum of money, in addition to the regular price of the processed article purchased by it does not mean that it . . . paid the taxes. It could not bring suit against the

Where a purchaser to whom the tax burden was shifted has sought, by separate suit against the reimbursed processor, to assert an equitable lien or declare a trust in the funds, his right to relief has been denied on the basis that the tax was absorbed in the contract price along with overhead, municipal and state taxes, and other items making up the total charge.[6] Although at least one of the cases denying intervention by the buyer in the processor's suit has suggested that the buyer may have a remedy at law against his vendor,[7] in the absence of a specific agreement by the processor to reimburse his vendee the courts generally deny quasi-contractual recovery.[8] Even where there has been a written agreement that the seller would reimburse the buyer in case the tax was declared invalid and was refunded, its provisions have been strictly construed against the buyer.[9] It is not denied that the processor is unjustly enriched by being allowed

government for refund because no taxes were paid by it to the government. . . . It knew at the time that it was paying the market price for such product, and the amount of taxes included represents a part of such price. . . ."

[6] Casey Jones, Inc. v. Texas Textile Mills, Inc. (C. C. A. 5th, 1937) 87 F. (2d) 454. In Acme-Eans Co. v. Smith, (D. C. Ind. 1936) 13 F. Supp. 356 at 358, the court asserts that "There was, however, included in the purchase price a sum sufficient to enable the complainant to carry all of its overhead, including city, state, and processing taxes, as well as other operating costs."

[7] "If the plaintiff [processor] . . . has passed the exaction on to the baker, the merchant, or the consumer . . . and then is not required to pay said sum so collected to defendant . . . the merchant, baker, or consumer *may* have a remedy against the processor. . . . *If* a merchant . . . has a right to recovery, certainly he has a plain and adequate remedy at law." Perry Mill & Elevator Co. v. Jones, (D. C. Okla. 1936) 13 F. Supp. 241 at 242.

[8] In Christopher v. Hoger and Co., 160 Misc. 21, 289 N. Y. S. 105 (1936), the assignee of a baker-purchaser sued his vendor on a general assumpsit theory for recovery of processing taxes. In denying recovery, the court said, 160 Misc. at 22: "the tax was absorbed in a total or composite price to be paid at all events. In such a cas the buyer is without remedy, though the annulment of the tax may increase the profit to the seller."

The Federal District Court for the Eastern District of Missouri arrived at a like result where the flour was sold to the buyer at a composite price including the amount of the tax, and where the processor had paid the "Windfall Tax" on processing taxes secured from buyers but not paid to the government. Johnson v. Scott County Milling Co., (D. C. Mo. 1937) 21 F. Supp. 847.

Where defendant purchaser attempted to set off the amount of processing taxes shifted to him by plaintiff processor, in a contract action against him by plaintiff, the court said: "This price may or may not have included a tax, but it is the price that appellant agreed to pay plaintiff for peanuts." Planters Nut & Chocolate Co. v. Brown-Murray Co., 128 Pa. Super. 239, 193 A. 381 at 384 (1937).

The recent case of Johnson v. Igleheart Bros., (C. C. A. 7th, 1938) 95 F. (2d) 4, held that there could be no recovery by the buyer of that part of the processing tax assumed by him and not paid to the government by the seller.

[9] In Casey Jones, Inc. v. Texas Textile Mills, Inc., (C. C. A. 5th, 1937) 87 F. (2d) 454, the contract between the parties provided that if the processing tax provisions were held unconstitutional within 90 days from date of sale of cotton, the seller

to recoup taxes which he has shifted to his vendees.[10] The apparent reluctance of courts to allow recovery of invalid taxes by purchasers who assumed them may be justified on practical grounds. If a wholesale buyer may recover, there seems to be no logical reason why the retail buyer from him, and finally the individual consumer, should not recoup their share of such refunded taxes. It is submitted that this raises administrative problems of allocation so intricate that the courts are justified in denying a right of recovery to vendees of taxpayers, though such vendees have borne the tax, in the absence of specific contract provisions stipulating therefor.

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would credit the buyer with a fixed sum. The A. A. A. was invalidated 117 days after title passed, and the court held that (p. 456): "Clearly no duty to refund rested upon the seller until the invalidation of the tax. By express terms of the provision, this must have occurred within 90 days, or the duty to credit did not arise at all. . . . The 90 day clause was required by appellant as the least concession it would accept on the basis of tax uncertainty, and assented to by appellee as the best arrangement it could make in a competitive market . . . it must be assumed that both parties contracted with full knowledge of the effect of the language used. . . ."

[10] Sections 902-906 of the Revenue Act of 1936, 49 Stat. L. 1648, 7 U. S. C. (Supp. 1937), §§ 644-648, withdrew the jurisdiction of federal district courts over suits for recovery of processing taxes, and provided that no refund should be allowed unless the claimant established to the satisfaction of the commissioner that he had borne the burden of the tax and had not passed it on. These provisions were upheld as equitable and tending to prevent unjust enrichment in Anniston Mfg. Co. v. Davis, 301 U. S. 337, 57 S. Ct. 816 (1937).

Concerning these sections, it is remarked in 37 COL. L. REV. 910 at 913 (1937) that: "It may be noted that the present statute is stripped of any pretence of protecting the purchaser, with its requirement of *prepayment* to him and subsequent proof in court that such purchaser bore the burden of the tax. . . ."

The tax on Unjust Enrichment [Secs. 501-506 of the Revenue Act of 1936, 49 Stat. L. 1648, 26 U. S. C. (Supp. 1937), §§ 345-345a], popularly known as the "Windfall Tax," provides that 80% of the income received from the collection of federal excise taxes imposed but not paid by a person, which he secured through shifting the burden of such tax on others whom he has not reimbursed, shall be collected for the use of the government. In Union Packing Co. v. Rogan, (D. C. Cal. 1937) 17 F. Supp. 934 at 940, the court, in upholding the tax, remarked: "Confronted with profits arising out of collected but unpaid excise taxes, the Congress asked: 'Upon what meat doth this our Caesar feed, that he is grown so great?' "