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TAXATION-RIGHT OF FEDERAL TAXPAYER TO QUESTION VALIDITY OF A FEDERAL TAX-EFFECT OF SECTION 3224 OF THE UNITED STATES REVISED STATUTES

TAXATION—RIGHT OF FEDERAL TAXPAYER TO QUESTION VALIDITY OF A FEDERAL TAX—EFFECT OF SECTION 3224 OF THE UNITED STATES REVISED STATUTES—Quite apart from the merits of the controversy, the recent decision of the Supreme Court in the *Hoosac Mills* case [1] presented the interesting problem of the taxpayer's standing in court to question the validity of a federal tax. The problem is really twofold. First, may the taxpayer enjoin the collection of the tax? Second, assuming that he may not, what steps must he take before he can get a refund of the amount that he has paid? [2]

I.

As the starting point of the discussion of both parts of the problem, it will be well to look into what the Supreme Court said in the *Hoosac Mills* case. The facts in that case were comparatively simple. Under Sections 9 and 16 of the Agricultural Adjustment Act, the United States presented a claim to the respondents for processing and floor taxes on cotton. The claim being resisted, suit was brought to collect it. The district court ordered the tax paid [3] but the circuit court of appeals reversed that decision.[4] On certiorari the case came before the United States Supreme Court, and on January 6, 1936, that tribunal affirmed the decision of the circuit court of appeals.

It was strenuously contended by the Government that the proces-

[1] United States v. Butler et al., Receivers of Hoosac Mills Corp., (U. S. 1936) 56 S. Ct. 312, commented on in 34 MICH. L. REV. 366 (1936).

[2] It might seem proper to add a third branch to the problem, namely, the right of the taxpayer to resist payment of the tax in the first instance. That is the way the problem arose in the Hoosac Mills case, where in an equity receivership the receivers of the taxed corporation asked the federal district court to approve their disallowance of the tax. Yet, ordinarily the problem does not arise in that fashion. Furthermore, there are no questions concerning that method of raising the issue that are not present where the taxpayer seeks an injunction. Both methods involve the question of the taxpayer's standing before the tax is paid. The same propositions that defeat or give to the taxpayer his right to an injunction apply where he refuses to pay the tax and the collector levies a distraint upon his property.

[3] Franklin Process Co. v. Hoosac Mills Corp., (D. C. Mass. 1934) 8 F. Supp. 552, noted in 83 UNIV. PA. L. REV. 376 (1935).

[4] Butler v. United States, (C. C. A. 1st, 1935) 78 F. (2d) 1.

sors had no standing in court to question the validity of the tax. The argument proceeded on the ground that the Act [5] merely levied an excise upon the business of processing cotton, the proceeds of the tax going into the federal treasury and thus becoming available for appropriation for any purpose. The respondents, the argument continued, were endeavoring to challenge the intended use of the money, after it became the property of the government, at which time the taxpayers would no longer have any interest in it. The Government cited *Massachusetts v. Mellon* [6] as conclusive of its contention. In that case it was held that a federal taxpayer may not question government expenditures on the ground that unlawful expenditures will increase the burden of future taxation. The basis of the decision was that the taxpayer's interest is too remote and indeterminable. However, the Court distinguished that case from the *Hoosac Mills* case by saying that in the latter the tax and the appropriation were indivisible parts of an unauthorized plan. Furthermore, the tax was an essential part of the regulation scheme involved in the Act.[7] The statute was not for the procurement of revenue for the support of government but it showed by its operation that the tax upon processors was the necessary means for the intended control of agricultural production. As soon as the Secretary of Agriculture determined that a benefit payment should be made, the tax automatically applied to the processing of a commodity. If the Secretary decided that the payment should cease, the tax ceased also. The result of all this argument was that the Court upheld the right of the respondents to question the tax.[8]

[5] The Agricultural Adjustment Act will be referred to throughout this comment as "the Act."

[6] 262 U. S. 447, 43 S. Ct. 597 (1923).

[7] As is shown by the Child Labor cases [Bailey v. Drexel Furniture Co., 259 U. S. 20, 42 S. Ct. 449 (1922)], the exaction part of the statute cannot be torn from the entire scheme, called an excise for raising revenue, and legalized by ignoring its purpose as an instrumentality for bringing about a desired end, if such end is outside the domain of legitimate power. However, it is not within the scope of this comment to discuss the use of the taxing power as a regulatory device. For cases on this point, see Head Money Cases, 112 U. S. 580, 5 S. Ct. 247 (1884); McCray v. United States, 195 U. S. 27, S. Ct. 769 (1918); Hammer v. Dagenhart, 247 U. S. 251 38 S. Ct. 214 (1919); Hill v. Wallace, 259 U. S. 44, 42 S. Ct. 453 (1922).

[8] It cannot be pointed out too strongly that the Court considered the tax only a mere incident of the regulation of agricultural production, which it thought was the real purpose of the Act. It was for that reason that it allowed the taxpayer to challenge the validity of the tax. Hence, it is not too much to say that this case has no real bearing upon the questions to be discussed in this comment. Nevertheless, it is a part of the whole picture, for it shows one way that a court may deal with the problem of a taxpayer's standing in court; namely, by saying that this exaction is not one for revenue purposes. The statutes limiting the taxpayer's right to come into court apply only where the taxes were imposed for revenue purposes.

2.

With this pronouncement of the Supreme Court as the background, it is proposed now to take up the two branches of the problem separately. First, then, under what circumstances will an injunction issue on behalf of a federal taxpayer who seeks relief against an alleged unconstitutional tax? [9] The argument denying the taxpayer's right to injunctive relief centers about section 3224 of the Revised Statutes,[10] which provides: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." [11] This legislation is in reality a codification of a rule worked out long ago. It finds its justification in the necessities of government. Since the machinery of government cannot operate unless taxes are promptly available, the Supreme Court decided quite early that under ordinary circumstances the federal courts will not interfere with the collection of taxes by injunction.[12] Most state courts have adopted the same principle.[13] Neither illegality, irregularity, nor hardship will give the right to an injunction.[14] This too was a general equity rule to which most courts acceded.[15] It was codified in a statute passed in 1867,[16] which was the predecessor of section 3224. In a variety of cases arising under section 3224 the Supreme Court gave effect to it and denied an injunction.[17]

[9] It is estimated that processors filed about two thousand suits for injunction to restrain collection of taxes levied under the Act. 3 U. S. LAW WEEK 401 (Jan. 14, 1936, p. 1.) In these about twelve hundred and fifty injunctions had been granted at the time the Hoosac Mills case was decided. 3 U. S. LAW WEEK 431 (Jan. 21, 1936, p. 15.) In all of these cases, before the court got into the merits of the controversy, it had to decide the preliminary question of the plaintiff's right to be in court attacking the validity of the tax in this manner. Thus, it is clear from the amount of litigation with respect to this one tax alone that the question of the plaintiff's right to injunctive relief is of vast importance.

[10] 26 U. S. C., § 1543.

[11] Section 21(a) of the Act as amended August 24, 1935, makes section 3224 of the Revised Statutes applicable to taxes imposed under the Act. See H. R. 8492, Aug. 24, 1935, c. 641, § 30 (Public No. 320).

[12] Dows v. City of Chicago, 11 Wall. (78 U. S.) 108 (1870); State Railroad Tax Cases, 92 U. S. 575 at 613 (1875).

[13] Mooers v. Smedley, 6 Johns. Ch. (N. Y.) 28 (1822), is a leading state case on the subject.

[14] One reason for this rule, according to Mr. Justice Miller, speaking for the Court in State Railroad Tax Cases, 92 U. S. 575 at 614 (1875), is that taxation is a legislative function and the Court cannot make a new assessment nor direct another to be made by the proper state officers. Therefore, it is loath to restrain collection of a tax. Although these remarks were made by the learned justice with reference to a state tax, they are equally applicable to a federal tax.

On the subject of illegality as affording no basis for an injunction, see Greene v. Mumford, 5 R. I. 472 at 478 (1858) and 22 L. R. A. 699 (1893).

[15] Hannewinkle v. Georgetown, 15 Wall. (82 U. S.) 547 (1872).

[16] 14 Stat. L. 471 at 475, § 10 (1867).

[17] Bailey v. George, 259 U. S. 16, 42 S. Ct. 419 (1922); Dodge v. Osborn, 240

It would seem that since section 3224 merely codifies a pre-existing rule, it is exclusive. That is, it would not be expected that the Court would read exceptions into it. The language of the statute is sweeping and inasmuch as it lays down no exceptions, it would be sound statutory interpretation to hold that it means just what it says. However, that has not been the turn taken by the Court. On the contrary, it has worked out many implied exceptions to the statutory prohibition. One of these exceptions is found in the cases where the tax is construed to be a criminal penalty.[18] The reason for this exception is that due process requires that no criminal penalty be inflicted without notice, hearing and trial by jury. Hence, the collection of this penalty by summary proceedings, a policy furthered by section 3224, would be unconstitutional. Another exception is in those cases where the legal remedy is impossible. For example, a stockholder may enjoin his corporation from paying the taxes voluntarily, if the result of such payment will be that the corporation cannot sue for refund.[19] It would be but a short step from the position taken by the Court in dealing with this exception to say that wherever the legal remedy is inadequate, injunctive relief may be granted. However, is it not sufficient answer to that type of reasoning to say that the proposition that equity acts only where the legal remedy is inadequate is much older than section 3224 and that in enacting such section, Congress must have meant to do more than merely affirm that proposition?

Still another exception to the applicability of section 3224 arises where the hardship on the taxpayer is very great. For example, in *Miller v. Standard Nut Margarine Co.*[20] no tax at all had been imposed by law upon an article later sought to be taxed. The plain-

U. S. 118, 36 S. Ct. 275 (1916); Graham v. Duponat, 262 U. S. 234, 43 S. Ct. 567 (1923). The case of Bailey v. George, supra, is extremely interesting, for it was decided the same day as the Child Labor Cases [Bailey v. Drexel Furniture Co., 259 U. S. 20, 42 S. Ct. 449 (1922)], in which the Court declared the tax statute that was involved in both cases unconstitutional. Nevertheless, in Bailey v. George it denied injunctive relief on the ground that there was no showing of inadequacy of the legal remedy.

[18] See, for example, Lipke v. Lederer, 259 U. S. 557, 42 S. Ct. 549 (1922), in which the Court held that so-called taxes, imposed by the National Prohibition Act upon those dealing in liquor in violation of the act, were in reality a penalty.

[19] Stanton v. Baltic Mining Co., 240 U. S. 103, 36 S. Ct. 278 (1916). It might be argued that this case does not really represent an exception to section 3224, for the defendant is not the Government or its agent. The decision might be based upon the right of a stockholder to exert his proprietary influence upon the action of his corporation. Furthermore, the situation presented by this case could not arise today, for in 1924 Congress passed an amendment to section 3226 of the Revised Statutes (26 U. S. C., §§ 1672-1673) which permits suit for refund, whether or not the tax was paid under protest. Moore Ice Cream Co. v. Rose, 289 U. S. 373, 53 S. Ct. 620 (1933).

[20] 284 U. S. 498, 52 S. Ct. 260 (1932).

tiff had gone into business in reliance upon determinations by courts and by the Commissioner of Internal Revenue to the effect that its product would not be taxed. If the injunction were not granted, the tax would ruin plaintiff financially, and inflict loss without remedy at law. The Court held that the Commissioner's change of position was capricious and he could be enjoined.[21] Another exception which might be suggested is that based upon multiplicity of suits at law to recover taxes which are paid periodically.[22] If the multiplicity will result from the necessity of bringing many suits against different individuals, all the suits being based upon the same original transaction, then equity will intervene. So too if the plaintiff is threatened with continuous litigation, each case depending upon similar facts and involving the same legal questions, equity may then interfere.[23] But if the number of suits is within the control of plaintiff himself and no hardship will follow from combining all his claims in one suit, the multiplicity argument vanishes.[24] Furthermore, the multiplicity argument does not extend to cases where there are numerous parties plaintiff and defendant and the issues between them and the adverse party are not necessarily identical.[25] Still another possible exception to section 3224 might be present, if the tax were made a lien upon the taxpayer's property, for then a cloud would be cast upon the taxpayer's title.[26] Another basis of equity jurisdiction might be mentioned, although it does not

[21] This particular exception is the widest and most important of all. Under it most of the lower federal courts granted injunctions in the AAA cases despite section 3224 of the Revised Statutes. See Neild Mfg. Co. v. Hassett, (D. C. Mass. 1935) 11 F. Supp. 642; Washburn Crosby Co. v. Nee, (D. C. Mo. 1935) 11 F. Supp. 822; J. T. McMillan Co. v. Landy, (D. C. Minn. 1935) 2 U. S. LAW WEEK 1065 (July 23, 1935, p. 12). Then in 1935 Congress passed the statute amendatory of the act and included section 21(a) which made section 3224 applicable to taxes imposed under the act. The result of such amendment was that many of the district courts began to deny injunctions. See Louisville Provision Co. v. Glenn, (D. C. Ky. 1935) 12 F. Supp. 545); Frye and Co. v. Vierhus, (D. C. Wash. 1935) 12 F. Supp. 597; Stratton & Co. v. Gayne (D. C. N. H. 1935) 3 U. S. LAW WEEK 119 (Oct. 29, 1935, p. 7).

[22] New Jersey Flour Mills Co. v. Duffy, (D. C. N. J. 1925) 2 U. S. LAW WEEK 1129 (Aug. 27, 1935, p. 5). See also Raymond v. Chicago Union Traction Co., 207 U. S. 20 at 38, 28 S. Ct. 7 (1907), which involved a state tax to which section 3224 is inapplicable but to which the general equity rule does apply.

[23] POMEROY, EQUITY JURISPRUDENCE, 4th ed., § 254, p. 429 (1918).

[24] With respect to taxes collected under the AAA, one suit might have been brought for the recovery of all taxes paid. See Fisher Flouring Mills Co. v. Vierhus, (C. C. A. 9th, 1935) 78 F. (2d) 889 at 893.

[25] Kelly v. Gill, 245 U. S. 116 at 120, 38 S. Ct. 38 at 39 (1917); Hale v. Allinson, 188 U. S. 56 at 77, 23 S. Ct. 244 at 252 (1903).

[26] Wallace v. Hines, 253 U. S. 66, 40 S. Ct. 435 (1920); New Jersey Flour Mills Co. v. Duffy, (D. C. N. J. 1935) 2 U. S. LAW WEEK 1129 (Aug. 27, 1935, p. 5).

constitute an exception to section 3224. If there are no funds with which to pay a judgment in recovery of taxes, equity might grant the requested injunction.[27] This situation cannot exist under federal tax laws for the federal statutes provide for repayment.[28]

On the other side of the picture certain things definitely do not constitute grounds for injunctive relief. The mere unconstitutionality of the taxing statute will not be sufficient to create an exception to section 3224.[29] Further, the imposition of penalties prescribed for failure to make payments is insufficient for that purpose, unless such penalties are so great as to be criminal in nature.[30] Even if the property is exempt from taxation, equity will intervene only in the presence of some unusual element such as one of those suggested in the preceding paragraphs.[31]

[27] Stewart Dry Goods Co. v. Lewis, 287 U. S. 9, 53 S. Ct. 68 (1932).

[28] 31 U. S. C., § 602; 31 U. S. C., § 583 (2).

[29] Dodge v. Osborn, 240 U. S. 118, 36 S. Ct. 275 (1916). See also, Boise Artesian Water Co. v. Boise City, 213 U. S. 276 at 285, 29 S. Ct. 426 (1909), Mr. Justice Moody saying: "It is safe to say that no case can be found where this court has deliberately approved the issuance of an injunction against the enforcement of an ordinance resting on state authority, merely because it was illegal or unconstitutional unless further circumstances were shown which brought the case within some clear ground of equity jurisdiction." This concise statement evidences the same reluctance to enjoin collection of state taxes which the Court feels about enjoining collection of federal taxes. An additional reason for refusing to enjoin collection of state taxes is that the federal courts feel they should not interfere by prevention with the fiscal operations of state governments, if the federal rights of the plaintiff can otherwise be preserved. See Boise Artesian Water Co. v. Boise City, 213 U. S. 276 at 282, 29 S. Ct. 426 (1909). That a statute denying the use of the injunction against an illegal tax is constitutional, see 77 A. L. R. 629 (1932).

[30] See Hardwicke, "Penalties as Affected by Good Faith Litigation," 33 MICH. L. REV. 40 (1934).

[31] 84 A. L. R. 1315 at 1319 (1933). It should be mentioned in passing that many of the AAA cases were suits for declaratory judgments under the Federal Declaratory Judgment Act of 1934. 48 Stat. L. 955, 28 U. S. C., § 400 (1934). See, for example, F. G. Vogt & Sons v. Rothensies, (D. C. Pa. 1935) 11 F. Supp. 225; Penn v. Glenn, (D. C. Ky. 1935) 10 F. Supp. 483. In Fisher Flouring Mills Co. v. Vierhus, (D. C. Wash. 1935) 2 U. S. LAW WEEK 1091 (Aug. 6, 1935, p. 7), not reported, it was held that plaintiff could not get a declaratory judgment, for to allow such judgment would be to violate section 3224. The Declaratory Judgment Act would then be a repeal by implication of section 3224, a result that the courts avoid if a contrary interpretation of the statute is possible. The 1935 amendment of the Act put an end to all controversy on this point by specifically prohibiting all suits for declaratory judgments in connection with the taxes imposed by the Act. H. R. 8492, Aug. 24, 1935, c. 641, § 30 (Public No. 320), creating § 21(a) of the Agricultural Adjustment Act, 7 U. S. C., § 601. Furthermore, by an amendment to the Federal Declaratory Judgment Act, approved on Aug. 30, 1935, controversies relating to federal taxes are excluded from the purview of that act. 28 U. S. C., § 400, as amended by H. R. 8974, Aug. 30, 1935, c. 829, § 405 (Public No. 407).

3.

The second part of our problem, i.e., the recovery of taxes paid when they have been illegally levied, generally raises no difficult questions. Section 3220 of the Revised Statutes [32] permits a refund by the Commissioner of Internal Revenue of all taxes illegally collected. Section 3226 [33] lays down certain conditions and the time limits with respect to the exercise of the right to a refund.

However, the Agricultural Adjustment Act, as amended in August, 1935, introduced complications that were theretofore lacking. By section 21(d) (1) of the amendatory act it was provided that no suit for refund shall be maintained, unless plaintiff can show that he has not directly or indirectly passed on the amount of the tax to the vendee of the article processed or to anyone else.[34] This provision of the statute was immediately attacked as depriving the taxpayer of his property without due process of law. It was widely insisted upon as a reason for injunctive relief.[35] Although the Supreme Court did not decide [36]

[32] 26 U. S. C., § 1670.

[33] 26 U. S. C., §§ 1672-1673.

[34] H. R. 8492, Aug. 24, 1935, c. 641, § 30 (Public No. 300), creating § 21(d) (1) of the Agricultural Adjustment Act, 7 U. S. C., § 601. This section also provided in effect that the decision of the Commissioner of Internal Revenue on the fact whether the tax had been passed on to the consumer or back to the producer should be conclusive. Processors attacked this provision on the ground that it deprived them of the right to trial by jury. A good portion of the Government's brief in the rice miller's case [Rickert Rice Mills, Inc. v. Fontenot, (U. S. 1936) 56 S. Ct. 374] is taken up with a defense of this provision. See pp. 52-77 of the Government's brief in that case. The questions concerning that phase of this general subject matter are outside the scope of this comment.

[35] See cases cited in note 21, supra. As was there observed, many of these cases were decided before the amendment to the Act took effect, and yet injunctions were granted in anticipation of the passage of such amendment. See particularly on this point, Neild Mfg. Co. v. Hassett, (D. C. Mass. 1935) 11 F. Supp. 642. But some federal courts said that the courts cannot attempt to defeat proposed legislation before it has become the law; hence they denied injunctions. La Croix v. United States, (D. C. Tenn. 1935) 11 F. Supp. 817. After the 1935 amendment, few courts were willing to grant an injunction just because of § 21(d) (1). One federal judge in New Hampshire, in denying an injunction, remarked that he had theretofore granted an injunction in this kind of cases, but that he had done so only because he feared congressional legislation barring all right to recover the taxes if improperly assessed. However, since the amendment as finally passed did give a right to recovery under certain circumstances, the injunction was now denied. Stratton & Co. v. Gayne, (D. C. N. H. 1935) 3 U. S. LAW WEEK 119 (Oct. 29, 1935, p. 7). See also Merchants Packing Co. v. Rogan, (C. C. A. 9th, 1935) 79 F. (2d) 1, a case in which the same court that denied the injunction in Fisher Flouring Mills Co. v. Vierhus, (C. C. A. 9th, 1935) 78 F. (2d) 889, here granted the injunction. Section 21(d) (1) was given as the reason for the difference in ruling.

[36] In Rickert Rice Mills, Inc. v. Fontenot, (U. S. 1936) 56 S. Ct. 374, the Supreme Court, contrary to earlier expectation, did not decide this question, for the rice

whether section 21(d) (1) affords an adequate remedy at law, it is interesting to speculate upon the possibilities that such a statute introduces.

First of all, it should be observed that there is nothing novel about this statute. There was a similar provision in section 424 of the Revenue Act of 1928, and the Supreme Court upheld it as valid in the case of *United States v. Jefferson Electric Co.*[37] In the now famous *Rice Millers* case[38] the Government in its brief earnestly contended that section 21(d) (1) was but a recognition of the equitable doctrine of unjust enrichment.[39] That is, if the processor had passed on the amount of the tax to the vendee or had passed it back to the producer, then if he were allowed a refund, he would be obtaining an unjust enrichment.[40] To avoid this inequitable result, Congress passed section 21 (d) (1). This contention is most convincing. It might be suggested, in an attempt to undermine this line of reasoning, that there would be no unjust enrichment, for the consumers or producers would have a right of action against the processor, if the latter were allowed a refund.[41] But, although quasi-contractual principles would seem to sanction such an action, it is doubtful if it would be permitted, absent a specific statute or contract to that effect.[42] Furthermore, it could not

millers had not paid any taxes. Furthermore, in view of the decision in the Hoosac Mills case, they could not be compelled to do so. When the Court granted certiorari in this case, it restrained collection of the tax upon condition that the processor should pay the amount of the accruing taxes to a depository, such funds to be withdrawn only upon further order of the Court. Now it ordered the return of such funds. District courts, which had adopted the same rule as the Supreme Court, also entered similar orders.

A strange thing about the Rickert Mills case should here be observed. Not only did the Court order the repayment of the funds impounded *pendente lite*, but it remanded the case to the district court for the entry of a decree enjoining collection of the tax. This followed the Court's statement that it was unnecessary to decide if section 21(d) (1) afforded an adequate remedy at law. Hence, it is tantamount to saying that since the tax is unconstitutional and cannot be collected, an injunction will issue. Yet, that is exactly opposed to many pronouncements of the Supreme Court to the effect that mere unconstitutionality of a tax will not support an injunction. See cases cited in note 29, supra. See also Bailey v. George, 259 U. S. 16, 42 S. Ct. 419 (1922).

[37] 291 U. S. 386 at 402, 54 S. Ct. 443 (1934).

[38] Rickert Rice Mills, Inc. v. Fontenot, (U. S. 1936) 56 S. Ct. 374.

[39] See brief of the Government in Rickert Rice Mills case, pp. 26-39.

[40] That the burden of the processing tax in the rice milling business, at least, was shifted away from the processor is an argument supported by lengthy statistics in the Government's brief in the Rickert Rice Mills case. See pp. 27-31 of such brief.

[41] It is interesting to note in connection with this suggestion that in one case at least, an injunction was granted on the ground of multiplicity, consisting of numerous suits by the processor against his customers to add to their bills the amount of the tax. Inland Milling Co. v. Huston, (D. C. Iowa, 1935) 12 F. Supp. 554).

[42] See Heckman & Co. v. I. S. Dawes & Son Co., (App. D. C. 1926) 12 F. (2d) 154; Kastner v. Duffy Mott Co., 125 Misc. 886, 213 N. Y. S. 128 (1925).

be argued by the taxpayer that the Government was unjustly enriched to the extent of the tax collected and hence ought to reimburse the taxpayer. The Government is a sovereign body, to which ordinary rules and principles ought not apply, the reason being that the presence of the element of sovereignty must of necessity color such rules. The fact that in tax matters the Government can behave summarily, that being the essence of good government, plus the fact that the tax really comes from a third party, plus the further fact that the funds were all disbursed by the Government to the agricultural producers, ought to rebut any argument of unjust enrichment advanced by the processor.

That brings us to the next point made by the processors in their attack upon section 21(d) (1). They said that admitting that the doctrine of unjust enrichment may be raised as a defense to a suit for a refund, the burden of proof may not be shifted from the Government to them, for that places an impossible burden upon them. However, it seems that once it is admitted that the doctrine of unjust enrichment is applicable here, the whole argument for the processor falls. That part of section 21(d) (1) that shifts the burden of proof to the taxpayer is certainly reasonable, for the taxpayer has peculiar knowledge of the facts, and can certainly know more about what part of the tax he passed on than can the Government. Nor can it be argued that the processor cannot determine the cost of any particular part of his product and therefore cannot know whether or not he shifted the tax to someone else. Modern accounting systems make possible the tracing of both direct and indirect costs into the finished product. Business today keeps such records that upon the completion of each unit of product, its cost is ascertained and entered on the records. That being true, it is not at all an impossible task for the processor to show whether or not he was the one who really bore the tax.

The next difficulty facing the taxpayer, in seeking a refund under section 21(d) (1), would be to make his showing to the Commissioner in order to satisfy him that the tax burden was not shifted. If the price of the product equals the cost plus the tax, has the tax burden been passed on? Will it be sufficient for the processor to show that after the Act took effect, he did not increase the price of his product nor decrease the price paid by him to the producer of the raw materials? If the processor shows that his profit now is no greater than was his profit before the tax was imposed upon him, will he then meet the burden of section 21(d) (1)? [43]

[43] These various theories of proof were suggested in the brief of the Government in the Rickert Rice Mills case, p. 48. The mere fact that the proof may be difficult and voluminous is certainly no basis for equity jurisdiction. United States v. Bitter Root Co., 200 U. S. 451, 26 S. Ct. 318 (1906).

The result of the above analysis would seem to be this. No one today at any rate denies the Government's right to collect its revenue in summary fashion. But on the other hand, due process requires that in some way or other the taxpayer be allowed to question the validity of the tax. Particularly is this true where the tax is merely a guise for governmental regulation of industry or agriculture. Therefore, despite the various restrictions imposed by Congress upon the right of the taxpayer to resist payment of the tax or to recover it once he has paid it, the Supreme Court, through its interpretation of federal statutes, has established a body of law that sufficiently safeguards the taxpayer's constitutional rights and gives him a standing in court to attack the tax.[44]

M. C. D.

[44] The picture with respect to the taxes imposed by the now defunct AAA is simply one evidence of the truth of this proposition.