Michigan Law Review

Volume 46 | Issue 6

1948

# CONSTITUTIONAL LAW - WAR CONTRACTS - EFFECT OF CONSTITUTIONAL ISSUES ON THE EXHAUSTION OF ADMINISTRATIVE REMEDIES DOCTRINE

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CONSTITUTIONAL LAW — WAR CONTRACTS — EFFECT OF CONSTITUTIONAL ISSUES ON THE EXHAUSTION OF ADMINISTRATIVE REMEDIES DOCTRINE—Plaintiff, a manufacturer of war materials under subcontracts with government contractors, filed suit in the District Court for the District of Columbia [1] requesting a declaratory judgment holding the First and Second Renegotiation Acts [2] unconstitutional and, as a consequence thereof, injunctive relief from threatened action by the defendants [3] to recover alleged excessive profits.[4] The district court dismissed the complaint on the grounds (1) that the suit was premature, plaintiff having failed to exhaust the prescribed administrative procedure, and (2) that the available legal and administrative remedies were adequate, the right to equitable relief not being established either on the basis of irreparable injury or multiplicity of suits. On appeal, *held*, affirmed. *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 67 S.Ct. 1493 (1947).

The principal case constitutes the second unsuccessful attempt to test the

[1] (D.C. D.C. 1945) 62 F. Supp. 520.

[2] 56 Stat. L. 226 at 245 (1942) as amended by 56 Stat. L. 798 at 982, 57 Stat. L. 347, 564 (1943), 58 Stat. L. 21 at 78 (1944), 59 Stat. L. 294, 50 U.S.C. (Supp. 1946) Appx. § 1191. The 1944 amendment, a complete rewriting of the original act, has been popularly named the Second Renegotiation Act. For the purpose of this note, only the provisions of the 1944 amendment are important and hereafter all citations refer to the Second Renegotiation Act.

[3] Defendants are the members of the War Contracts Price Adjustment Board created by § 403 (d) (1), the Secretary of War and the Undersecretary of War.

[4] Responsibility for the original determination of excessive profits lies with the Price Adjustment Board. § 403 (c) (1).

constitutionality of the Renegotiation Acts in the Supreme Court.[5] The need for uniformity and the necessity for sound administrative discretion where technical and intricate matters of fact are involved have been held sufficient to justify requiring prior resort to administrative tribunals even when Congress has expressly preserved existing common law and statutory remedies.[6] Since constitutional authority to establish the jurisdiction of the federal courts rests with Congress, a declaration of intention by Congress that a prescribed administrative procedure be followed weighs heavily against judicial intervention and requires an especially strong showing of inadequacy of the administrative remedy to raise an implied exception.[7] Administrative tribunals have exclusive original jurisdiction to determine questions of coverage of enabling statutes, and therefore an allegation of want of jurisdiction (constitutional fact) is not authorization for side-stepping prescribed administrative procedure.[8] Where resort to administrative remedies is not voluntary according to the terms of the statute, it is exceedingly doubtful whether the defense of estoppel can be raised against the complainant on the ground that he has forfeited his right to challenge the validity of the statute by proceeding thereunder, and judicial intervention is not warranted under this principle.[9] The Second Renegotiation Act provides that any contractor or subcontractor aggrieved by the board's determination of excessive profits may file a petition with the Tax Court [10] for a de novo redetermination and further provides that upon filing of such petition the Tax Court "shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits," which determination "shall not be reviewed or redetermined by any other court or agency." [11] In affirming the decision of the district court, the Supreme Court explicitly reserved decision upon the question of the finality given by the statute to Tax Court decisions in renegotiation matters and expressed no opinion as to whether the Tax Court has jurisdiction to decide constitutional issues. Although considerable finality is attached to administrative determinations of fact and to those administrative conclusions of technical law which the expert character of the tribunal makes it

[5] In Mine Safety Appliance Co. v. Forrestal, 326 U.S. 371, 66 S.Ct. 219 (1945), the complaint was dismissed because the government, an indispensable party, was not joined. See also note, infra, p. 850.

[6] Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S.Ct. 350 (1907); United States v. Sing Tuck, 194 U.S. 161, 24 S.Ct. 621 (1904); Board v. Great Northern Ry. Co., 281 U.S. 412, 50 S.Ct. 391 (1930).

[7] Principal case at 774-775.

[8] Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 58 S.Ct. 459 (1938); Macauley v. Waterman S.S. Corp., 327 U.S. 540, 66 S.Ct. 712 (1946), involving Second Renegotiation Act.

[9] Booth Fisheries Co. v. Industrial Commission, 271 U.S. 208, 46 S.Ct. 491 (1926); Lawrence v. St. Louis-San Francisco Ry. Co., 274 U.S. 588, 47 S.Ct. 720 (1927); 34 COL. L. REV. 1495, 1504 at 1505 (1934).

[10] The Tax Court is an administrative tribunal and not a judicial court. 56 Stat. L. 957, 26 U.S.C. (1940) § 1100; Dobson v. Commissioner, 320 U.S. 489, 64 S.Ct. 239 (1943).

[11] 58 Stat. L. 21 at 78, § 403 (e) (1).

especially qualified to render,[12] the general opinion of legal writers[13] and the implication from decided cases[14] is that an administrative tribunal has no authority to question the constitutional validity of the statute which it has been created or designated to enforce. As a practical matter, it is very doubtful that an administrative tribunal would reduce itself to impotence by such a holding of unconstitutionality. On the other hand, it has been asserted that administrative tribunals should have such jurisdiction for the sake of uniformity and expediency.[15] The expert qualifications of the tribunal would not extend to constitutional issues and therefore a full review of these issues would remain available in the courts.[16] If an administrative tribunal does not have jurisdiction to decide constitutional questions, it would be difficult to justify a rule which requires a litigant to struggle through a long and expensive administrative process when the only issue he wishes to raise is the constitutionality of the statute. However, the suggestion of the Supreme Court that presence of constitutional issues makes exhaustion of administrative remedies all the more necessary can readily be explained as meaning that whenever other grounds are available upon which an administrative tribunal could give relief without deciding constitutional issues, the assertion of constitutional issues by the complainant will weigh against rather than in favor of his request to be excused from following the prescribed procedure. Such an explanation is consistent with the general rule that constitutional issues will be avoided whenever reasonably possible and would leave unanswered the questions whether an administrative tribunal has jurisdiction to entertain constitutional issues, and whether the administrative procedure need be exhausted when the only issue raised is that of constitutionality. In any event, the decision in the principal case renders more doubtful the authority of those decisions which hold that if an entire statute is challenged as unconstitutional[17] or if a statute is unconstitutional on its face,[18] the administrative process need not be exhausted. Although some weight was given in the principal case to the fact that the Renegotiation Acts are emergency legislation and entitled to special consideration, it seems reasonable to conclude that even when emergency legislation is not involved, the same effect will continue to be given to the presence of constitutional issues.

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[12] Dobson v. Commissioner, 320 U.S. 489, 64 S.Ct. 239 (1943).

[13] Stason, "Timing of Judicial Redress," 25 MINN. L. REV. 560 at 575 (1941); Loughran, "The Tax Court's 'Exclusive Jurisdiction' As The Second And Final Administrator of the Renegotiation Act," 12 D.C.B.A.J. 327 (1945).

[14] Engineers Public Service Co. v. Securities and Exchange Commission, (App. D.C. 1943) 138 F. (2d) 936; Buder v. First National Bank, (C.C.A. 8th, 1927) 16 F. (2d) 990.

[15] Berger, "Exhaustion of Administrative Remedies," 48 YALE L.J. 981 at 998 (1939); see also, Gorham Manufacturing Co. v. State Tax Commission, 266 U.S. 265, 45 S.Ct. 80 (1924); Stein Brothers Manufacturing Co. v. Secretary of War, 7 T.C. 863 (1946).

[16] Bingham's Trust v. Commissioner, 325 U.S. 365 at 377, 65 S.Ct. 1232 (1945).

[17] Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114 (1926).

[18] Smith v. Cahoon, 283 U.S. 553, 51 S.Ct. 582 (1931).