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REPEALING THE TAXES ON OLEOMARGARINE

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Mr. MILLIKIN, from the Committee on Finance, submitted the following

REPORT

[To accompany H. R. 2245]

The Committee on Finance, to whom was referred the bill (H. R. 2245) to repeal the tax on oleomargarine, having considered the same, report thereon with amendments and, as amended, recommend that the bill do pass.

LEGISLATIVE BACKGROUND OF REGULATION OF OLEOMARGARINE THROUGH THE TAXING POWER

The act of August 2, 1886 (24 Stat. 209) defined "butter" and "oleomargarine" and imposed the following taxes on oleomargarine: Manufacturers $600; wholesalers $480; retailers $48; domestic oleomargarine, 2 cents per pound; and imported oleomargarine 15 cents per pound. This tax statute contained packaging and labeling provisions and, in addition to providing for the forfeiture of unstamped oleomargarine, it provided for the forfeiture of oleomargarine which was adjudged to be deleterious to the public health.

It was clear from its inception that this exercise of the taxing power was primarily designed to achieve certain regulatory effects in the field of competition between oleomargarine and butter. In opening the Senate debate on this 1886 Act, Senator Miller said:

> I resort to no subterfuges in this case, Mr. President. My object in bringing forward this bill and supporting it is, not to secure a large increase to the revenue of our Government; but I have sought to invoke the taxing power of the Government in order that under it the Government might take absolute control of this manufacture, might properly regulate it, and so regulate and control it that it should be carried on in a legitimate way and that the product should be sold to the consumer in all cases for what it is, and it is for that purpose that the friends of this measure have invoked the taxing power of the Government (Congressional Record, July 17, 1886, p. 7073).

The present difference in tax treatment between yellow oleomargarine and other oleomargarine was inserted in the law by the act of

May 9, 1902 (32 Stat. 193). The purpose of this differential tax treatment was to regulate further the competition of oleomargarine and butter. This act imposed a 10-cents-per-pound tax on oleomargarine artificially colored to look like butter.

By the act of March 4, 1941 (46 Stat. 1549), the 10-cent tax was made to apply to all oleomargarine which met a statutory definition of "yellow," whether or not colored artificially.

REVENUES

Total collections under all of the oleomargarine taxes amounted to $4,932,000 in the fiscal year 1946 and $5,874,000 in the fiscal year 1947. The Treasury has estimated that receipts from these taxes in the fiscal years 1948 and 1949 will amount to approximately $7,000,000 per year. A loss of revenue of this amount will not have any appreciable effect on the general Federal revenue picture. The question of revenue loss has not been raised as a significant factor in the discussion of the issues involved in this bill. Both in its legislative history and in current discussions oleomargarine taxation has been viewed as an exercise of the taxing power for regulatory purposes.

POWERS OF THE FEDERAL TRADE COMMISSION TO REGULATE COMPETITION BETWEEN OLEOMARGARINE AND BUTTER

Competition between yellow oleomargarine and butter in interstate commerce falls within the scope of the jurisdiction of the Federal Trade Commission to prevent unfair methods of competition and unfair or deceptive acts or practices. Section 5 (a) of the Federal Trade Commission Act (title 15, U. S. C., sec. 45 (a)) states:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

Misrepresentation of oleomargarine as butter is prohibited by this section, and in the past the Federal Trade Commission has proceeded against labeling and advertising practices which were deceptive in confusing oleomargarine with butter.

PROTECTION AGAINST ADULTERATION AND MISBRANDING OF OLEOMARGARINE THROUGH THE FOOD, DRUG, AND COSMETIC ACT

The Federal Food, Drug and Cosmetic Act in its present form prohibits the introduction of any adulterated or misbranded food in interstate commerce; and proffered delivery or receipt in interstate commerce of any adulterated or misbranded food.

On the basis of the testimony presented to your committee on this bill and the hearings and debates on the bill in the House of Representatives there does not appear to be any doubt but that the standards provided by the Food, Drug, and Cosmetic Act (Public Law 717, 75th Cong., 3d sess., June 23, 1939; U. S. C. title 21, sec. 301 et seq.) are adequate to protect against adulterated oleomargarine in interstate commerce.

With respect to the misbranding of food the act prohibits, in section 301 (k)—

> the alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food,

drug, device, or cosmetic, if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being misbranded.

The United States Supreme Court recently held, in *U. S.* v. *Sullivan*, (332 U. S. 689) with reference to section 301 (k) that—

* * * the language used by Congress broadly and unqualifiedly prohibits misbranding articles held for sale after shipment in interstate commerce, without regard to how long after the shipment the misbranding occurred, how many intrastate sales had intervened, or who had received the articles at the end of the interstate shipment (332 U. S. 689, 696).

Under the provisions of the Food, Drug, and Cosmetic Act the Federal Security Administrator, who is charged with its administration, has assumed jurisdiction over oleomargarine moving in interstate commerce. The Administrator has established a standard of identity for oleomargarine in accordance with provisions of section 401 of the act, and oleomargarine in interstate commerce is regulated in accordance with this standard of identity.

ISSUE AND COMMITTEE'S DECISION

While not asserting an enforceable legal claim to the exclusive use of butter color, the butter interests assert that their product is notable for its wholesome and savory qualities and has been distinguished by this color over a long period of years; that a consumer preference has been built up for a table spread of that color and that they have a moral right to tax protection to hinder imitation.

The oleomargarine interests claim the right to make and sell their product in harmless colors of their own choice in free competition with butter unhindered by the burden of discriminatory taxation.

The House bill, H. R. 2245, contents itself with abolishing the Federal taxes on oleomargarine. Your committee approves the House bill but believes that the consumer of table spreads should have the right to know by affirmative notice what he is getting. The competition between the two products for consumer preference should be free of confusion as to their identity.

The amendments proposed by your committee are intended to give legal basis for achieving such notice and other protections later described relating to fair competition and public health.

TECHNICAL EXPLANATION OF PROVISIONS OF THE BILL

The bill provides that repeal of the 10-cents-per-pound tax on yellow oleomargarine and the one-fourth-cent-per-pound tax on other oleomargarine shall be effective on the day following the date of enactment. The bill repeals the occupational taxes on oleomargarine manufacturers, wholesalers, and retailers effective July 1, 1948.

The provisions of the bill will make it possible for wholesalers to stock tax-free yellow oleomargarine between the date of enactment and July 1 for sale after that date without liability for occupational taxes.

EXPLANATION OF THE COMMITTEE AMENDMENTS

Section 3 of the bill (H. R. 2245) is a committee amendment to the House bill and (1) provides generally that each separate serving of colored oleomargarine sold by a public eating place must bear labeling identifying it as oleomargarine, and (2) requires a public eating place

serving colored oleomargarine to place a prominent and conspicuous notice in such place stating that oleomargarine is served. Section 3 also subjects colored oleomargarine which is sold in the same State or Territory in which it is produced to regulation under the Federal Food, Drug, and Cosmetic Act.

Section 3 (a) comprises a declaration and finding that the sale of colored oleomargarine without clear identification as such, or which is otherwise adulterated or misbranded, burdens interstate commerce by depressing the market for butter and for oleomargarine which is clearly identified and which is neither adulterated nor misbranded. This burden exists irrespective of whether such oleomargarine originates from an interstate source or from the State or Territory in which it is sold.

Section 3 (b) amends section 301 of the Federal Food, Drug, and Cosmetic Act by adding a new paragraph thereto which prohibits the serving of colored oleomargarine in violation of the new section 407 (b) of such act.

Section 3 (c) amends chapter IV of the Federal Food, Drug, and Cosmetic Act by adding a new section (section 407) to such Act. Subsection (a) of section 407 subjects colored oleomargarine which is sold in the same State or Territory in which it is produced, to the same controls under the act as if it had been introduced in interstate commerce. Thus, intrastate colored oleomargarine would be held to the same standards respecting purity and labeling as colored oleomargarine which is shipped in interstate channels.

Oleomargarine is not dependent upon local supply of raw materials, as is butter which depends upon an available supply of fluid milk and cream, and it would be entirely feasible and practicable to establish manufactories in each of the several States to avoid the effects of the Federal law. It is clear that close regulation of colored oleomargarine from interstate producers, while oleomargarine of local production is left free of control, would in practical effect give local producers a great competitive advantage. The substitution for butter or sale as butter of colored oleomargarine not clearly identified as such, or which is otherwise adulterated or misbranded, would not only depress the interstate market in butter but would also bring colored oleomargarine which fully complies with Federal regulation into disrepute and depress the interstate market for it.

Without regulation of colored oleomargarine from all sources there cannot be effective regulation of that part of the colored oleomargarine which comes from out-of-State sources. As a matter of enforcement, it would be difficult and in some cases impossible to prove that colored oleomargarine substituted or sold for butter in public eating places had been previously in interstate commerce. The regulation of the whole is necessary in order to provide effective regulation of that part which originates outside the State of consumption. Also the proprietor of a public eating place is assured that the colored fat which he purchases from any source is neither misbranded nor adulterated when it reaches him. He then could not be heard to say that he had no knowledge that the colored oleomargarine which he served as butter was not in fact butter.

The regulation by Congress under the commerce power of purely interstate transactions is constitutionally permissible if such regulation is reasonably necessary to protect interstate commerce and to make its regulation effective.

Following the *Shreveport Rate Cases* (234 U. S. 342) in which it was held that railroad rates of an admittedly intrastate character and fixed by authority of the State might still be revised by the Federal Government because of the economic effects which they had upon interstate commerce, the Supreme Court has frequently sustained Federal regulations under the commerce power when applied to intrastate transactions (*Mulford* v. *Smith*, 307 U. S. 38; *United States* v. *Darby*, 312 U. S. 100; *Currin* v. *Wallace*, 306 U. S. 1; *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110; *Wickard* v. *Filburn*, 317 U. S. 102).

In *United States* v. *Wrightwood Dairy Co.*, supra (1942), the issue was raised as to whether a Chicago milk dealer who purchased milk within the State and sold it locally could be properly subjected to the provisions of the Agricultural Marketing Agreement Act of 1937 for the purpose of setting minimum prices. The Court in upholding this exertion of the Federal power states:

> * * * the national power to regulate the price of milk moving interstate into the Chicago, Ill., marketing area, extends to such control over intrastate transactions there as is necessary and appropriate to make the regulation of the interstate commerce effective; and that it includes authority to make like regulations for the marketing of intrastate milk whose sale and competition with interstate milk affects its price structure so as in turn to affect adversely the congressional regulation (p. 121).

In defining the scope of the commerce power the Court had this to say:

> The commerce power is not confined in its exercise to the regulation of commerce among the States. It extends to those activities intrastate which so affect interstate commerce or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce (p. 119).

Subsection (b) of section 407 requires persons who serve colored oleomargarine at a public eating place, whether or not any charge is made therefor to (1) cause each separate serving of colored oleomargarine to bear labeling identifying it as oleomargarine, and (2) to post a prominent and conspicuous sign in such place stating that oleomargarine is served.

This requirement is enforceable by criminal actions and suits for injunction (secs. 302 and 303).

The requirement that each separate serving bears labeling identifying it as oleomargarine is not met by imprinting the word oleomargarine on the pat of table fat. The yellow color makes it difficult to read the imprint and such pats tend to melt at room temperature.

Section 403 (f) of the Federal Food, Drug, and Cosmetic Act, which is applicable to this requirement specifies that identifying marks shall be "prominently placed" on the food "with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use." These provisions would require that the word "oleomargarine" appear in some contrasting color either on the receptacle, or on a wrapping or on a slip placed upon the pat of fat.

Representatives of the Pure Food, Drug, and Cosmetic Administration have informed us that the provision is practicable, easily adjustable to all types of public eating places, and is not unduly burdensome in any way. It would not be surprising if the oleomargarine industry

would quickly supply public eating places using its product with appropriate signs and labeling.

Should it develop that regulations are needed to specify the type of notice or labeling required, the Federal Security Administrator has the power under section 701 (a) of the act to prescribe it.

Subsection (c) of section 407 exempts colored oleomargarine from most of the labeling requirements of section 403 of the act at the time of service at public eating places, provided compliance is had with the notice requirements discussed above. Exception is made of section 403 (f) which requires conspicuousness in labeling. Under existing law it is not altogether clear what labeling requirements are placed upon public eating places. The amendment clarifies the point with respect to the type of notices required of public eating places serving colored oleomargarine.

Subsection (d) of section 407 defines colored oleomargarine. The definition is drawn from the Oleomargarine Tax Act. If it is any color other than one within the defined ranges the provisions of the amendment would not apply.

Section 4 of the bill is a committee amendment and provides for the transfer of funds available for enforcement of the Oleomargarine Tax Act to the Food and Drug Administration. These funds should be made available to the Administration in an amount determined to be proper by the Director of the Bureau of the Budget. The committee does not intend that there shall be a time lapse between repeal of the tax statute and enforcement of the controls provided in the amended Federal Food, Drug, and Cosmetic Act.

EFFECT ON STATE LAWS

If the amendments proposed to the bill (H. R. 2245) are adopted there should be no occasion for conflict with State laws regulating the sale of colored oleomargarine. The Food and Drug Administration has worked cooperatively with the States, and the amendments will not disturb that relationship. The purpose of the amendments is to provide a minimum of protection to consumers of butter and colored oleomargarine, and to assure honesty, fair dealing, and an absence of all deception in the competitive sale of such products. The purpose of the amendments is not to nullify any State laws which may impose additional requirements not in conflict with the Federal Act.

In the opinion of your committee the bill (H. R. 2245) as amended, is in the public interest and should be enacted without delay.

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