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378 F. Supp. 1155 (1974)

YOSHIDA INTERNATIONAL, INC.
v.
UNITED STATES.

C.D. 4550; Court No. 72-2-00314.

United States Customs Court.

July 8, 1974.

[Edited]

The plaintiff has filed a motion for summary judgment challenging the validity of Presidential Proclamation 4074 promulgated August 15, 1971, which imposed a surcharge in the form of a supplemental duty in the amount of 10 percent ad valorem upon most articles imported into the United States from and after August 16, 1971. The merchandise involved herein consisting of zippers was imported from Japan and entered at the port of New York on August 17, 25 and 26, 1971. In addition to being assessed with duty at the rate of 23.5 percent ad valorem pursuant to item 745.72, Tariff Schedules of the United States, the merchandise in question was assessed with an additional duty of 10 percent ad valorem pursuant to item 948.00 which was added to the tariff schedules by Presidential Proclamation 4074.

The defendant has filed a cross-motion for summary judgment contending that Presidential Proclamation 4074 was lawfully authorized by (1) the "termination" authority delegated to the President by the Congress in section 350(a)(6) of the Tariff Act of 1930, as amended (19 U.S.C. § 1351(a)(6)) and section 255(b) of the Trade Expansion Act of 1962 (19 U.S.C. § 1885(b)); and (2) the authority vested in the President by section 5(b) of the Trading with the Enemy Act, as amended (50 U. S.C. App. § 5(b)).

Against this background, the question is whether the President, in the assessment of the supplemental duty provided for in Presidential Proclamation 4074, acted beyond the authority so delegated to him by the Congress.

Viewing this Proclamation in the light of the statutory authority delegated by the Congress, it would appear that it is hybrid in character. Although an effort is made to "terminate" and

"suspend" prior proclamations in the same breath, presumably in the hope that some justifying authority might be thereby synthesized, there can be little doubt that the basic authority and justification for the President's action therein was predicated on the termination powers conferred by section 350(a)(6) of the Tariff Act and section 255(b) of the Trade Expansion Act.[3]

We conclude that the authority granted by statute to "terminate, in whole or in part, any proclamation" does not include the power to determine and fix unilaterally a rate of duty which has not been previously legally established. On the contrary, the "termination" authority, as statutorily granted, merely provides the President with a mechanical procedure of supplanting or replacing existing rates with rates which have been established by prior proclamations or by statute.

Accordingly, it is the opinion of this court that Presidential Proclamation 4074 cannot be sustained by the termination authority and that the Proclamation, in fact, arrogated unto the President a power beyond the scope of any authority delegated to him by the Congress. The assessment of the surcharge constituted an affirmative unilateral act on the part of the Executive which cannot be viewed nor rationalized in any way other than an unauthorized imposition of a new and additional duty. Indeed, to invest the President with the powers contended by the defendant would render the proceedings and guidelines enumerated in other tariff legislation meaningless.

Recognizing that a declaration of a national emergency is within the discretion of the President and that a determination as to the need or desirability of affirmatively exercising such authority is not a judicial function, this court will refrain from offering any gratuitous comment as to the existence or nonexistence of the national emergency declared in Presidential Proclamation 4074. Sardino v. Federal Reserve Bank of New York, 361 F.2d 106 (2d Cir. 1966); Werner v. United States, 119 F. Supp. 894 (S.D.Cal.1954), aff'd, 233 F.2d 52 (9th Cir. 1956).

This court is not without appreciation of the burdensome problems encountered by the Executive as he represents these United States in the society of nations. Nor can the court fail to recognize the efforts of the President to achieve stability in the international trade position and monetary reserves of this country. But neither need nor national emergency will justify the exercise of a power by the Executive not inherent in his office nor delegated by the Congress. Expedience cannot justify the means by which a deserving and beneficial national result is accomplished. To indulge in judicial rationalization in order to sanction the exercise of a power where no power in fact exists is to strike the deadliest of blows to our Constitution.

The power to levy and collect taxes, duties, imposts and excises and to regulate foreign commerce has been vested solely in the Congress by the Constitution.

"The question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good. The point is not one of motives, but of

constitutional authority, for which the best of motives is not a substitute." Panama Refining Co. v. Ryan, *supra,* 293 U.S. p. 420, 55 S.Ct. p. 248, 79 L. Ed. 446.

Notwithstanding the broad and expansive authority delegated by various congressional enactments to the Executive in the administration of our international trade relations and affairs, we are of the opinion that Presidential Proclamation 4074 in its attempt to unilaterally assess a surcharge in the form of a supplemental duty in the amount of *1176 10 percent on imports entering this country, exceeded the authority delegated to the President and is, therefore, invalid.

The motion of the plaintiff for summary judgment is granted and the cross-motion of the defendant is denied.

Let judgment be entered accordingly.

For all the foregoing reasons, it must be concluded that the regulatory licensing power delegated to the President by section 5(b) of the Trading with the Enemy Act does not include the authority to assess the 10 percent import surcharge here in question.

RE, Judge (concurring).

The pertinent legislative delegations of power do not authorize the President to assess the "surcharge in the form of a supplemental duty" prescribed in Presidential Proclamation 4074. Since the imposition of the surcharge is therefore *ultra vires*, I concur in the result which grants plaintiff's motion for summary judgment.