REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

KAWILIHAN PASTRIES &
TAKE HOME COUNTER, INC.,
Petitioner,

- versus - C.T.A. CASE NO. 4283

COMMISSIONER OF INTERNAL
REVENUE,
Respondent.
x - - - - - - - - - - - - x

D E C I S I O N

This is a judicial claim for the refund/or tax credit of sales taxes and penalties erroneously paid to the Commissioner of Internal Revenue amounting to P101,419.28.

Petitioner operates a small chain of eating and take-out counters. It bakes the bread, pastries and other bakery products which it sells through said eating and take-out counters.

For the years 1986 and 1987, petitioner paid the 10% manufacturer's sales tax on the sales of its bakery products under former Section 165(a) (3) of the NIRC. It also paid the 4% caterer's tax under former Section 172 (1) of the NIRC on the sales of other food items.

On July 4, 1988, petitioner wrote to respondent Commissioner of Internal Revenue requesting an opinion as to whether its operations are subject to the 10% value added tax (VAT). In response, respondent issued BIR Ruling No. 114, Series of 000-00-012-88, dated January 28, 1988 (Exhibit A), advising petitioner that it is not subject to the 10% VAT. Furthermore, respondent advised that petitioner as operator of a refreshment parlor or eating places, its "gross receipts are subject to the 4% caterer's (tax) under Section 114 (formerly Section 172) of the Tax Code," and that "the take-out counter is not ordinarily taxed as an independent business, in which case, the sales in said counter forms (sic) part of the gross receipts of the operator with the eating place subject to the 4% caterer's tax."

In view of the ruling of respondent Commissioner of Internal Revenue, petitioner Kawilihan Pastries & Take Home Counter, Inc. wrote to respondent on April 8, 1988 requesting for a refund of sales taxes paid in excess of the amount computed at the rate of 4%.

Respondent Commissioner of Internal Revenue never acted on petitioner's request. Considering the provisions of Section 230 of the NIRC, that a suit for refund must be filed within two (2) years from the date of payment of the tax or penalty, petitioner was constrained to file the instant petition for review, without waiting for the decision of respondent so as not to be barred from prescription.

The only issue to be decided is whether or not petitioner is entitled to the refund of the sum of P101,419.28 paid for sales taxes and penalties for the years 1986 and 1987.

Under BIR Ruling No. 114, dated January 28, 1988 (Exhibit A), it has been unequivocally stated that petitioner is not subject to the 10% VAT. It was further declared that as an operator of a refreshment parlor or eating place, petitioner's gross receipts are subject to the 4% caterer's (tax) under Section 114 (formerly Section 172) of the Tax Code," and that "the take out counter is not ordinarily taxed as an independent business, in which case, the sales on said counter forms (sic) part of the gross receipts of the operator with the eating place subject to the 4% caterer's tax." This ruling has been settled with the BIR Ruling No. 202, dated July 13, 1987, stating that bakery products sold through outlets consisting of sit-in services and take-out counters are subject only to 4% caterer's tax.

Considering the aforesaid BIR ruling, petitioner alleged that it is properly liable only to 4% caterer's tax and not for 10% manufacturer's tax.

As shown by the Quarterly Percentage Tax Returns filed by petitioner for the second to the fourth quarters of 1986, and for all quarters of 1987 (Exhibits B,D,F,H,J,L and N), petitioner declared for payment of the 10% manufacturer's tax its gross receipts for the sales of its bakery products.

Petitioner had actually paid the said amounts, as shown by the confirmation receipts issued by the BIR for the corresponding years 1986 and 1987. (Exhibits C,E,G,I,K,M and O).

It appears that petitioner filed the quarterly percentage tax returns for the 2nd quarter of 1986 to the 4th quarter 1986; and for the 1st to the 4th quarters of 1987, as follows:

1986

Quarter	Gross Receipt Caterer/Food	Gross Receipt as Manufacturer of Bakery Products	Tax Paid
Second	P69,740.65	P379,619.88	P 2,789.63 37,961.99
Third	66,651.20	401,133.85	2,666.02 40,113.50
Fourth	61,547.94	345,353.52	2,461.95 34,535.23
Caterer Tax			P 79,176.00
Manufacturer sales Tax			112.610.72

1987

Quarter	Gross Receipt Caterer/Food	Gross Receipt as Manufacturer of Bakery Products	Tax Paid
First	P 92,808.32	P392,573.75	P 3,713.92 39,257.36
Second	105,740.00	373.103.63	4,229.60 37,310.36
Third	81,113.40	454,108.19	3,244.54 45,410.82
Fourth	129,066.12	413,793.20	5,162.65 41,379.32
Caterer Tax			P 16,350.71
Manufacturer sales Tax			163,357.86

It paid the caterer/food tax and the manufacturer's sales tax abovestated.

This Court finds, based on the receipts of sales of petitioner for the years 1986 to 1987, that petitioner is more of a manufacturer of bakery products than an operator of a refreshment parlor or eatery place. We can say, therefore, that petitioner is a bakery and that it is the operation of the eating place which is merely incidental to the main business and not the other way around, as ruled by respondent Commissioner of Internal Revenue in BIR Ruling No. 012-88 and sustained in Apple II Pastries & Take Home Counter, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 4284, Sept. 17, 1991. The pertinent portion of our decision is quoted:

> "xxx the ultimate issue presented before this Court is whether or not petitioner as Operator of a chain of eating and take-out counters is liable to the 10% manufacturers sales

tax on its sales of bakery products inspite its being liable to the normal caterers tax.

"The provisions of the National Internal Revenue Code involved are as follows:

"Sec. 165 - Sales Taxes A - on original sales of articles - there shall be levied, assessed-collected once only on every original sale, barter, exchange, or similar transaction intended to transfer ownership of, or title to, the articles herein below enumerated, a sales tax to be paid by the manufacturer, producer, or importer:

"(3) Essential Articles - 10% of the gross selling price or gross value in money of the following articles as sold, bartered, exchanged or transferred:

"(F) Bread and ordinary bakery products

and

"Sec. 172 (now Sec. 114) - Caterers - A caterer's Tax is hereby imposed as follows:

"(1) on proprietors or operators of restaurants, refreshment parlors and other eating places, including clubs and caterers, four (4%) percentum of their gross receipts;

"From the various evidences presented particularly the quarterly percentage tax returns filed by petitioner for taxable years 1986 and 1987, the following facts were gathered by this Court:

"1986

"Quarter	Gross Receipt Caterer/Food	Gross Receipt as Manufacturer of Bakery Products	Tax Paid
Second	P185,269.99	P 605,070.02	P 7,410.80 60,507.00

Third	103,555.60	424,739.26	4,142.20 42,473.92
Fourth	98,218.26	458,239.18	3,928.74 45,823.91
Total	P387,043.85	P1,488,048.46	

Caterer Tax	P 15,481.74
Manufacturer sales Tax	148,804.83

"1987

"Quarter	Gross Receipt Caterer/Food	Gross Receipt as Manufacturer of Bakery Products	Tax Paid
First	P151,363.60	P 429,201.39	P 6,054.62 42,920.11
Second	210,790.83	389,380.27	38,938.03 8,431.64
Third	231,918.48	461,072.26	46,107.22 9,276.74
Fourth	179,263.95	460,341.02	46,034.10 7,170.56
Total	P773,336.86	P1,739,995.14	

Caterer Tax	P 30,933.56
Manufacturer sales Tax	173,999.46

"Clearly, from the above gross receipts of sales by petitioner for the years 1986 and 1987 we can conclude that actually petitioner is more of a manufacturer of bakery products than as an operator of a refreshment parlor or eatery place. We can safely say that mainly petitioner is a Baker and that it is the operation of the eating place which is merely incidental to the main business and not the other way around as ruled by the respondent in his BIR Ruling No. 012-88. However, respondent may not be blame for the ruling as the above facts may not have been presented to him by the petitioner when it requested for the said ruling.

"As held in the case of <u>Crispulo Malicse, Petitioner vs. Collector of Internal Revenue, Respondent,</u> (G.R. L-7578 Philippine Reports Vol. 99, July 24, 1956), the facts of the petitioner in paying three (3%) percent of gross receipts as hotel keeper of Palo Alto Hotel and Restaurant and for his business as keeper of a restaurant where wines of liquors are served, he paid five (5%) percent percentage tax prescribed in Section 191 of the Tax Code are in order. The Supreme Court dismissed the contentions of the petitioner, that the operation of said restaurant is merely incidental to and necessarily connected with the hotel business and as such his receipts from said restaurant should be considered receipts of his hotel business subject to the 3% percentage tax due him as hotel keeper. Furthermore, contrary to the contention of the petitioner that Section 191 applies only to purely drinking establishments, the Supreme Court agrees with the Solicitor General that "if the theory is sustained, it would be easy for taxpayers to evade the payment of the 5 percent percentage tax prescribed in Section 191 on bars and cafes where wines or liquors are served by simple expedient of not maintaining a purely drinking establishment and keeping just a sort of an eating establishment but at the same time serving therein wines or liquors which could not have been the intentions of the legislators". The same ruling was held by the Supreme Court in the case of <u>Bay View Hotel Inc. and Mariano Zamora, petitioners vs. Collector of Internal Revenue and Court of Tax Appeals, respondent,</u> G.R. No. L-11116 June 30, 1959, Vol. 109 Philippine Reports, pp. 1357 - 1358.

"Similarly in the case at Bar, the acts of the petitioner in paying the 4% caterers tax as an operator of a refreshment parlor or eating place and at the same time paying 10% as manufacturer of Bakery products & selling them to the public are in order. To rule otherwise, will open the gate for possible evasion

> of the payment of the higher ten (10%) percent manufacturer sales tax by the simple expedient of maintaining a refreshment parlor or any eating place inside the bakery establishments and treat the selling of the bakery products as incidental to its operation of the eating place. This court believes that the most equitable manner of interpreting the law is to give force and effect to each and every provisions of the law. A statute must be read or construed as a whole or in its entirely. All parts, provisions or sections must be read, considered or construed together and each must be read, considered with respect to all others and in harmony with the whole. (Chartered Bank vs. Imperial, 48 Phil. 931; Lopez et al vs. El Hogar Filipino, 47 Phil. 249; Almeda vs. Florentino, G.R. No. L-23800 Dec. 21, 1965). In the instant case, this Court believes Sections 165 and 172 of the National Internal Revenue Code may be given equal force and effect as there appears no conflict at all. If the business establishment manufactures and sells its bakery products to the public, it is liable to the 10% manufacture sales tax and if it maintains at the same time an eating place inside the establishment it is liable to the 4% caterers tax for the food and drinks it serves. This manner of paying taxes, the petitioner has correctly followed as shown in its quarterly percentage tax returns."

WHEREFORE, the instant Petition for Review is hereby dismissed, and the amount sought to be refunded is consequently DENIED. With costs against petitioner.

SO ORDERED.

Quezon City, Metro Manila, April 8, 1992.

CONSTANTE C. ROAQUIN
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

STELLA DADIVAS-FARRALES
Acting Associate Judge

CERTIFICATION

I hereby certify that this decision was reached after due consultation among the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge