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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
MANILA

August 4, 1960

LA PAZ Y BUEN VIAJE (LA DICHA CIGAR & CIGARETTE FACTORY,
Petitioner,

- versus -

C.T.A. CASE NO. 700

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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D E C I S I O N

This is an appeal from the decision of the Commissioner of Internal Revenue, denying the claim for refund of petitioner La Paz y Buen Viaje (La Dicha Cigar & Cigarette Factory) for the amount of ₱12,066.00 representing deficiency specific tax on cigarettes.

This case was submitted for judgment on the pleadings. The facts are not disputed.

Petitioner La Paz y Buen Viaje (La Dicha Cigar and Cigarette Factory) is a domestic corporation (Par. 1, Petition for Review, CTA rec. p. 1) engaged in the manufacture of cigars and cigarettes (BIR rec. p. 12). Between September, 1949 and September 22, 1950, petitioner removed from its factory and sold 6,033,000 "Largos" (over 80 Millimeters long) cigarettes at ₱7.60 per thousand cigarettes (Par. 9 (a), Petition for Review, CTA rec. p. 3). A tax amounting to ₱12,066.00 was paid by affixing, with the approval and under the supervision of respondent's authorized representatives, internal revenue stamps of the ₱4.00 per M class on the packages of the cigarettes in question (Par. 9 (b), Petition for Review, CTA rec. p. 3).

After an investigation of the case (BIR rec. pp. 1-12), the Commissioner of Internal Revenue determined against petitioner deficiency specific tax in the amount of ₱12,066.00.

In view of the denial of its request for reconsideration of the assessment, petitioner appealed to this Court (C.T.A. Case No. 323). However, this Court dismissed the appeal in a resolution, dated December 27, 1957, the dispositive part of which reads as follows:

> "Finding that the herein appeal was filed beyond the 30-day period provided in Section 11 of Republic Act No. 1125, the same has to be, as it is hereby, dismissed for lack of jurisdiction. With costs against petitioner." (BIR rec. p. 369.)

On September 26, 1958, petitioner paid the deficiency specific tax (BIR rec. p. 375), and filed a claim for its refund on July 21, 1959 (BIR rec. pp. 376-377) which was denied by the Commissioner in his letter dated August 28, 1959 (BIR rec. p. 380). On October 7, 1959, petitioner filed the instant petition, seeking the refund of the sum of ₱12,066.00.

The issues raised by the parties for our consideration are:

(1) Whether or not petitioner is barred from bringing an action for the recovery of the sum of ₱12,066.00 paid as deficiency specific tax; and

(2) Whether or not the said amount of ₱12,066.00 was legally collected by respondent.

As regards the first issue, respondent contends that petitioner is barred from bringing the instant action, for the reason that the subject matter of this action is the same as that in C.T.A. Case No. 323, which, upon its dismissal by this Court, rendered the assessment final, executory and demandable.

We find no merit in respondent's contention. For a final judgment or order of a court to be conclusive in a subsequent case between the same parties and their privies litigating upon the same thing and issue, the following requisites must concur: (a) the former judgment must be final; (b) it must have been rendered by a court having jurisdiction of the subject matter and of the parties; (c) it must be a judgment on the merits; and (d) there must be, between the first and the second actions, identity of parties, of subject matter, and of cause of action (San Diego vs. Cardona, 70 Phil. 281, 283). There is no dispute as to the presence of three of these requisites.

However, the petition for review in C.T.A. Case No. 323 having been filed beyond the 30-day period prescribed in Section 11 of Republic Act No. 1125, the same was dismissed for lack of jurisdiction. Obviously, such dismissal was not on the merits of the case, but only on the question of whether or not the petition for review was seasonably filed. Such being the case, the dismissal is not res adjudicata to the instant action (Bayot vs. Zurbito, 39 Phil. 650), for it is well settled that the judgment of a court dismissing a suit for want of jurisdiction does not conclude the plaintiff's right of action (Smith vs. McNeal, 109 US 426, 27 L ed 986, 987).]

> "x x x In order that a judgment may constitute a bar to another suit it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases and must be determined on the merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." (Hughes vs. United States, 4 Wall 232, 18 L ed 303, 305.)

Respondent avers that its decision holding petitioner liable for the payment of the tax in question became final, executory and demandable upon the failure of petitioner to appeal the assessment within the 30-day period prescribed in Section 11 of Republic Act No. 1125, citing the case of Republic of the Philippines vs. Juana Vda. de Del Rosario, et al., G. R. No. L-10460, March 11, 1959. Hence, it is concluded that:

> "x x x petitioner is now estopped from denying or contesting the legality of the said assessment." (Memorandum for Respondent, CTA rec. p. 31.)

We are not in accord with respondent's view. While it is true that the assessment appealed from became final, executory and demandable when petitioner failed to file its appeal within the reglementary period of 30 days, such consequence did not close all avenues available to the taxpayer. Having been blocked, by lapse of time, in its attempt to bring the case to this Court under Section 11 of Republic Act No. 1125, petitioner lost no time in availing itself of the remedy afforded by Section 306 of the Tax Code by paying the tax and seasonably filing a written claim for refund with the respondent. It was through this procedure that petitioner finally succeeded in elevating the case at bar to this Court.

We now come to the second issue raised in this case. Respondent's deficiency determination is based on Section 137 (b) of the Tax Code, as amended by Republic Act No. 419, the pertinent portion of which reads:

> "SEC. 137. Specific tax on cigars and cigarettes.- On cigars and cigarettes there shall be collected the following taxes:
>
> x x x x
>
> '(b) Cigarettes -
>
> (1) When the manufacturer's or importer's wholesale price, less the amount of the tax, is three pesos and fifty centavos or less per thousand, on each thousand, two pesos.
>
> (2) When the manufacturer's or importer's wholesale price, less the amount of the tax, is more than three pesos and fifty centavos, but not more than four pesos and fifty centavos per thousand, on each thousand, six pesos.
>
> (3) When the manufacturer's or importer's wholesale price, less the amount of the tax, exceeds four pesos and fifty centavos but not more than six pesos per thousand, on each thousand, eight pesos.
>
> (4) When the manufacturer's or importer's wholesale price, less the amount of the tax, exceeds six pesos per thousand, on each thousand, ten pesos.
>
> x x x And provided, further, That on all cigarettes which have been mechanically packed, or are more than eighty millimeters in length, a minimum tax of four pesos per thousand shall be collected, irrespective of whether the price at which such cigarettes are sold by the manufacturer or importer is three pesos and fifty centavos or less per thousand. x x x.'"

Since the actual selling price was ₱7.60 per thousand cigarettes, the wholesale price, less the amount of tax (₱4.00), was ₱3.60 per thousand. As argued by respondent, under paragraph (2) of subsection (b) of the above-quoted section, the specific tax was ₱6.00 per thousand cigarettes. Since petitioner paid a tax of only ₱4.00 per thousand cigarettes, respondent determined a deficiency specific tax of ₱2.00 per thousand cigarettes or ₱12,066.00 on the 6,033,000 cigarettes (BIR rec. p. 26).

Petitioner contends that there is an ambiguity in the language of the law, which under the rule in statutory construction, should be construed strictly against the government and liberally in favor of the taxpayer (BIR rec. pp. 243-248). We quote the petitioner:

> "The 'largos' cigarettes in question were sold by La Dicha at the wholesale price, including the tax, of ₱7.60. La Dicha declared and paid the tax thereon under the ₱4.00 per thousand class. Under the brackets set by the said Act, however, if the corresponding specific tax on these cigarettes is ₱4.00 per thousand, then the wholesale price of these 'largos' cigarettes, exclusive of the tax, is ₱3.60 per thousand, which is more than the ₱3.50 per thousand wholesale price covered by the ₱4.00 rate. It would appear, therefore, that the specific tax should be ₱6.00 per thousand. On the other hand, if the ₱6.00 rate is applied, the wholesale price, exclusive of the tax, is ₱1.60 only, which is less than ₱3.50, and therefore, it would appear that the ₱4.00 rate is the rate applicable. There is no question that only one of these two rates should be applied in this case. But the facts of the case are such that neither rate is clearly applicable to the exclusion of the other. We have here, therefore, a case of doubt or ambiguity as to the proper construction and application. But the issue before us is clear: Which of the two rates should apply: ₱6.00 or ₱4.00?
>
> x x x x
>
> "In view of the fact that under the express provisions of Section 137 of the National Internal Revenue Code, as amended, it does not clearly appear which of the rates of specific

> tax is applicable, the ₱4.00 or the ₱6.00 rate, where the selling price, including the tax, is ₱7.60 per thousand cigarettes, it is evident that the lower rate of ₱4.00 should be applied in keeping with the principles laid down in both Philippine and American jurisprudence aforecited governing the construction of tax laws in cases of doubt x x x." (BIR rec. pp. 243-24.)

A statute is not open to construction as a matter of course. It is open to construction only where the language used in the statute requires interpretation, that is, where the statute is ambiguous, or will bear two or more constructions, or is of such doubtful or obscure meaning, that reasonable minds might be uncertain or disagree as to its meaning. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation (50 Am. Jur., Statutes, Sec. 225, pp. 204-205).

We see no reasonable basis for the application of the rules of statutory construction in this case, for we do not agree to the suggestion that the language of paragraphs (1) and (2), subsection (b) of Section 137 of the Tax Code, as amended by Republic Act No. 419, is ambiguous. Under paragraph (1) when the wholesale price is ₱3.50 per thousand cigarettes, exclusive of the specific tax, the tax shall be ₱4.00 on each thousand cigarettes; under paragraph (2), when the wholesale price, less the amount of tax is more than ₱3.50 but not more than ₱4.50 per thousand cigarettes, the tax shall be ₱6.00.]

To ascertain the tax, the wholesale price, sans tax, should first be determined. The evidence shows that petitioner sold its cigarettes at ₱7.60 per thousand, paying therefor a tax of ₱4.00. The wholesale price was ₱3.60 per thousand cigarettes. The tax thereon should be computed in accordance with paragraph (2), subsection (b) of Section 137 of the Tax Code, as amended by Republic Act No. 419, which provides:

> "(2) When the manufacturer's or importer's wholesale price, less the amount of the tax, is more than three pesos and fifty centavos but not more than four pesos and fifty centavos per thousand, on each thousand, six pesos."

Consequently, the rate of tax applicable in the case at bar is ₱6.00 per thousand cigarettes. This conclusion may force petitioner to take a loss, inasmuch as it is now too late to shift the deficiency specific tax of ₱2.00 per thousand cigarettes to the consumers. Nevertheless, this is not a sufficient reason for us to disregard the court's duty to apply the law as it stands. Besides, if we were to follow petitioner's theory, we would be permitting taxpayers, like petitioner herein, to pay a specific tax at a rate within a lower bracket although their actual wholesale price, exclusive of the tax, comes within a bracket of higher tax rate. For instance, if the taxpayer should choose to sell "largos" cigarettes at less than ₱9.51 per thousand cigarettes, the tax therefor would be only ₱4.00 per thousand, although the wholesale price, less the amount of the tax, is more than ₱3.50 which comes within a higher tax rate of ₱6.00 per thousand. This situation could not have been the intention of Congress when it enacted Republic Act No. 419 amending Section 137 of the Tax Code.

Petitioner invokes equity in support of its claim for the refund of the tax involved. We borrow the language of petitioner:

> "Another ground supporting the reversal of respondent's refusal to make refund is equity. Excise taxes, like the present specific tax on cigarettes, are intended by the statute to be borne by the final consumer, the producer being merely a medium for collection. When respondent required and approved the affixing of stamps corresponding to ₱4.00 per 1,000 sticks, taxpayer had every reason to believe that this was all the tax it was allowed to shift to its customers. It was on the basis of this tax, as approved by respondent, that petitioner herein fixed its wholesale price at ₱7.60 including tax and it was at this price that it sold to its customers. More than three years have elapsed since the last taxable removal was made. There is no more way for the petitioner to recoup from customers the amount of the ₱2.00 additional tax per 1,000 that respondent assessed. x x x" (CTA rec. pp. 21-22)

Suffice it to say that, if ever there was mistake or negligence on the part of the Commissioner's representatives in allowing and/or requiring petitioner to pay a tax of only ₱4.00, instead of ₱6.00 per thousand cigarettes, it would not preclude respondent from subsequently collecting the correct tax, for the government is not bound by the mistakes and errors of its agents (Genato Commercial Corporation vs. Court of Tax Appeals, et al., G. R. No. L-11727, September 29, 1958; Pineda vs. Court of First Instance of Tayabas, 52 Phil. 803).

IN VIEW OF THE FOREGOING CONSIDERATIONS, the decision of respondent Commissioner of Internal Revenue denying petitioner's claim for refund is affirmed. The petition for review in this case is hereby dismissed, with costs against the petitioner.

SO ORDERED.

Manila, August 4, 1960.

MARIANO NABLE
Presiding Judge

I concur:

~~AUGUSTO M. LUCIANO~~
Associate Judge

Associate Judge ROMAN M. UMALI concurs
and dissents in a separate opinion.

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x - - - - - - - - - - - - - - x

CONCURRING AND DISSENTING OPINION

I concur in the view that this Court has jurisdiction over the present appeal, but I dissent as regards the opinion that the cigarettes in question are subject to the tax at the rate of ₱6.00 per thousand.

The law applicable to the case is Section 137 of the Revenue Code, as amended by Republic Act No. 419, the pertinent provisions of which are as follows:

> SEC. 137. Specific tax on cigars and cigarettes.- On cigars and cigarettes there shall be collected the following taxes:
>
> x x x
>
> (b) Cigarettes -
>
> (1) When the manufacturer's or importer's wholesale price, less the amount of the tax, is three pesos and fifty centavos or less per thousand, on each thousand, two pesos.
>
> (2) When the manufacturer's or importer's wholesale price, less the amount of the tax, is more than three pesos and fifty centavos, but not more than four pesos and fifty centavos per thousand, on each thousand, six pesos.
>
> x x x

> x x x And provided, further, That on all cigarettes which have been mechanically packed, or are more than eighty millimeters in length, a minimum tax of four pesos per thousand shall be collected, irrespective of whether the price at which such cigarettes are sold by the manufacturer or importer is three pesos and fifty centavos or less per thousand. x x x.

The cigarettes in question were "largos" cigarettes of more than 80 millimeters in length. They are, therefore, taxable under the proviso at the minimum rate of ₱4.00 per thousand, if the selling price, less the tax, is ₱3.50 or less per thousand. If the selling price is more than ₱3.50 but not more than ₱4.50 per thousand, they are taxable at the rate of ₱6.00 per thousand, according to sub-paragraph (2).

The said cigarettes were sold for ₱7.60 per thousand, including the tax. If the four-peso rate is applied, the selling price, less the tax, would be ₱3.60 per thousand, in which case the six-peso rate would apply. On the other hand, if the six-peso rate is applied, the selling price, less the tax, would be ₱1.60 per thousand, in which case the four-peso rate would apply. Obviously, this case is one which involves cigarettes not falling specifically under any of the classes of cigarettes enumerated in the law. For this reason, I believe that the minimum rate of ₱4.00 provided in the proviso should apply.

The majority opinion states that there is no ambiguity in the law so that there is no basis for the application of the rules of statutory construction. It then proceeds to state the rule for ascertaining the tax. We quote:

> "To ascertain the tax, the wholesale price, sans tax, should first be determined. The evidence shows that petitioner sold its cigarettes at ₱7.60 per thousand, paying therefore a tax of ₱4.00. The wholesale price was ₱3.60 per thousand cigarettes. The tax thereon should be computed in accordance with paragraph (2), subsection (b) of Section 137 of the Tax Code, as amended by Republic Act No. 419, which provides:
>
> > '(2) When the manufacturer's or importer's wholesale price, less the amount of the tax, is more than three pesos and fifty centavos but not more than four pesos and fifty centavos per thousand, on each thousand, six pesos.'
>
> Consequently, the rate of tax applicable in the case at bar is ₱6.00 per thousand cigarettes." (Page 8, majority opinion.)

In determining the rate of tax applicable, the majority opinion deducted the amount of tax paid on the date of removal of the cigarettes from the factory, that is, ₱4.00 per thousand, from the wholesale price of ₱7.60, and since the resulting wholesale price, without the tax is ₱3.60, it concludes that the correct tax applicable is ₱6.00 per thousand. Apparently, the rule which is sought to be established in determining the wholesale price, without the tax, is to deduct from the wholesale price, including the tax, the amount of tax paid by the manufacturer or importer. I do not think this is correct. The tax which the law requires to be deducted from the wholesale price to determine the net wholesale price without the tax means the correct tax fixed by law, not the amount which the taxpayer may have paid, irrespective of whether such amount is more or less than that fixed by law. To show the incorrectness of such a rule, let us suppose that the manufacturer or importer had paid ₱6.00 per thousand, instead of ₱4.00 per thousand. Applying the rule, the sum of ₱6.00 must have to be deducted from the wholesale price of ₱7.60. The result would be ₱1.60, and the rate of tax properly applicable is ₱4.00, not ₱6.00, per thousand.

Assuming the correctness of respondent's theory, the fact is that petitioner has actually paid ₱6.00 per thousand cigarettes. It is true that the amount paid upon removal of the cigarettes from the factory was ₱4.00 per thousand, but it paid the additional sum of ₱2.00 per thousand, making a total of ₱6.00 per thousand. Following the rule established by respondent and accepted as correct in the majority opinion, the tax which must be deducted from the wholesale price of ₱7.60 per thousand is ₱6.00, not ₱4.00, so that the wholesale price which must be used as basis in determining the classification of the cigarettes is ₱1.60 per thousand. Therefore, following the opinion of respondent, the rate of tax properly applicable is ₱4.00 per thousand, and petitioner is entitled to the refund.

A parallel situation obtains under the Income

Tax Law, but the law has been interpreted even more liberally in favor of taxpayers. If property purchased or constructed for use as a personal residence is rented or otherwise appropriated to income-producing purposes and is used for such purposes, and then sold, there may be a deductible loss, a taxable gain, or neither, depending on the basis and selling price of the property.

Deductible loss.- The basis of the property for computing loss is cost, or the value on the conversion date, whichever is lower. After applying the adjustments, the selling price is subtracted from the adjusted basis to find the recognized loss.

> Example 1: Property purchased by the taxpayer on July 1, 1950, for ₱28,000 (₱7,000 allocable to the land and ₱21,000 to the building) was used as a residence until January 1, 1953, when it was used by the taxpayer solely as an office for his real estate business. On the latter date, the fair market value of the property was ₱25,000 (₱5,000 allocable to the land and ₱20,000 to the building, which at that time had an estimated useful life of 20 years). The property was sold on October 1, 1954, for ₱22,400 (₱4,400 allocable to the land and ₱18,000 to the building). There were no capital improvements put on the property and there were no casualty losses. Since property was converted to business use before sale there is an adjustment for depreciation from date of conversion.

Basis (unadjusted) of land -- ------------------		₱ 5,000
Basis (unadjusted) of building --------- (value on conversion date since that is less than cost)	₱20,000	
Plus: Improvements -----	0	
Less: Casualty loss ----	0	

Depreciation for period 1/1/53 to 10/1/54 (₱1,000 a year for 1-/3/4 years) -------		₱1,750
(No depreciation allowable for 7/1/50 to 12/31/52 when property used as personal residence) ----------		
Adjusted basis of building ------		18,250
Basis of land & building --------		₱23,250
Selling price of land & building ------------------		22,400
Recognized loss on sale ---------		₱ 850

<u>Taxable gain</u>.- The basis for computing <u>gain</u> on the sale of the property is cost, regardless of the value on the conversion date. After applying the adjustments, the adjusted basis is subtracted from the selling price to find the recognized gain.

Example 2: Assume the same facts as in Example 1, except that the property was sold for ₱30,000.

Basis of land (cost; value on conversion date is not considered) ------------------		₱ 7,000
Basis of building (cost; value on conversion date is not considered) --	₱21,000	
Plus: Improvements ----	0	
Less: Casualty loss ---	0	
Depreciation for period 1/1/53 to10/1/54, ₱1,000for 1/3/4 years (based on value on conversion date since it is less than cost) ---	1,750	
(No depreciation allowable for 7/1/50 to 12/31/52 when property used as personal residence)		
Adjusted basis of building -----		19,250
Basis of land & building -------		₱26,250
Selling price of land & building ------------------------		30,000
Recognized gain on sale --------		₱ 3,750

Neither gain nor loss.- The different rules regarding basis for computing gain and basis for computing loss (as shown above) will result in neither gain nor loss upon the sale of the converted personal residence if the selling price is an amount between the basis for computing gain and the basis for computing loss.

> Example 3: Assume the same facts as in Example 1, except that the property was sold for ₱25,000. There would be neither gain nor loss on the sale of the property. Since the basis for computing gain is ₱26,250 (cost less depreciation allowable), there is no gain on a sale at ₱25,000. Since the basis for computing loss is ₱23,250 (cost less depreciation allowable), there is no loss on sale at ₱25,000.
>
> (See PH Federal Tax Course, 1955, Par. 2203.)

In the above example, neither gain nor loss is recognized where the selling price of the property is ₱25,000 because if the basis for computing gain is used, the result would be a loss. On the other hand, if the basis for computing loss is used, the result would be a gain. The instant case of petitioner is similar to the income tax case described above. The cigarettes in question are apparently within and at the same time beyond the classification of cigarettes provided in the law. It cannot be justly said that the law is so clear as not to need the aid of the rules of statutory construction. In fact, I think that not enough aid has been mustered, and none can be found, to validly support respondent's theory.

I believe that, in all fairness, the minimum

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rate of ₱4.00 per thousand cigarettes prescribed in the proviso of Section 137 of the Revenue Code should be held to apply, not the six-peso rate under paragraph (b)(2). I vote to reverse the decision of respondent.

ROMAN M. UMALI
Associate Judge