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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

GEORGE C. WEE,
Petitioner,

versus C.T.A. CASE NO. 1157

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

Oct. 11, 1967

D E C I S I O N

This is a petition to review the decision of respondent dated October 24, 1961, assessing and demanding from petitioner the sum of ₱72,032.96 as deficiency advance sales tax and 25% and 50% surcharges on his importations of petrolatum in 1951. Respondent also suggested to petitioner payment of ₱8,240.00 as compromise penalty in extrajudicial settlement for violation of Sections 183 and 184 of the Revenue Code.

The facts of this case as stipulated by the parties are as follows:

> "1. That the petitioner is a Filipino citizen with office address at 640 Misericordia Street, Sta. Cruz, Manila, and that respondent is the Commissioner of Internal Revenue with offices at the Department of Finance Building, Manila, duly vested with authority to act as such for the Government of the Republic of the Philippines;
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> "2. That the petitioner, as owner and operator of the now defunct HOC CHUAN HO PHARMACEUTICAL LABORATORY, imported 256 drums of petrolatum on July 31, 1951 and another 339 drums of petrolatum on August 10, 1951, or a total of 595 drums of petrolatum, to

be used exclusively in the manufacture of medicinal products in accordance with the representations made by the petitioner per his affidavits signed and sworn to on September 15 and 25, 1951, respectively, said affidavits appearing on pages 11 and 2, respectively, of the B.I.R. records of this case and made integral parts of this stipulation of facts;

"3. That upon authority and consent of the respondent, the petitioner secured the release from customs custody of the 595 drums of petrolatum aforementioned upon payment of the 7% advance sales tax based on the landed cost thereof plus 25% mark-up;

"4. That sometime in 1953 the HOC CHUAN HO PHARMACEUTICAL retired from business;

"5. That the respondent in a letter of demand, dated July 7, 1960, and received by the petitioner on August 10, 1960, assessed and demanded from the petitioner the sum of ₱80,272.96 as deficiency advance sales tax, inclusive of surcharges and compromise, on its importations in 1951 of 595 drums of petrolatum hereinbefore mentioned, computed as follows:

Cost of 595 drums of petrolatum	₱45,927.17
Add: 100% mark-up	45,927.17
Landed cost	₱91,854.34
50% advance sales tax thereon	₱45,927.17
Less: 7% advance sales tax paid	4,765.48
Deficiency advance sales tax	₱41,161.69
Add: 75% surcharge thereon	30,871.27
AMOUNT DUE AND COLLECTIBLE.	₱72,032.96
Compromise penalty	₱ 8,240.00
TOTAL AMOUNT DUE AND COLLECTIBLE	₱80,272.96

"6. That in a letter, dated August 15, 1960, petitioner addressed a letter to respondent protesting the above-mentioned assessment and requesting a reinvestigation of the case;

"7. That respondent in a letter, dated October 24, 1961, which was received by the petitioner on November 28, 1961, denied the protest of the petitioner and reiterated his demand for the payment of the sum of ₱80,272.96;

"8. That petitioner executed a waiver of the statute of limitations prescribed in the National Internal Revenue Code, said waiver being found on pages 98 and 99 of the B.I.R. records of this case and likewise made an integral part of this stipulation of facts;

"9. That the parties hereto reserve the right to present further evidence and manifest willingness to prove such other facts as this Honorable Court may require for the complete resolution of the issues raised in this case." (Stipulation of Facts, pp. 46-48, CTA rec.)

The principal issues submitted to the Court for resolution are the following:

1. Whether or not the right of respondent to assess the deficiency advance sales tax has already prescribed;

2. Whether or not the 595 drums of petroleum jellies (petrolatum) imported by petitioner were used in the manufacture of medicinal preparations; and

3. Whether or not petitioner is liable for 25% and 50% surcharges.

FIRST ISSUE

Petitioner claims that the right of respondent to assess the deficiency advance sales tax has prescribed under Section 331 of the Revenue Code because more than five years had already elapsed from the filing of his revenue declarations in 1951 to the date of the assessment on July 7, 1960. The pertinent portions of the Revenue Code on prescription provide:

> "SEC. 331. Period of limitation upon assessment and collection.- Except as provided in the succeeding section, internal-revenue taxes shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period. xx xx xx.
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> "SEC. 332. Exceptions as to period of limitation of assessment and collection of taxes.- (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within ten years after the discovery of the falsity, fraud, or omission." (Underscoring supplied)

Petitioner, as owner and operator of the Hoc Chuan Ho Pharmaceutical Laboratory, imported 595 drums of petrolatum in July and August, 1951. On the strength of his representation that the imported article would be used exclusively for the manufacture and/or preparation of medicinal products (pp. 2 & 11, BIR rec.), respondent authorized the release of the shipments on September 15 and 25, 1951 upon payment of the 7% advance sales tax based on the landed cost plus 25% mark-up, pursuant to Section 186 of the Revenue Code (pp. 4 & 13, BIR rec.). On the same dates, respondent instructed the City Revenue Agent to ascertain whether the articles imported were really to be used in the manufacture or preparation of medicinal products. If the said articles were used or disposed of by petitioner for other purposes, the 50% sales tax prescribed by Section 184(c) of the Revenue Code, as amended by Republic Act No. 588, should be assessed and collected.

Respondent admitted that petitioner filed in 1953 his income tax return for 1952 and reported therein that all the 595 drums of petrolatum were used in the manufacture of medicinal preparations (Exh. 1, pp. 48-50, BIR rec.) and disposed of in 1952 (p. 43, BIR rec.). The said income tax return was made the basis in assessing the deficiency advance sales tax in question. (Exh. 1, *supra*.)

We agree with petitioner that the right of the Government to assess the deficiency sales tax has already prescribed.

An importer who is subject to the advance sales tax under Section 183(b) of the Revenue Code is not required by Section 183(a) of the same Code, as amended by Republic Act No. 594, to make a return because he has no taxable gross quarterly sales, receipts or earnings. The reason is that the advance sales tax is paid before the release of the imported articles from customs custody without the necessity of filing a quarterly return. However, before the imported articles could be released from customs custody, the importer must necessarily file the corresponding import entry and revenue declaration to serve as the basis for the computation of the advance sales tax. This declaration could serve as a return for the purpose of determining the period of limitation within which to assess the advance sales tax. (See Engineering Equip. & Supply Co. vs. The Comm. of Int. Rev., CTA Case No. 681, Nov. 29, 1966.)

Petitioner must have filed a revenue declaration with the Bureau of Customs before he paid the advance sales tax on his importations of petrolatum. The fact that he paid the 7% advance sales tax before release of the said article from customs custody is a clear indication that his declaration contained the necessary data upon which respondent based his computation of the advance sales tax. The payment was, however, subject to the condition that the imported article should be used exclusively for medicinal purposes; otherwise, it will be subject to 50% advance sales tax imposed by Section 184(c) of the Revenue Code, as amended by Rep. Act No. 588.

When petitioner filed with the Bureau of Customs in 1951 the import entry and revenue declaration representing that the imported petrolatum would be used for medicinal purposes, respondent had five years from 1951 to 1956 within which to assess the deficiency advance sales tax because the revenue declaration is tantamount to a tax return. Since the assessment in question was made only on July 7, 1960 (pp. 61-62, BIR rec.), the same was made four years, more or less, beyond the five-year period of limitation prescribed in Section 331 of the Revenue Code.

Respondent contends that, assuming arguendo, petitioner's declaration with the Bureau of Customs can be considered as a tax return for purposes of assessing the deficiency advance sales tax, the said return was false and fraudulent and, therefore, respondent has ten years from March 3, 1960, the date of the discovery of the fraud, up to March 3, 1970, within which to assess the deficiency advance sales tax under Section 332(a) of the Revenue Code, supra.

The basis of respondent in attributing fraud to petitioner is the report of Supervising Revenue Examiner Felipe Ibarra that, being new in the business, petitioner could not consume 595 drums of petrolatum in a short period of seven months. He claims that even Vick International, Inc. could not use the same quantity of petrolatum in so short a period. He concluded, therefore, that the imported petrolatum could have been sold to other end-users. In short, respondent's examiner wants us to believe that, since Vick International, Inc. cannot consume the 595 drums of petrolatum in 7 months, petitioner cannot likewise consume the same. This argument is presumptuous and without factual basis because the said examiner admitted on cross examination that there is no evidence to show that Vick International, Inc. cannot consume that much petrolatum (pp. 80-83, t.s.n.). But even assuming arguendo that it can not consume that much petrolatum, it does not necessarily follow that petitioner is also incapable of consuming the same quantity, in the absence of an independent evidence to this effect. His conclusion is, therefore, not borne out by the facts. Moreover, respondent's examiner failed to identify any person or entity to whom the imported petrolatum was sold by petitioner. (pp. 74-75; 86-87, t.s.n.)

On the other hand, petitioner was able to show that from 1951 to 1953, he was engaged in the manufacture and sale of medicinal preparation called the Wee Ointment (p. 4, t.s.n.); that the basic ingredient used in the manufacture thereof was petrolatum (p. 6, t.s.n.); that the manufacturing process involved three stages, namely: melting, mixing and filling; and that the total capacity of the plant per working day of 8 hours was from 6 to 7 drums (pp. 10-11, t.s.n.) of 475 pounds net weight (p. 27, t.s.n.). Based on this daily output, even at 50% capacity, the total consumption of petrolatum during the period in question would be 633.5 drums. Further proof that the petrolatum was actually used for medicinal purposes is the report of respondent's examiner Alfonso Alejandro dated June 4, 1958 stating that "the petrolatum in question has never been sold but were used instead x x x in the manufacture and/or preparation of medicines which fact appears in the record of daily transactions." (Exhs. K & K-1, p. 38, BIR rec.)

It is not true as claimed by respondent that petitioner was not granted a permit to manufacture medicinal preparations. The evidence shows that on August 23, 1951, petitioner was issued a permit by the Department of Health to open a pharmaceutical laboratory (Exh. L, p. 64, CTA rec.). This was corroborated by the testimony of Jose de Leon, Senior Clerk of the Food and Drug Administration, Department of Health. (pp. 101-103, t.s.n.)

From the foregoing facts and circumstances, it is clear that respondent's determination of the alleged existence of fraud rests solely on inferences and presumptions and not on actual facts. It is a well-settled rule that fraud can never be presumed and he who alleges it must prove its existence. Fraud is never imputed and the courts never sustain findings of fraud upon circumstances which, at the most, create only suspicion. (Yutivo Sons Hardware Co. vs. CTA, et al., L-13203, Jan. 28, 1961.)

In concluding that the right of respondent to assess the deficiency advance sales tax has prescribed, we have also passed upon the merits of the second issue. We are satisfied from the preponderance of evidence on record that the imported petrolatum were used in the manufacture of medicinal preparations. Consequently, it is idle and purposeless to discuss the third issue.

WHEREFORE, the decision of respondent appealed from is hereby reversed and respondent's assessment against petitioner for deficiency advance sales tax, 25% and 50% surcharges, and suggested compromise penalty, is hereby cancelled and declared without force and effect. Without pronouncement as to costs.

SO ORDERED.

Quezon City, October 11, 1967.

Estanislao R. Alvarez
ESTANISLAO R. ALVAREZ
Associate Judge

WE CONCUR:

R M Umali
ROMAN M. UMALI
Presiding Judge

Ramon L. Avanceña
RAMON L. AVANCEÑA
Associate Judge