BUTUAN SAWMILL, INC.,
Petitioner,

- versus - C.T.A. CASE NO. 993

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

D E C I S I O N

This is an appeal from the decision of respondent assessing against and demanding upon petitioner payment of ₱54,911.54 as alleged deficiency franchise tax covering the period from 1948 to 1959 and the first quarter of 1960, inclusive of the 25% surcharge for late payment thereof, under Section 259 of the National Internal Revenue Code, as amended by Republic Act No. 39, which provides as follows:

> SEC. 259. Tax on corporate franchises.- There shall be collected in respect to all existing and future franchises, upon the gross earnings or receipts from the business covered by the law granting the franchise a tax of five per centum or such taxes, charges, and percentages as are specified in the special charters of the corporations upon whom such franchises are conferred, whichever is higher, unless the provisions thereof preclude the imposition of a higher tax. xx xx.

On February 15, 1931, petitioner was granted a municipal franchise for electric light, heat and power service in Butuan, Agusan, under the provisions of Act No. 667, as amended by Act No. 1022 of the Philippine Legislature (Exh. D, pp. 50-57-A, BIR rec.). The said municipal franchise was superseded by a legislative franchise (Republic Act No. 399), which took effect on June 18, 1949, granted to petitioner by Congress of the Republic of the Philippines. The new franchise covers the municipalities of Butuan and Cabadbaran, province of Agusan, (Exh. 1, p. 64, CTA rec.) subject to the terms and conditions established in Act No. 3636 (Model Electric Light and Power Franchise Act) of the Philippine Legislature, as amended by Commonwealth Act No. 132. Under Section 10 of the said Act, the rate of the franchise tax, the manner and date of payment thereof, and the exemption from all other taxes read as follows:

> SEC. 10. In consideration of the franchise and rights hereby granted, the grantee shall pay into the municipal treasury of the municipality in which it is supplying electric current to the public under its franchise, a tax equal to 2% of the gross earnings from electric current sold or supplied under this franchise in said municipality. Said tax shall be due and payable quarterly and shall be in lieu of any and all taxes of any kind, nature, or discretion levied, established, or collected by any authority whatsoever, municipal, provincial, or insular, now or in the future, on its poles, wires, insulators, switches,

> transformers and structures, installations, conductors, and accessories, placed in and over and under all public property, including public streets and highways, provincial roads, bridges and public squares, and on its franchise rights, privileges, receipts, revenues and profits, from which taxes the grantee is hereby expressly exempted. (Underscoring supplied)

It is to be noted, however, that Section 10 of Act No. 3636 of the Philippine Legislature, supra, granting exemption from any and all taxes of whatever kind or nature, whether municipal, provincial, or national, was amended by Section 259 of the Tax Code, as amended, by virtue of Section 12 of Act No. 3636, as amended by Section 4 of Commonwealth Act No. 132, effective on November 6, 1936, which provides as follows:

> SEC. 4. Section twelve of the form for electric light and power franchises, is hereby likewise amended so as to read as follows:
>
> "SEC. 12. This franchise is granted subject to the provisions of Act No. 3108, as amended, and with the understanding and upon the condition that it shall be subject to amendment, alteration, or repeal by the National Assembly or by the Congress of the United States, and that it shall be subject in all respects to the limitations upon corporations and the granting of franchises contained in the Constitution of the Philippines, and also subject to the provisions of Act No. 1459 of the Philippine Legislature, as amended." (Underscoring supplied)

On October 1, 1946, Republic Act No. 39, supra, was approved by the President of the Republic of the

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Philippines effective on said date. It amended Section 259 of the National Internal Revenue Code by providing for the collection, in respect to all existing and future franchises, of a franchise tax of 5% on the gross earnings or receipts of the franchise grantee as are specified in the special charters of the corporations upon whom such franchises are conferred, whichever is higher, unless the provisions thereof precluded the imposition of a higher rate of franchise tax. A similar provision is also found in Section 259 of the Revenue Code, as amended by Republic Act No. 418 which took effect upon its approval on June 18, 1949.

On the theory that petitioner is subject to the higher rate of franchise tax (5% instead of 2%), respondent issued on September 8, 1960 an assessment notice and a letter of demand upon petitioner calling for the payment of ₱54,911.54 as deficiency franchise tax covering the period from 1948 to 1959 and the first quarter of 1960, computed as follows:

Gross receipts	₱1,369,383.18
5% tax due thereon	₱ 68,469.16
Less: Amount already paid ..	24,539.93
B a l a n c e	₱ 43,929.23
Add: 25% surcharge	10,982.31
TOTAL AMOUNT DUE	₱ 54,911.54

(Exhs. A and 2, p. 28, BIR rec.)

In a letter dated October 4, 1960, addressed to the Commissioner of Internal Revenue, petitioner contested the legality of the said deficiency franchise tax assessment and requested the withdrawal thereof by alleging that it is only subject to the franchise tax of 2% on its gross earnings under Section 10 of Act No. 3636, supra, in relation to its charter granted under Republic Act No. 399 (Exh. B, pp. 36-37, BIR rec. and p. 64, CTA rec.). As the said request for the withdrawal of the disputed tax assessment was denied by respondent, petitioner appealed to this Court.

There are two (2) principal questions at issue submitted by the parties to this Court for resolution, namely:

> 1. Whether or not the right of respondent to assess the deficiency franchise tax from 1948 to 1959 and the first quarter of 1960 has partly prescribed under the provisions of Section 331 of the National Internal Revenue Code, in relation to Section 332(a) of the same Code; and
>
> 2. Whether or not petitioner is subject to the higher rate of franchise tax (5% of the gross earnings) imposed by Section 259 of the Revenue Code, as amended by Republic Act Nos. 39 and 418.

Petitioner contends that the deficiency franchise tax assessment issued by respondent, covering the period from 1948 up to September 10, 1955, has partly prescribed because it was made beyond five (5) years from the date the franchise tax returns were filed by petitioner (Petitioner's Memo., p. 21, CTA rec. p. 91). Respondent countered by alleging that petitioner failed to adduce satisfactory evidence showing that the said returns were filed during the period covered by the assessment; and, during the same period, petitioner's books of accounts reflected unrecorded gross receipts subject to the franchise tax. Respondent concluded, therefore, that he has ten (10) years from the discovery of the fraud on August 1, 1960 within which to assess the deficiency tax in question, under Section 332(a) of the Revenue Code.

The prescriptive periods of tax assessments are embodied in Sections 331 and 332 of the National Internal Revenue Code which provide as follows:

> 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. For the purposes of this section a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day: Provided, That this limitation shall not apply to cases already investigated prior to the approval of this Code.
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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.

It is very clear from the foregoing provisions of the Revenue Code that internal revenue taxes may only be assessed within five (5) years after the tax return was filed by the taxpayer, except in cases where the taxpayer willfully failed to file a return or he had filed a false or fraudulent return with the intent to evade the tax due from him. In such cases, the revenue tax may be assessed by respondent within ten (10) years after the discovery of the falsity, fraud or omission.

First Issue:

In support of its stand that respondent's assessment has partly prescribed, petitioner presented its accountant as a witness. He testified that, during the period covered by the assessment, it was the practice and procedure of the petitioner to pay its franchise tax at the time of the filing of the returns (p. 30, t.s.n.). The testimony of the said witness is corroborated by the certificate issued by Mr. Francisco Magno, Acting City Treasurer of Butuan City, dated January 12, 1961, showing the itemized gross receipts of petitioner from the first quarter of 1949 to the first quarter of 1960, inclusive; the amounts of quarterly or monthly franchise taxes paid by it; and the numbers and dates of the official receipts issued therefor. (Exh. H, pp. 61-63, CTA rec.). Even the letter of Assistant City Treasurer Francisco T. Concon, dated July 8, 1966 and addressed to petitioner's counsel, indicates that the franchise tax returns filed by petitioner from 1948 to 1960 were among the old records of his office deposited in the warehouse near the City Engineer's Office which were completely burned during the fire that took place at Butuan City in 1960. (Exh. G-1, p. 60, CTA rec.). We are, therefore, satisfied from the evidence of record that petitioner has filed its franchise tax returns during the period covered by respondent's assessment. Consequently, under Section 331 of the Revenue Code, supra, we hold that the right of respondent to assess petitioner for deficiency franchise tax from 1948 to the first quarter of 1960 has partly prescribed.

In a final bid to assail petitioner's defense of the period of limitation prescribed by the Tax Code, respondent alleged that, assuming arguendo, the petitioner filed its franchise tax returns, yet the same are false or fraudulent with the intent to evade the franchise tax because the said petitioner underdeclared its gross earnings during the period covered by the assessment.

It is cardinal rule in taxation that fraud is never presumed because it is a serious charge (Yutivo Sons Hardware Co. vs. Court of Tax Appeals, et al., G.R. No. L-13203, January 28, 1961); it must be alleged and proved, at least satisfactorily if not conclusively by one who alleges its existence (De Roda vs. Balk, 48 Phil. 104; De Santos vs. Bank of the Philippine Islands, 66 Phil. 38; Menzi & Co. vs. Bastida, 63 Phil. 16; Arroyo vs. Granada A. Centero, 18 Phil. 484).

In the case at bar, the allegations of fraud with the intent to evade the franchise tax has not been proven satisfactorily. The records show that from the first quarter of 1948 to the first quarter of 1960, the gross receipts of petitioner as a franchise grantee amounted to ₱1,369,383.18. Out of the said amount, only ₱16,799.56 represents the alleged unrecorded and underposted receipts of petitioner. (Exh. 1, p. 27, BIR rec.). It is to be noted, however, that a big portion of the unrecorded receipts of ₱16,799.56 was not reflected in the books of accounts of petitioner because it represents the cost of the electric current used (free of charge) by the officers and employees of the petitioner. (Exh. 1-B, p. 11, BIR rec.). Under this circumstance, it cannot be charged that petitioner intended to defraud the Government of the franchise tax. Mere understatement of the gross earnings does not in itself prove fraud. (See Yutivo case, supra, citing James Nicholson, 32 BTA 997, affirmed 90 F(2d) 978).

Inasmuch as fraud has not been proven satisfactorily by respondent, the period of limitation is five (5) years from the filing of petitioner's returns, according to Section 331 of the Tax Code, supra. (See Republic of the Philippines vs. Rita Lim De Yu, G.R. No. L-17438, April 30, 1964). Consequently, the right of respondent to assess the franchise tax for the period from 1948 to September 8, 1955 had already prescribed, when respondent assessed petitioner on September 8, 1960.

Second Issue:

Petitioner's legislative franchise (Republic Act No. 399), which took effect on June 18, 1949, was granted pursuant to the Model Electric Light and Power Franchise Act (Act No. 3636 of the Philippine Legislature, as amended by Commonwealth Act No. 132 of the National Assembly). It is claimed that the provisions of Act No. 3636, particularly Section 10 thereof, supra, were incorporated by reference into the petitioner's charter. It is now argued that, since petitioner is only subject to 2% franchise tax on its gross earnings in lieu of all other taxes on receipts, revenues and profits, the imposition of the higher rate of franchise tax (5%) under Section 259, as amended by Republic Act No. 39, does not legally affect or include the petitioner. To bolster its stand on the legal issue, petitioner alleged that there is no irreconcilable conflict between Section 10 of Act No. 3636 and Section 259 of the Tax Code, as amended; the Model Electric Light and Power Franchise Act, particularly Section 10 thereof, is a general law and, therefore, the provisions of the special law will prevail over the general law in case of conflict between the two laws; and that the decisions of the Supreme Court in cases similar to the case at bar, wherein the imposition of the 5% franchise tax was upheld, were not binding to petitioner because the said decisions were rendered in the unauthorized exercise of judicial legislation.

The doctrine enunciated by the Supreme Court in the various decisions rendered by it, and which was assailed by petitioner in its memorandum, reads as follows:

> We find petitioner's position untenable. We agree that its franchise is, by express provision of its charter, subject to all the terms and conditions ex-

pressed in Act 3636. But we do not believe that the 2 per cent franchise tax originally provided in section 10 of the model franchise set forth in section 1 of said Act had been intended by the Legislature to be part of and incorporated into its charter. The reason is that at the time petitioner's franchise was granted (1950), the original 2 per cent tax had already been increased to 5 per cent by section 259 of the Internal Revenue Code, as amended by Republic Acts 39 and 418.

It should be noted that at the time of the approval of Act 3636 in 1929, the provisions of the then applicable tax law (section 1508 of the Administrative Code of 1917, the source of our present tax Code) was in accord with section 10 of the model franchise (section 1 of Act 3636) in that sec. 1508 provided:

> "Sec. 1508. Tax on corporate franchises.- There shall be collected in respect to all existing and future franchises, upon the gross earnings or receipts from the business covered by the law granting the franchise, such taxes, charges, and percentages as are specified in the special charters of the corporations upon whom such franchises are conferred x x x."

This provision was substantially copied in the original section 259 of the Tax Code, at the time of its passage in 1939. But on October 1, 1946, because of pressing need for increased revenue (See Explanatory Note to H.B. No. 730, Congressional Record, H. R., Vol. 1, No. 69, pp. 1615-1616), Congress passed Republic Act No. 39, amending section 259 of the Tax Code to read as follows:

> "Sec. 259. Tax on corporate franchise.- There shall be collected in respect to all existing and future franchises, upon

> the gross earnings or receipts from the business covered by the law granting the franchise a tax of <u>five per centum</u> or such taxes, charges, and percentages as are specified in the special charters of the corporations upon whom such franchises are conferred, <u>whichever is higher, unless the provisions thereof preclude imposition of a higher tax</u> x x x"

> Because of the apparent conflict between sec. 259 of the Code as amended by R. A. 39 (5 per cent) and section 10 of the model franchise under Act 3636 (2 per cent) the former must be deemed to have modified the latter. Therefore, when petitioner's charter was passed and its franchise granted under Republic Act 444 in 1950, the franchise tax payable by it was already the 5 per cent provided for in section 259 of the Tax Code as amended. (Carcar Electric & Ice Plant Co., Inc. vs. Coll. of Int. Rev., 100 Phil. 52-54; See also Visayan Electric Co. v. Coll. of Int. Rev., G.R. Nos. L-10099 & L-10100, Aug. 30, 1957; Portugaliza Jr. v. CTA et al., G.R. No. L-8829, Oct. 30, 1957, 102 Phil. 1169-1170; and Visayan Electric Co. v. Coll. of Int. Rev., G.R. No. L-9685, Oct. 30, 1957, 102 Phil. 218-219)

We are in accord with the views expressed by the Supreme Court in the cases above-cited. To our mind, however, there is no conflict between Section 259 of the Tax Code, as amended, increasing the rate of the franchise tax of petitioner to 5%, and Section 10 of Act No. 3636 fixing the rate of franchise tax at 2% in lieu of all other taxes. It should be noted that, under Section 12 of Act No. 3636, as amended by Section 4 of Commonwealth Act No. 132, <u>supra</u>, effective on November 6, 1936, the franchise granted to petitioner was given "with the understanding and upon the condition that it shall

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be subject to amendment, alteration, or repeal by the National Assembly or by the Congress of the United States". It is obvious, therefore, that Section 10 of Act No. 3636 was amended by Section 259 of the Tax Code, as amended, by virtue of Section 12 of the same Act, as amended, by reserving to our legislative department the power to amend, alter, or repeal the rate of the franchise tax which was fixed at 2%. In effecting such alteration by increasing the franchise tax to 5% under Section 259 of the Tax Code, as amended by Republic Act Nos. 39 and 418, our Congress has merely exercised a power expressly reserved thereto by petitioner's franchise, and has acted, therefore, <u>in conformity</u> therewith, <u>not in violation</u> of the provisions thereof or to the detriment of the rights thereby vested in the petitioner herein. (See Balañga Power Plant Co. vs. Commissioner of Internal Revenue, G.R. No. 20499, June 20, 1965). Accordingly, we hold that the imposition and collection of the higher rate of franchise tax (5%) are just and legal.

We have noted, however, that respondent computed the 5% franchise tax on the gross sales of electric current, plus the value of the electric current given free to the officers and employees of petitioner. Since the value of the free lighting services was not earned by petitioner from its business of furnishing electric light, it would seem far-fetched to include and consider the same as part of the gross earnings of petitioner in computing the 5% franchise tax.

As to the imposition of 25% surcharge for late payment of the franchise tax, suffice it to state the said surcharge may be dispensed with where the taxpayer's delay to pay the tax was in good faith due to misunderstanding of revenue regulations or because respondent issued conflicting rulings as to the rate of franchise tax to be applied by the franchise grantee. (Conell Bros., Co. vs. Collector of Internal Revenue, G. R. No. L-5470, December 13, 1963; Imus Electric Co., Inc. vs. Court of Tax Appeals and the Commissioner of Internal Revenue, G.R. No. L-22421, March 18, 1967; Guagua Electric Light Plant Co., Inc. vs. Collector of Internal Revenue, et al., G.R. No. L-23611, April 24, 1967). Moreover, this Court can take judicial notice of the fact that in many franchise tax cases submitted to it for review, but before the cases of Hoa Hin Co., Inc., G.R. Nos. L-9616 & 11783, were decided by the Supreme Court on May 25, 1959, respondent has been refunding alleged overpaid franchise tax of 5% in cases similar to the case at bar. We hold, therefore, that petitioner is not liable for the 25% surcharge.

After resolving the questions at issue, we find that, from September 9, 1955 to the 1st quarter of 1960, petitioner is liable for deficiency franchise tax of ₱10,193.69, computed as follows:

1955	114/365 of ₱108,173.63	₱ 33,785.74
1956	....	132,494.44
1957	....	156,344.92
1958	....	141,660.34
1959	....	181,340.82
1960	(1st quarter)	49,046.06
	GROSS RECEIPTS	₱694,672.32
	5% tax thereon	₱ 34,733.62
	Less: Amount already paid ...	24,539.93
	DEFICIENCY TAX DUE	₱ 10,193.69

WHEREFORE, the decision of respondent appealed from is hereby modified. Petitioner is hereby ordered to pay respondent or his duly authorized collection agent the sum of ₱10,193.69, instead of ₱54,911.54, as deficiency franchise tax covering the period from September 9, 1955 to the 1st quarter of 1960. Without costs.

SO ORDERED.

Quezon City, August 15, 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

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