REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

PIER 8 ARRASTRE AND STEVEDORING SERVICES, INC.,
Petitioner,

- versus -

C.T.A. CASE NO. 3789

THE COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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D E C I S I O N

This is an appeal by Pier 8 Arrastre and Stevedoring Services, Inc. from the denial of its protest against a deficiency assessment dated November 25, 1983 for income and business taxes for tax year 1978 as follows (inclusive of interests and charges):

Income tax	P2,261,420.98
Fixed tax	252.77
Percentage tax	533,768.98
TOTAL AMOUNT ASSESSED	P2,795,442.98

Petitioner protested the assessment on February 21, 1984. The protest was denied by respondent on March 29, 1984, which denial was received by petitioner on April 25, 1984. Hence, this petition for review was filed on May 23, 1984.

The deficiency business taxes (fixed and percentage taxes) were compromised pursuant to EO 44, thereby leaving the income tax deficiency assessment for this court's determination. The deficiency income tax assessment arose from the disallowance of certain claimed deductions or portions thereof.

In its memorandum, respondent contends that petitioner is estopped from assailing the assessment and is barred from presenting evidence to dispute the same or to substantiate the deductions claimed because of the latter's failure to present evidence during the pre-assessment level (CTA records, pp. 255-258). Respondent points to a letter dated June 2, 1980 (BIR records, p. 53) sent by the Assistant Revenue District Officer wherein after informing petitioner of the pending investigation, the Assistant Revenue Examiner requested petitioner or its duly authorized representative to come to the office to verify the details of a proposed assessment, and present its objections thereto, further stating that failure to do so will be interpreted as a waiver of such privilege and the tax assessment would then be finalized without any further notice to petitioner. Although petitioner indicated its desire to present its side relative to the proposed assessment (June 16, 1980, BIR records, p. 56), respondent claims the petitioner did nothing more. Hence, in accordance with the terms of the notice, such inaction was considered a waiver of its privilege to present evidence concommitantly resulting in an implied admission of the correctness of the assessment.

It must be noted that the respondent allowed the case to go to trial, participating therein and letting petitioner present its evidence consisting of more than 2,000 exhibits without objecting to the admission thereof (Respondent's "Manifestation", Records, p. 255) only to invoke the alleged loss of right to present evidence in its memorandum. This shows either neglect or bad faith on respondent's part such that the court could have exercised its discretion and disregarded such defenses entirely. But the court is well aware that taxation is vital for the sustenance of government such that if the taxpayer is given every opportunity to defend himself from the allegedly erroneous impositions of tax, then the court should also afford the government every leeway to defend its assessment.

Nevertheless, the Court disagrees with respondent's contention. The admonition of waiver in respondent's letter dated June 2, 1980 is of no moment because it can not be said that the "proposed assessment" made pursuant to the investigation then being conducted by the respondent's office became the final assessment subject of this appeal for in fact the assessment made at that point was different from the November 1983 assessment as summarized below:

Proposed Assessment of May 23, 1980 (BIR records, pp. 45-47):

Net Income disclosed by return:		P (314,166.50)
Less: Allowable Deductions &Or Add'l income		
Ave. Cash Credit Bal.	P 482,303.59	
Undisclosed sources of cash	705,624.33	
50% of representation expense	37,599.38	
50% of miscellaneous expense	77,088.51	
Exp not subjected to w/h tax**	160,031.00	
Unreported claims expense	78,518.98	
Increase in depreciation	1,105.50	
Total Adjustments		P1,542,253.10
Net Income per investigation		P1,228,086.52
Tax Due		P 419,830.00

**Office and equipment rental, legal and audit fees and security services for Nov. & Dec. under the expanded withholding tax provision.

Proposed assessment in the 10-day preliminary letter dated Sept. 23, 1983 and the final assessment dated Sept. 23, 1983 and the final assessment dated Nov. 23, 1983 (CTA Records, pp. 5-6 and 9-10):

Net Loss per return		P (134,166.58)
Add: Disallowances		
Gratification*	P 63,253.55	
Salaries and wages	3,062,615.66	
Emergency living allowance	452,287.25	
13th Month pay	148,360.72	
Rep'n & Misc expense	114,360.72	
Claims expense	78,518.98	
Allowance - Board members	3,000.00	

	Rental - equipment	154,800.00	
	Legal/Audit	2,558.00	
	Rental - Office space	1,800.00	
	Security services	855.00	
			P4,082,737.05
Net Income per review			P3,768,570.47
Tax Due theron			P1,497,398.80

*In the 10-day preliminary letter, the gratification expense was not included.

There being a different assessment, petitioner cannot be denied of the opportunity to object to the "new" assessment. Furthermore, in petitioner's reply to the June 2, 1980 letter, it specifically requested for a reinvestigation where, judging from the tenor of said letter, it would present the evidence to substantiate its claimed deductions. In the absence of any notice of the denial thereof, petitioner can safely assume that said request was favorably acted upon.

More importantly, Section 319-A of the 1977 Tax Code (which was added by PD 1773, effective Jan. 14, 1981) laid down the procedure for contesting the assessment. It is therein stated that failure of the taxpayer to respond to the pre-assessment notice shall entitle the Commissioner of Internal Revenue to issue an assessment based on his findings. However, the taxpayer is still allowed to file a protest against the final assessment issued by filing a request for reconsideration or reinvestigation and in case of an adverse decision by the Commissioner on said protest, petitioner has a further remedy of appeal to this court.

Nowhere is it stated that failure of the taxpayer to appear and/or to present its evidence during the pre-assessment level, or even during the protest period, would mean a waiver of its right to present any evidence to dispute said assessment. Thus in the 10-day preliminary letter there is no admonition of waiver like that found in the June 2, 1980 letter. Neither is such failure equivalent to an implied admission of the correctness of the tax assessment. Even in an appeal to this court, there is only a presumption of the correctness of said assessment which is exactly overcome by the introduction of evidence by the taxpayer-petitioner.

Taxation being a powerful right of the government, unless it is palpably clear that there was a willful and manifest intent to delay collection of the tax, the taxpayer must be given every opportunity to be heard in objection of the amount assessed. Republic Act No. 1125 creating the Court of Tax Appeals allows the taxpayer to dispute the correctness or legality of an assessment both in the purely administrative level and in the said court (**Republic v. Lim Tian Teng**, 16 SCRA 585, March 31, 1966). The Court of Tax Appeals was created to serve the interest of the different tax collection agencies and to afford the taxpayer their day in court. It is in that forum [the CTA] where a taxpayer can ventilate her defenses against the assessment (**Commissioner of Internal Revenue v. Yusay-Gonzales & CTA**, 18 SCRA 757, Nov. 24, 1966). It is only by the failure of the taxpayer to file an administrative protest upon receipt of the final assessment or to appeal the denial of the protest made within the periods laid down by law would the assessment become final, unappealable and executory thereby negating its right to present evidence precisely because the right to dispute the assessment has prescribed and the court can no longer acquire jurisdiction over the same.

We now come to the main issue in this case which is whether the deductions claimed by petitioner but disallowed by the respondent are in fact allowable. The amounts claimed in the income tax return and the amounts disallowed in the assessment, per item, are as follows:

	Deductions per Return	Amounts disallowed
Gratification*	P 63,253.55	P 63,253.55
Salaries and wages	4,505,495.91	3,062,615.66
Emergency living allowance	665,246.65	452,287.25
13th Month pay	349,006.77	148,360.72
Rep'n & Misc expense	165,616.81	114,687.89
Claims expense	78,518.98	78,518.98
Allowance - Bd. ses. & off.	3,000.00	3,000.00
Rental (equipment)	642,910.00	154,800.00
Legal/Audit	15,350.00	2,558.00
Rental (Office space)	1,800.00	1,800.00
Security services	109,102.75	855.00

In its memorandum, however, petitioner chose to limit the issue to the salaries and wages, emergency living allowance and 13th month pay, these being the larger amounts. Having chosen to so limit the issue to these items, the other items in the deficiency assessment are deemed uncontested for where the taxpayer's brief failed to mention a point which was relied on in his petition, it was assumed that the contention had been abandoned and no further consideration will thus given by the Tax Court (9 **Mertens, Law on Federal Taxation, Sec. 50.92, 1977**).

Deductions being a matter of legislative grace, the taxpayer must point to some specific provision of a statute allowing said deduction. Petitioner claims that salaries and wages, 13th Month Pay and Emergency Living Allowance are deductible as legitimate business expenses under Section 30(a) of the Tax Code and to substantitate the amounts claimed, it presented the originals of its payment vouchers, payroll sheets and petty cash disbursement receipts (Petitioner's Memorandum, CTA records, p. 240). But respondent, in its answer to the petition, contends that the expenses were disallowed either for failure to deduct the corresponding withholding tax due thereon or for being excessive or fictitious (Respondent's "Answer", records, p. 39).

Section 30(1) of the 1977 Tax Code as amended allows as deductions business expenses which includes "a reasonable allowance for salaries or other compensation for personal services actually rendered." Emergency Living Allowance and 13th Month Pay were likewise deductible because they were required by law (PD 525 as amended by PD 1123 and PD 851, respectively) to be given to employees who fall under the law's respective coverage.

With regard to the 13th Month Pay, there is no evidence on record to show that this was paid and who the recipients were. A mere allegation in the pleadings or statement in the tax return is insufficient to convince this court that the said amount was indeed expended. As to the Emergency Living Allowance, payment vouchers for the same were presented by the petitioner but these were not signed by the employees concerned (see Exhibits "AOC to "AOC-2", "AOB" to "AOB-5", and "AOJ" to "AOJ-22"). While the taxpayer's records are relevant and competent evidence, they are self serving and this fact may be considered in determining the weight to be given to them (**Richardson v. Commissioner**, 264 F 2d 400, 59-1 USTC 9292, 1959). Since said vouchers were unsigned, they can not serve as competent proof that the Emergency Living Allowance were indeed given.

We now come to the bulk of the deductions in dispute - the salaries and wages. Without doubt, salaries and wages are business expense which can be deducted from the gross income. However, PD 1351 (effective April 17, 1978) added Sec. 30(m) to the 1977 National Internal Revenue Code as follows:

(m) Additional Requirement for deductibility of income payments -

Any income payment which is otherwise deductible from gross income under this section shall be allowed as a deduction only if it is shown that the tax required to be deducted and withheld has been paid to the BIR in accordance with this section, Sections 54 and 93 of this Code.

Necessarily, only those who are required to file income tax returns must have their taxes withheld because presumably, these are the persons who have taxable incomes. Section 45(a)(1) of the Tax Code states that individuals with a gross income of at least P1,800 per annum are required to file income tax returns. Hence, the minimum annual income for the requirement on withholding tax to apply is P1,800. But Section 45(a)(3) exempted from this requirement individuals whose gross income is derived solely from salaries, wages and other similar compensation for services rendered which does not exceed P1,800 if single, P3,000 if married or a head of the family plus the optional standard deduction to which he or she is entitled to claim under Section 30(k). Therefore, although the gross income may be more than P1,800 per annum, the personal and additional exemption to which an individual income taxpayer is entitled may not subject the individual to income tax and therefore put him beyond the ambit of the withholding tax on wages provision. This is precisely the thrust of petitioner's defense against the assessment for it asserts that most of its workers and employees are not subject to withholding tax on wages because their "annual salaries were less than P1,800 and also considering the personal and additional exemption to which they are entitled" (Petitioner's Memorandum, CTA records, pp. 240-241).

In the 10-day preliminary report, the Accounting Chief requested the petitioner to submit the following:

1) Report on remittances of withholding tax on wages; and

2) List of income payments of P1,800 or above.

Purportedly, respondent intended to determine which income payments should be subjected to withholding tax and if it should be, whether or not the withholding tax was indeed deducted and remitted. Petitioner failed to submit these to the BIR for the latter's proper appraisal and evaluation. Neither were they submitted to this Court. Instead, petitioner submitted to this Court the payroll sheets and vouchers for the whole year of 1978 (numbering more than 2,000 exhibits) leaving to the Court the job of sifting through all of them to determine which of petitioner's more than 600 employees should have been subjected to withholding tax and then to determine the amount deductible as salaries and wages expense.

As a result of the presumption in favor of the correctness of the assessment, when such assessments are assailed, the burden of proof is upon the taxpayer to clearly show that the assessment was erroneous in order to relieve himself from it. Where a taxpayer invokes the jurisdiction of the Tax Court, he enters the hearing burdened with the duty of establishing at least by a preponderance of evidence that the determination made by the Commissioner was erroneous (**American Pipe and Steel Corp. v. Commissioner**, 243 F 2d 125, 57-1 USTC 9590, 1957). At the very least, the petitioner should have submitted to this court a list of those workers whose income payments were more than P1,800 attaching thereto copies of the exemption certificates required by the withholding tax on wages provision to be submitted by the employees to entitle them to personal and additional exemptions for the purpose of checking or verification. Though petitioner's exhibits were voluminous yet they are insufficient to overcome the presumption of correctness of the assessment. As stated, the exemption certificates and the withholding tax returns were not presented. There is however, in the BIR records (p. 8), a xerox copy of a document containing a list of employees subjected to withholding tax on wages in 1978. Presumably then, employees of petitioner not included in the list earned less than P1,800 or their personal and additional exemptions places them beyond the coverage of withholding tax on wages provision. At first glance, it could be believed that out of 600 plus employees of petitioner, only those in the list of withheld income taxes (around 30) were earning more than P1,800 per annum considering that the bulk of its employees are stevedores and dockworkers who, as petitioner stated, work on a system of rotation thereby rendering service only for a maximum of 4 days a week for 8 hours a day. However, this court can not indulge in assumptions, speculations or inferences especially since there is a presumption of correctness of assessment in favor of the Commissioner. A court is not permitted to guess at any fact in order to decide a point or issue in favor of the party who had the burden of proving that fact, but must decline to make the decision or decide the other way unless it is able to find satisfactory proof of such essential fact in the record (**Times Tribune vs. Commissioner**, 20 TC 449, 1953). The facts required for the proper disposition of this case were available to the petitioner, thus it should have endeavored to make the facts clear to this court. The obligation of good faith and fair dealing in carrying out its [taxation's] provisions is reciprocal and, as the government should never be overreaching or tyrannical, neither should the taxpayer be permitted to escape payment by the concealment of material facts (**O'Laughlin v. Helvering**, 81 F 2d 269, 1935).

Nonetheless, let it not be said that the court was dissuaded from sifting through petitioner's voluminous exhibits. But what the court found from the examination thereof could only be detrimental to petitioner's cause. Not only were there discrepancies in the amount indicated in the vouchers when compared to the summation of the entries in the corresponding payroll sheets (which tend to show padding) but the payrolls revealed quite a number of employees who earned more than P1,800 (almost half by July) whose names were not included in the list of employees whose incomes were subjected to withholding tax. As this court already discussed, it can not be made to draw on inferences as to the amounts of the exemption these employees are entitled which would have put them beyond the coverage of the withholding tax on wages provision. Thus the presumption is that their incomes should have been subjected to withholding tax.

Thus, having failed to sustain the burden of demonstrating that the respondent was wrong, the deficiency assessment is accordingly upheld.

However, in going over the deficiency assessment, the court found a discrepancy in the computation of the tax due such that the amount of tax that should actually be assessed as of November 23, 1983 is P1,992,951.96 arrived at as follows:

Net Loss per return (p. 33, BIR rec.)		P (134,166.58)
Add: Disallowed Deductions		
1. Gratification*	P 63,253.55	
2. Salaries and wages	3,062,615.66	
3. Emergency living allowance	452,287.25	
4. 13th Month pay	148,360.72	

	5. Representation/Misc. expense	114,360.72	
	6. Claims expense	78,518.98	
	7. Allowance-Board members/officer	3,000.00	
	8. Rental - equipment	154,800.00	
	9. Legal/Audit	2,558.00	
	10. Rental - Office space	1,800.00	
	11. Security services	855.00	
Net Income per review			P3,768,570.47
Tax Due theron:			
	First P100,000.00 x 25%		P 25,000.00
	Excess of P3,668,570.47 x 35%		1,283,999.66
	Total		P1,308,999.66
Add: Interest			
	14% fr. 4/16/79 - 7/31/80		236,710.76
	20% fr. 8/01/80 - 4/16/82		447,241.54
Total amount due and collectible			P1,992,951.96

WHEREFORE, petitioner Pier 8 Arrastre and Stevedoring Co. is ordered to pay the respondent Commissioner of Internal Revenue the sum of P1,992,951.96 as deficiency income tax due for the year 1978, plus 10% surcharge and 20% annual interest from date of assessment up to the date of payment but not to exceed 3 years pursuant to Section 51 of the Tax Code.

With costs against petitioner.

SO ORDERED.

Quezon City, Metro Manila, August 1, 1991.

CONSTANTE C. ROAQUIN
Associate Judge

WE CONCUR:

ALEX Z. REYES
Presiding Judge

ERNESTO D. ACOSTA
Associate Judge

C E R T I F I C A T I O N

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.

ALEX Z. REYES
Presiding Judge
Court of Tax Appeals