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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ENGINEERING EQUIPMENT & SUPPLY CO.,
Petitioner,

versus

CTA CASE NO. 681

THE COMMISSIONER OF INTERNAL REVENUE,
Respondent.

x - - - - - - - - - - - x Nov. 29, 1966

DECISION

This is an appeal from the decision of respondent, dated March 3, 1959, assessing against and demanding upon petitioner payment of ₱916,362.65 as deficiency advance sales tax and manufacturer's sales tax, inclusive of the 25% and 50% surcharges, for the period from June 1, 1948 to September 21, 1956 and June 1, 1948 to December 31, 1956, respectively, based on Section 185(m) of the National Internal Revenue Code, before its amendment by Republic Act No. 3029, and Section 183 of the same Code which provide as follows:

> SEC. 185. Percentage tax on sales of x x x, refrigerators, and others.— There shall be levied, assessed, and collected once only on every original sale, barter, exchange, or similar transaction intended to transfer ownership of, or title to, the articles hereinbelow enumerated, a tax equivalent to thirty per centum of the gross selling price or gross value in money of the articles so sold, bartered, exchanged or transferred, such tax to be paid by the manufacturer or producer: Provided, That where the articles enumerated herein below are manufactured out of materials subject to tax under this section, the total cost of such materials, as duly established, shall be deductible from the gross selling price or gross value in money of such manufactured articles:

x x x x x

(m) Air-conditioning units and parts or accessories thereof. (As amended by Rep. Act No. 588, effective from Sept. 22, 1950 until it was amended by Rep. Act No. 1612 which was made effective on Aug. 24, 1956.)

SEC. 183. Payment of percentage taxes—(a) In general.—It shall be the duty of every person conducting a business on which a percentage tax is imposed under this Title, to make a true and complete return of the amount of his, her or its gross monthly sales, receipts or earnings, or gross value of output actually removed from the factory or mill warehouse and within twenty days after the end of each month, pay the tax due thereon: Provided, That any person retiring from a business subject to the percentage tax shall notify the nearest internal revenue officer thereof, file his return or declaration, and pay the tax due thereon within twenty days after closing his business.

If the percentage tax on any business is not paid within the time specified above, the amount of the tax shall be increased by twenty-five per centum, the increment to be a part of the tax.

In case x x x a false or fraudulent return is willfully made, there shall be added to the tax or to the deficiency tax, in case any payment has been made on the basis of such return before the discovery of the falsity or fraud, a surcharge of fifty per centum of its amount. x x x

(b) Sales tax on imported articles. —When the articles are imported, the percentage taxes established in sections one hundred eighty-four, one hundred eighty-five, and one hundred eighty-six of this Code shall be paid in advance by the importer, x x x based on the import invoice value thereof, x x x including freight, postage, insurance, commission, customs duty, and all similar charges, plus x x x fifty per centum of such total value in the case

> of articles enumerated in section one hundred and eighty-five; x x x

Petitioner, a domestic corporation, is an engineering and machinery firm. As operator of an integrated engineering shop, it is engaged, among others, in the design and installation of central type air-conditioning system, pumping plants, and steel fabrications (pp. 12-16, t.s.n.). Sometime on July 27, 1956, respondent received a letter from Juan dela Cruz denouncing petitioner for tax evasion by misdeclaring its imported articles and failing to pay the correct percentage tax due thereon (Exh. 2, p. 1, BIR rec.). Petitioner was also denounced to the Central Bank for alleged fraud in obtaining its dollar allocation. Acting on the said denunciations, the agents of the National Bureau of Investigation, Central Bank and Bureau of Internal Revenue raided and searched, on September 27, 1956, the premises of petitioner where voluminous records were seized and confiscated (See pp. 173-177, t.s.n.). On September 30, 1957, revenue examiners Quesada and Catudan reported and recommended to respondent that petitioner be assessed for ₱480,-912.01 as deficiency advance sales tax on the theory that it misdeclared its importations of air-conditioning units and parts and accessories thereof which are subject to tax under Section 185(m) of the Tax Code, supra, instead of Section 186 of the same Code (Exh. 3, pp. 59-63, BIR rec.). Subsequently, the investigating revenue examiners submitted a revised report dated January 23, 1959, in line with an opinion of the Chief of the Law Division of the Bureau of Internal Revenue, recommending that petitioner be assessed for ₱916,362.56, representing deficiency advance sales tax and manufacturer's sales tax, inclusive of the 25% and 50% surcharges (pp. 72-80, BIR rec.).

On March 3, 1959, respondent assessed against and demanded upon petitioner payment of the aforesaid amount and suggested that ₱10,000.00 be paid as compromise in extrajudicial settlement of petitioner's penal liability for violation of the Tax Code. However, petitioner contested the said tax assessment and requested that it be furnished with the details and particulars of respondent's assessment (Exhs. 3 & 15, pp. 86-88, BIR rec.). On June 24, 1959, respondent informed petitioner that the tax assessment in question was made in accordance with law and the facts of the case. On July 30, 1959, petitioner appealed the case to this Court for review.

During the pendency of this case and based on the evidence submitted by petitioner to the Court, the investigating revenue examiners reduced petitioner's deficiency tax liabilities from ₱916,362.65 to ₱740,-587.86 (Exhs. R & 9, pp. 162-170, BIR rec.).

The controversial questions at issue in this case are the following:

1. Whether petitioner is a manufacturer of air-conditioning units under Section 185(m) of the National Internal Revenue Code, supra, or a contractor under Section 191 of the same Code;

2. Whether petitioner is subject to the percentage tax imposed by Section 185(m) of the National Internal Revenue Code, supra, or to the 7% advance sales tax imposed by Section 186 in relation to Section 183(b) of the same Code, on the imported air-conditioning units and parts or accessories thereof;

3. Whether or not petitioner is subject to the 25% and 50% surcharges imposed by Section 183(a) of the National Internal Revenue Code; and

4. Whether or not the right of respondent to assess the deficiency advance sales tax and manufacturer's sales tax has already prescribed under Section 331 of the Tax Code, in relation to Section 332(a) of the same Code.

Respondent contends that petitioner is manufacturer and seller of air-conditioning units and parts or accessories thereof and, therefore, it is subject to the 30% prescribed by Section 185(m) of the National Internal Revenue Code, supra, in relation to Section 194(x) of the same Code which defines a manufacturer as follows:

> (x) "Manufacturer" includes every person who by physical or chemical process alters the exterior texture or form or inner substance of any raw material or

> manufactured or partially manufactured product in such manner as to prepare it for a special use or uses to which it could not have been put in its original condition, or who by any such process alters the quality of any such raw material or manufactured or partially manufactured product so as to reduce it to marketable shape or prepare it for any of the uses of industry, or who by any such process combines any such raw material or manufactured or partially manufactured products with other materials or products of the same or of different kinds and in such manner that the finished product of such process of manufacture can be put to a special use or uses to which such raw material or manufactured or partially manufactured products in their original condition could not have been put, and who in addition alters such raw material or manufactured or partially manufactured products, or combines the same to produce such finished products for the purpose of their sale or distribution to others and not for his own use or consumption.

Petitioner contends that it is not a manufacturer and seller of air-conditioning units and spare parts or accessories thereof subject to tax under Section 185(m) of the Tax Code but a contractor engaged in the design, supply and installation of the central type air-conditioning system subject to the 3% tax imposed by Section 191 of the same Code, the pertinent portion of which reads as follows:

> SEC. 191. Percentage tax on road, building x x x and other construction work contractors, x x x and others.— Road, building x x and other construction work contractors; x x x shall pay a tax equivalent to three per centum of their gross receipts. (Underlining supplied.)

The 3% tax imposed by Section 191 of the National Internal Revenue Code is essentially a tax on the sale of services, labor and materials of a contractor, while the 30% tax under Section 185(m) of the same Code is imposed upon manufacturer, producer or importer on the original sale, barter, exchange, or transfer of title to the articles enumerated therein. The distinction between a (1) contract of sale and a (2) contract for services, labor and materials is as follows:

> The distinction between a contract of sale and one for work, labor, and materials is tested by the inquiry whether the thing transferred is one not in existence and which never would have existed but for the order of the party desiring to acquire it, or a thing which would have existed and been the subject of sale to some other person, even if the order had not been given (Groves v. Buck, 3 Maule & S. 178; Towers v. Osborne, 1 Strange, 506; Benjamin on Sales, 90).

Our Civil Code, however, distinguishes a contract of sale and a contract for piece of work as follows:

> ART. 1467. A contract for the delivery at a certain price of an article which the vendor in the ordinary course of his business manufactures or procures for the general market, whether the same is on hand at the time or not, is a contract of sale, but if the goods are to be manufactured specially for the customer and upon his special order, and not for the general market, it is a contract for a piece of work. (Civil Code of the Philippines.)

With the foregoing distinctions as a guidepost, we will examine the evidences of record, documentary and testimonial, to ascertain the nature, scope and operation of the refrigeration and air-conditioning business of petitioner.

In the case at bar, petitioner imported air-conditioning units but some of the parts or accessories thereof were made by it. If the air-conditioning units are not available from petitioner or the local market, the importation thereof is done by the owner of the building (pp. 215-223, 268, t.s.n.). Petitioner does not manufacture air-conditioning units for sale to the general public, but it imports them and undertakes the negotiations and executions of individual contracts for the design, supply and installation of air-conditioning units of the central type (pp. 20-36, t.s.n.; Exhs. F, G, H, 1, J, K, L and M).

Among the factors which petitioner considers in designing, supplying and installing the central type of air-conditioning system are the following: (1) the area of the space to be air-conditioned; (2) the nature and type of the building to be air-conditioned; (3) the purposes for which the various air-conditioning areas are to be used; (4) the number of persons that will occupy the premises; and (5) the sources of heat gain or cooling load on the machineries to be installed such as sun load, lighting, and other electric appliances which may be used in the premises (pp. 31-34, t.s.n.).

In a nutshell, petitioner fabricates, assembles, supplies and installs in the building of its various customers the central type of air-conditioning system; prepares the plans and specifications therefor which are distinct and different from each other; the air-conditioning units and spare parts or accessories thereof used by petitioner are not the window type of air-conditioner which are manufactured, assembled and produced locally for sale to the general market; and the imported air-conditioning units and spare parts or accessories thereof are supplied and installed by petitioner upon previous orders of its customers conformably with their needs and requirements.

Under the facts and circumstances of this case, the question of whether petitioner is a "contractor" or a "seller" of the air-conditioning units and spare parts or accessories thereof is certainly a case of first impression in this jurisdiction. In a case involving similar issue, the Supreme Court of Tennessee (U.S.A.) has decided, on February 8, 1962, that a partnership undertaking the construction and furnishing of air-conditioning systems, pursuant to contracts executed by it with its customers, is a "contractor" and not a "seller" of personal property. Considering the distinctions between a contract of sale of personal property and a contract for a piece of work, *supra*, which we have adopted as our guidepost, we are in accord with the said decision, the pertinent portion of which reads as follows:

> "The cause presents the question of whether one engaged in the business of contracting for the establishment of air-conditioning systems in buildings, which work requires, in addition to the furnishing of a cooling unit, the connection of such unit with electrical and plumbing facilities and the installation of ducts

within and through walls, ceilings and floors to convey cool air to various parts of the building, is liable for sales or use tax as a contractor rather than a retail seller of tangible personal property, the contractee being a church or municipality.

x x x x x

"The appellee took the position that the appellant was not engaged in the business of selling air-conditioning equipment as such but in the furnishing to its customers of completed air-conditioning systems pursuant to contract, was a contractor engaged in the construction or improvement of real property, and as such was liable for sales or use tax as the consumer of materials and equipment used in the consummation of its contracts, irrespective of the tax status of its contractees.

x x x x x

"In order to transmit the warm or cool air over the buildings the appellant installed systems of ducts running from the basic units through walls, ceilings and floors to registers. The contracts called for completed air-conditioning systems, which became permanent parts of the buildings and improvements to the realty.

"We are of the opinion that the appellant was a contractor which used the materials and equipment, upon the value of which the tax herein imposed was levied, in the performance of its contracts with its customers and that the customers did not purchase the equipment and have same installed." (S. M. Lawrence Co. v. MacFarland, Commissioner of Revenue of the State of Tennessee, and McHanless, Attorney General of the State of Tennessee, 355 S.W., 2d Series 100; underlining supplied.)

Our conformity to the above-cited decision is predicated on the fact that, following our guidepost, the supply of the air-conditioning units to petitioner's various customers, whether the said machineries are on hand or not, were specially made for the said customers and installed in their building upon their special order. Unlike the window type of air-conditioner, a centralized air-conditioning system requires air-conditioning units which are tailored and suited to the needs and requirements of petitioner's customers. Said air-conditioning units were not manufactured or intended to be sold by petitioner to the public in the ordinary course of its business. In short, the air-conditioning units installed in a central type of air-conditioning system would not have existed but for the order of the party desiring to acquire it and, if it existed without the special order of petitioner's customer, the said air-conditioning units were not intended for sale to the general market. Accordingly, we hold that petitioner is not subject to the manufacturer's sales tax imposed by Section 185(m) of the Revenue Code, but to the contractor's tax prescribed by Section 191 of the same Code.

As a consequence of our ruling that petitioner is a contractor and not a manufacturer and seller of the air-conditioning units and parts or accessories thereof, it follows that petitioner is not subject to the advance sales tax imposed by Section 183(b) of the Tax Code, in relation to Section 185(m) of the same Code, __supra__, but to the compensating tax imposed by

Section 190 of the Tax Code which provides as follows:

> SEC. 190. Compensating tax.—All persons residing or doing business in the Philippines, who purchase or receive from without the Philippines any commodities, goods, wares, or merchandise, excepting those subject to specific taxes under Title IV of this Code, shall pay on the total value thereof at the time they are received by such persons, including freight, postage, insurance, commission and all similar charges, a compensating tax equivalent to the percentage taxes imposed under this Title on original transactions effected by merchants, importers, or manufacturers, such tax to be paid before the withdrawal or removal of said commodities, goods, wares, or merchandise from the customhouse or the post office: Provided, however, That merchants, importers, and manufacturers, who are subject to tax under sections one hundred eighty-four, one hundred eighty-five, one hundred eighty-six, or one hundred eighty-nine of this Title, shall not be required to pay the tax herein imposed where such commodities, goods, wares, or merchandise purchased or received by them from without the Philippines are to be sold, resold, bartered, or exchanged or are to be used in the manufacture or preparation of articles for sale, barter, or exchange and are to form part thereof: And provided, further, That the tax imposed in this section shall not apply to articles to be used by the importer himself in the manufacture or preparation of articles subject to specific tax, or those for consignment abroad and are to form part thereof. If any article withdrawn from the customhouse or the post office without payment of the compensating tax is subsequently used by the importer for other purposes, corresponding entry should be made in the books of accounts, if any are kept, or a written notice thereof sent to the Collector of Internal Revenue and payment of the corresponding compensating tax made within 30 days from the date of such entry or notice and if the tax is not paid within such period the amount of the tax shall be increased by 25%, the increment to be a part of the tax. (As amended by Rep. Act No. 253, effective July 1, 1948; underscoring supplied.)

The above provision exempts from the compensating tax imported commodities which are already subject to the advance sales taxes if they are sold, resold, bartered or exchanged or used for the preparation of goods for sale, resale, barter and exchange. There is, however, an exception to the said exemption, that is, where the imported commodities are subsequently used for other purposes and not for the purpose of sale, resale, barter, or exchange. In such a case, the corresponding compensating tax must be paid.

The word "use" in the phrase "used for other purposes" should be understood in its ordinary and popular meaning. Where words have more than one meaning and are used in a statute, they should be given that meaning which will comport with the usual and popular meaning attached to the words employed (Bradley vs. Ames, 194 N. E. 272). Webster's Dictionary defines the word "use" as an act of employing or state of being employed; to convert to one's service, to employ (Trelo v. Iroquis Auto Insurance Underwriters, 348 Ill. 93; 180 N. E. 575). As there is no dispute that the imported air-conditioning units and parts or accessories were used by petitioner in its construction business and they were not sold, resold, bartered or exchanged by it, petitioner is subject to the compensating tax on the said imported articles and not to the advance sales tax. Consequently, the 30% tax imposed by Section 185(m) of the Tax Code on the imported air-conditioning units and parts or accessories thereof should be collected from petitioner. However, the 50% mark-up prescribed by Section 183(b) of the Tax Code, supra, should not be included in the computation of the compensating tax legally due from petitioner.

As to the second question at issue, respondent charges petitioner of misdeclaration of the imported air-conditioning units and parts or accessories thereof so as to make them subject to a lower rate of percentage tax (7%) under Section 186 of the National Internal Revenue, when they are subject to a higher rate of tax (30%) under Section 185(m) of the same Code (See pp. 72-73, BIR rec.). In other words, it is contended that petitioner deliberately refrained from correctly identifying its importations as "air-conditioning units and spare parts or accessories thereof" and instead classified them as refrigeration equipment subject to 7% advance sales tax in order to evade the payment of the 30% tax.

We are amply convinced from the evidence presented by respondent that petitioner deliberately and purposely misdeclared its importations. This evidence consists of letters written by petitioner to its foreign suppliers, instructing them on how to invoice and describe the air-conditioning units ordered by petitioner. We are reproducing below the pertinent portions of petitioner's letters which indubitably establish fraudulent intent to evade the 30% tax imposed by Section 185(m) of the Tax Code.

As early as March 18, 1953, petitioner, in a letter of even date, wrote to Trane Co. (Exh. 3-K, pp. 152-155, BIR rec.) the following:

> "Your invoices should be made in the name of Madrigal & Company, Inc., Manila, Philippines, c/o Engineering Equipment and Supply Company, Manila, Philippines - forwarding all correspondence and shipping papers concerning this order to us only and not to the customer.
>
> "When invoicing, your invoices should be exactly as detailed in the customer's Letter Order dated March 14th, 1953, attached. This is in accordance with the Philippine import licenses granted to Madrigal & Company, Inc. and such details must only be shown on all papers and shipping documents for this shipment. No mention of the words 'air conditioning equipment' should be made on any shipping documents as well as on the cases. Please give this matter your careful attention, otherwise great difficulties will be encountered with the Philippine Bureau of Customs when clearing this shipment on its arrival in Manila. All invoices and cases should be marked 'THIS EQUIPMENT FOR RIZAL CEMENT CO.'" (Exh. 3-K-1, p. 152, BIR rec.; underlining supplied.)

The same instruction was made to Acme Industries, Inc., San Francisco, California, U. S. A., in petitioner's letter of March 19, 1953 (Exhs. 3-J & 3-J-1, pp. 150-151, BIR rec.).

In another letter, dated April 6, 1953 (Exh. 3-1, pp. 147-149, BIR rec.), petitioner enjoined Owens-Corning Fiberglass Corp., New York, U. S. A. (Exh. 3-I, pp. 147-149, BIR rec.) thus:

> "As explained in the second paragraph of this letter, the Philippine Govern-

> ment is so restrictive in the importation of goods into the country involving dollar remittances, that importation of air conditioning machinery and accessories is almost banned. We will request that in the preparation of the shipping documents for this order such as invoices, bill of lading and consular invoices, no mention or even reference to the term 'air conditioning' be made. The goods on orders must be described in the shipping documents generally as Fiberglass pipe and pipe fitting insulation." (Exh. "3-I-1", p. 148, BIR rec.) (Underlining supplied.)

Petitioner threatened to discontinue the forwarding service of Universal Transcontinental Corp. when it wrote to the Trane Company, on April 30, 1953 (Exh. "3-H", p. 146, BIR rec.), as follows:

> "It will be noted that the Universal Transcontinental Corp. is not following through on the instructions which have been covered by the above correspondence, and which indicates the necessity of discontinuing the use of the term 'Air conditioning Machinery or Air Coolers'. Our instructions concerning this general situation have been sent to you in ample time to have avoided this error in terminology, and we will ask that on receipt of this letter that you again write to Universal Transcontinental Corporation and inform them that, if in the future, they are unable to cooperate with us on this requirement, we will thereafter be unable to utilize their forwarding service. Please inform them that we will not tolerate another failure to follow our requirements." (Exh. "3-H-1", p. 146, BIR rec.) (Underlining supplied)

Again, in another letter to Trane Company, dated July 17, 1953 (Exh. "3-G", p. 145, BIR rec.), petitioner wrote:

"In the past, we have always paid the air conditioning tax on climate changers and that mark is recognized in the Philippines as air conditioning equipment. This matter of avoiding any tie-in on air conditioning is very important to us, and we are again asking that from hereon that whoever takes care of the processing of our orders be carefully instructed so as to avoid again using the term 'Climate Changers' or in anyway referring to the equipment as air conditioning." (Exh. 3-G-1, p. 145, BIR rec.; underlining supplied.)

To solve petitioner's problem, the Trane Co. wrote on July 30, 1953 (Exh. 3-F, p. 144, BIR rec.), as follows:

"We feel that we can probably solve all the problems by following the procedure outlined in your letter of March 25, 1953, wherein you stated that on all future jobs you would enclose photostatic copies of your import license so that we might make up two sets of invoices: one set describing equipment ordered simply according to the way that they are listed on the import license and another according to our ordinary regular methods of order write-up. We would then include the set made up according to the import license in the shipping boxes themselves and use those items as our actual shipping documents and invoices, and we will send the other regular invoice to you by separate correspondence." (Exh. 3-F-1, p. 144, BIR rec.); underlining supplied.)

On August 27, 1955, petitioner made it clear to the Trane Company (Exh. 3-C, p. 141, BIR rec.) that:

"In the process of clearing the shipment from the piers, one of the Custom inspectors requested to see the packing list. Upon locating the packing list, it was discovered that the same was prepared on a copy of your letterhead which indicated that the Trane Co. manufactured air conditioning, heating and heat transfer equipment. Accordingly, the inspectors insisted that this equipment was being imported for

> air conditioning purposes. To date, we have not been able to clear the shipment and it is possible that we will be required to pay heavy taxes on this equipment.
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> "The purpose of this letter is to request that in the future, no documents of any kind should be sent with the order that indicate in any way that the equipment could possibly be used for air conditioning. It is realized that this is a broad request and fairly difficult to administer, but we believe with proper caution it can be executed. Your cooperation and close supervision concerning these matters will be appreciated." (Exh. 3-C-1, p. 141, BIR rec.; underlining supplied.)

Again, in a letter dated February 21, 1956, petitioner intimated to Trane Co., Wisconsin, U. S. A. (Exh. 3-A, pp. 137-139, BIR rec.) as follows:

> "At the present time, there are two obstacles which prevent improvement in our present performance. The first and most difficult is that we are limited by a very small quota for air-conditioning equipment. This figure amounts to only $10,108.00 yearly. By ordering compressors alone and without motors, we are able to exclude them from the air-conditioning classification. We are also classifying condensers as heat exchangers. We must classify the cooling coils as air-conditioning. You can readily see that we have serious problems to remain in the air conditioning field." (Exh. 3-A-1, p. 138, BIR rec.; underlining supplied.)

The above communications leave no room for doubt as to petitioner's intention in 1953 to 1956 to fraudulently misdeclare its importations of air-conditioning units and spare parts or accessories thereof, in order to evade the payment of the 30% tax. As air-conditioning units are classified as semi-luxury items under Section 185 of the National Internal Revenue Code at the time of their importation, the arbitrary and underhanded classification thereof by petitioner as ordinary articles subject to 7% tax, although seemingly in compliance with Central Bank rules and regulations, constitute fraud against the legitimate revenue of the government.

As the third and fourth questions of 25% and 50% surcharges and prescription of assessment are interrelated, we deem it appropriate to discuss them jointly. Petitioner claims that it is not subject to the 25% and 50% surcharges imposed by Section 183(a) of the Tax Code, supra, because a taxpayer who is subject either to the compensating tax or the advance sales tax is not required under the said section of the law "to make a true and complete return of the amount of his, her or its gross monthly sales, receipts or earnings, or gross value of output actually removed from the factory or mill warehouse and within twenty days after the end of each month, pay the tax due thereon." Petitioner, therefore, argues that since the law does not require it to file the return and pay the tax within twenty days after the end of the month, it cannot be held subject to the 25% and 50% surcharges because it paid the 7% advance sales tax on the imported articles before they were released from customs custody. In short, petitioner contends that only those taxpayers who are required to file their monthly returns and pay the percentage tax within twenty days after the end of the month are subject to the 25% and 50% surcharges imposed by Section 183(a) of the National Internal Revenue Code.

At first blush it would seem that the contention of petitioner that it is not subject to the delinquency surcharge of 25% is sound, valid and tenable. However, a serious study and critical analysis of the historical provisions of Section 190 of the Tax Code dealing on compensating tax, in relation to Section 183(a) of the same Code, will show that the contention of petitioner is without merit. The original text of Section 190 of Commonwealth Act No. 466, otherwise known as the National Internal Revenue Code, as amended by Commonwealth Act No. 503, effective on October 1, 1939, does not provide for the filing of a compensating tax return and the payment of the 25% surcharge for late payment thereof. Under the original text of Section 190 of the Tax Code, as amended by Commonwealth Act No. 503, the contention of the petitioner that it is not subject to the 25% surcharge appears to be legally tenable. However, Section 190 of the Tax Code was subsequently amended by Republic Act Nos. 48, 253, 361, 1511 and 1612, effective on October 1, 1946, July 1, 1948, June 9, 1949, June 16, 1956 and August 24, 1956, respectively, which invariably provides, among others, the following:

> "x x x If any article withdrawn from the customhouse or the post office without payment of the compensating tax is subsequently used by the importer for other purposes, corresponding entry should be made in the books of accounts, if any are kept, or a written notice thereof sent to the Collector of Internal Revenue and payment of the corresponding compensating tax made within thirty days from the date of such entry or notice and if the tax is not paid within such period the amount of the tax shall be increased by 25%, the increment to be a part of the tax." (Underlining supplied.)

In view of our ruling that the imported air-conditioning units and spare parts or accessories thereof are subject to the compensating tax of 30% (not to the advance sales tax of 7% plus mark-up) because the imported articles were used in the construction business of petitioner, it is incumbent upon petitioner to comply with the requirements of Section 190 of the Tax Code, as amended, supra, by posting in its books of accounts or notifying the Collector (Commissioner) of Internal Revenue that the imported articles were used for other purposes, within thirty days from the date of such entry or notice and the compensating tax paid within the said period; otherwise, the amount of the tax is subject to the 25% surcharge.

√ It is to be noted that while the original text of Section 190 of the Tax Code and the amendatory provisions of Commonwealth Act No. 503 do not require the filing of a compensating tax return and the payment of 25% surcharge for delinquency, the same section of the Tax Code, as amended by Republic Act Nos. 48, 253, 361, 1511 and 1612, embodies the said requirements. In other words, when the imported articles subject to the advance sales tax were not sold, resold, bartered or exchanged but were subsequently used by the importer for other purposes, it is the duty of the said importer to enter in its books of accounts or notify the Commissioner of Internal Revenue in writing that the imported articles were used for other purposes, within thirty days from the date of such entry or notice, and the compensating tax paid within the said period. Consequently, as the 30% compensating tax was not paid by petitioner within the time prescribed by Section 190 of the Tax Code, as amended, supra, it is subject to the 25% surcharge for delinquency in the payment of the said tax.

After disposing the question of the 25% surcharge, we will now resolve the question of the 50% surcharge prescribed by Section 183(a) of the Tax Code. At the outset, it may be stated that we sustain respondent's findings of fraud. Be that as it may, the legal question for resolution is whether or not there is a valid and legal justification for the imposition of the 50% surcharge as fraud penalty under Section 183(a) of the Tax Code, supra.

Section 183(a) of the Tax Code requires every person subject to the percentage tax under Title V of the same Code to make a true and complete return of his gross monthly sales, receipts, or earnings and within twenty days after the end of each month, pay the tax due thereon. The persons referred to therein are the merchant, manufacturer, or producer mentioned in Sections 184, 185 and 186 of the Tax Code; the proprietors or operators of rope factories, sugar centrals, coconut oil mills, cassava mills and desiccated coconut factories mentioned in Section 189 of the Tax Code; road, irrigation, artesian well, waterworks, and/or construction work contractors, proprietors or operators of dockyards, and others mentioned in Section 191 of the Tax Code; the carriers and keepers of garages mentioned in Section 192 of the Tax Code; and the stock, real estate, commercial, customs and immigration brokers and cinematographic film owners, lessors, or distributors mentioned in Section 195 of the Tax Code. It is clear from the foregoing enumeration that an importer who is subject to the compensating tax under Section 190 of the Tax Code is not required by Section 183(a) of the same Code to make a return because he has no taxable gross monthly sales, receipts or earnings. The reason is obvious. A person who is subject to the compensating tax pays the same before the release of the imported articles from customs custody without the necessity of making and filing the return contemplated in Section 183(a) of the Tax Code.

As the imposition of the 50% surcharge prescribed by Section 183(a) of the Tax Code is based on willful neglect to file the monthly return within twenty days after the end of each month or in case a false or fraudulent return is willfully made, it can readily be seen that petitioner cannot legally be held subject to the 50% surcharge imposed by Section 183(a) of the Tax Code. Neither can petitioner be held subject to the 50% surcharge under Section 190 of the Tax Code dealing on compensating tax because the provisions thereof do not include the 50% surcharge. Where a particular provision of the Tax Code does not impose the 50% surcharge as fraud penalty, we cannot enforce a non-existing provision of law notwithstanding the assessment of respondent to the contrary. Instances of the exclusion in the Tax Code of the 50% surcharge are those dealing on tax on banks, taxes on receipts of insurance companies, and franchise tax (See Sections 250, 256 and 259 of the Tax Code). However, if the Tax Code imposes the 50% surcharge as fraud penalty, it expressly so provides as in the cases of income tax, estate and inheritance taxes, gift taxes, mining tax, amusement tax, and the monthly percentage taxes (See Sections 72, 102, 120, 245, 260 and 183(a) of the Tax Code). Accordingly, we hold that petitioner is not subject to the 50% surcharge despite the existence of fraud in the absence of legal basis to support the imposition thereof.

After deciding that petitioner is not subject to the 50% surcharge because the provisions of Section 190 of the Tax Code, whether in the original text or in the subsequent amendments thereof, do not impose the 50% surcharge, we will now resolve the question of prescription of the tax assessment here in question under the provisions of Sections 331 and 332 of the Tax Code, in relation to Section 183(a) of the same Code, supra.

Legally speaking, we have stated that a person subject to the compensating tax under Section 190 of the Tax Code is not required to file the tax return or declaration mentioned and contemplated in Section 183(a) of the same Code. Under the latter section of the Tax Code, we have enumerated the persons or taxpayers who are required by law to file the return for percentage tax purposes. In the case at bar, however, this Court can take judicial notice of the fact that petitioner filed a tax return or declaration with the Bureau of Customs before paying the advance sales tax of 7%. This is so because of the standard operating procedure in the said Bureau requiring that, before the imported articles could be released from customs custody, the importer must invariably file the corresponding importer's revenue declaration. Now, it may be asked: What is the effect of the tax return or declaration filed by petitioner with the Bureau of Customs insofar as the prescription of tax assessment is concerned? The answer is found in Section 332(a) of the Tax Code which provides as follows:

> 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.

Considering the preponderance of evidence of fraud with the intent to evade the higher rate of percentage tax due from petitioner, we hold that the tax assessment here in dispute was made within the period prescribed by law and prescription has not tolled against the Government except with respect to the assessment from 1948 to 1952. However, our ruling on this point should not be confused with the false or fraudulent return mentioned and referred to in Section 183(a) of the Tax Code.

Despite the existence of fraud, we agree with petitioner that the disputed tax assessment should not have included the deficiency tax covering the years 1948 to 1952 since no evidence of fraud was presented by respondent for those years. It is a well-settled doctrine in taxation that fraud is not to be presumed and it is incumbent upon respondent to prove its existence to justify the inclusion of the deficiency tax assessment for 1948 to 1952. Respondent, however, failed in this respect.

The factual question to be resolved is whether or not the imported air-conditioning units valued at ₱218,207.12 and used by petitioner in Contract EC-173 with Madrigal & Co. should be excluded from the landed cost of the imported materials. Petitioner contends that the articles in question were imported by Madrigal & Co. because the tax receipts evidencing payment thereof were issued in the name of said company (Exhs. V, V-1 to V-12). However, an evaluation of the exhibits of respondent shows otherwise. As shown by the evidence (Exhs. U, U-1 & U-2) and as admitted by petitioner's counsel, the total value of the imported air-conditioning units are included in the contract price for services, labor and materials (p. 438, t.s.n.). If Madrigal & Co. were really the importer of the said articles, the amount thereof should have been excluded by petitioner from the contract price. The fact that the contract price includes the value of the imported materials proves that it was petitioner which imported the air-conditioning units and not Madrigal & Co. Therefore, the amount of ₱218,207.12 was properly included as part of petitioner's cost of imported materials.

Petitioner wants to exclude from the total cost of the imported air-conditioning units the amount of ₱39,320.17, representing the cost of imported materials for Contract EC-230, on the ground that it had already paid the 30% advance sales tax thereon. However, payment of said tax was denied by respondent (p. 415, t.s.n.). The records, however, show that the advance sales tax on the said importation had already been paid by petitioner (See Exh. 10, p. 117, BIR rec.; pp. 564-565, t.s.n.). Consequently, the amount of ₱39,320.17 should be excluded from petitioner's total cost of the imported materials.

In their last two reports, revenue examiners Quesada and Catudan ended their computation of the 30% advance sales tax on September 21, 1956 because petitioner started paying the 30% advance sales tax after said date (See Exh. 6, pp. 74-79, BIR rec.; Exh. 9, pp. 162-170, BIR rec.; pp. 534, 590-593, t.s.n.). Except for one shipment which arrived on September 12, 1956, all the rest arrived after September 21, 1956 (Exh. 5, pp. 39-45, BIR rec.). The 30% advance sales tax must have been paid on the latter shipments. And, the 30% advance sales tax on the shipment that arrived on September 12, 1956 had already been paid. This payment was admitted by respondent's examiners (See Exh. 4, p. 65, BIR rec.; Exh. 5, supra).

Petitioner is, therefore, liable for compensating tax and 25% surcharge in the total sum of ₱174,441.62 computed as follows:

Landed cost of imported materials for the period Sept. 22, 1950 to December 31, 1956 (BIR Memo dated Aug. 27, 1962)	₱942,967.72
Less: Landed cost of imported materials for the years 1950 to 1952 (Exh. T-4) . .	190,691.29
Landed cost of imported materials for the years 1953 to 1956	₱752,276.43
Less: Materials for which 30% advance sales tax was paid (EC-230)	39,320.17
Materials for which 7% advance sales tax was paid.	₱712,956.26
Landed cost of materials less 7% advance sales tax based on 25% mark-up (₱712,956.26 ÷ 108.75%)	₱655,591.96
30% tax thereon.	₱196,677.59
Less: 7% advance sales tax paid	57,364.29
Compensating tax due	₱139,313.30
25% surcharge for late payment	34,828.32
Total amount due	₱174,141.62

FOR ALL THE FOREGOING CONSIDERATIONS, the decision of respondent appealed from is hereby modified, and petitioner, as a contractor, is declared exempt from the deficiency manufacturer's sales tax covering the period from June 1, 1948 to September 21, 1956. However, petitioner is ordered to pay respondent or his duly authorized collection agent, the sum of ₱174,141.62 as compensating tax and 25% surcharge for the period from 1953 to September 21, 1956. With costs against petitioner.

SO ORDERED.

Quezon City, November 29, 1966.

Estanislao R. Alvarez
ESTANISLAO R. ALVAREZ
Associate Judge

WE CONCUR:

R. M. Umali
ROMAN M. UMALI
Presiding Judge

Ramon L. Avanceña
RAMON L. AVANCEÑA