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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

HANTEX TRADING CO., INC.,
Petitioner,

- versus -

C.T.A. CASE NO. 5126

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
DEC 11 1997

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DECISION

The issue which is presented for our consideration is whether or not the assessments made by respondent against petitioner have valid and legal bases, thus making the latter liable to pay the former the amounts of P13,414,226.40 and P14,752,903.28, as deficiency income and sales taxes, respectively, plus interest that may accrue thereon until actual payment of the same.

Petitioner is a registered general partnership duly organized and existing under the laws of the Philippines and is engaged in the importation of plastic products (p. 210, BIR records). Acting on a confidential information that the 1987 importations of the petitioner were understated in its accounting records, the agents of the Economic Intelligence and Investigation Bureau (EIIB) went to the business premises of the petitioner to conduct an investigation on its 1987 transactions pursuant to Mission Order No. 398-89, dated November 14,

1989. In their memorandum report (Exh. F), the EIIB agents reported that the herein petitioner could not be persuaded to open its books and records despite the authority given to them and since the herein petitioner becomes in a way hostile, they resorted to the best evidence obtainable method under Section 16, NIRC. By using this method, there was found unreported sales in the amount of P63,032,989.17, thru non-recording by petitioner of some of its 1987 importations (purchases). The best evidence referred to by the agents of the EIIB were the different copies of consumption entries filed by the petitioner with the Bureau of Customs, marked as Annexes F-1 to F-68. In the same memorandum report, the EIIB agents declared that these entries were duly authenticated as having been processed and released after payment of the duties and taxes due thereon, by the Chief, Collection Division of Manila International Container Port, dated August 7, 1990, and the Acting Chief, Collection Division, Port of Manila, dated August 22, 1990. Duly certified copies of financial statements of the petitioner which was secured by the agents of the EIIB from the Securities and Exchange Commission were also used as its evidence to determine the tax liabilities of petitioner. Thus, it was recommended to the Commissioner of EIIB that the Honorable Commissioner of the Bureau of Internal Revenue be apprised of the report and be requested to collect from the herein petitioner the following tax liabilities for 1987:

35% for income tax	₱22,061,546.20
50% for fraud	11,030,773.10
40% delinquency interest 1988 and 1989	8,824,618.48
T O T A L	₱41,916,937.78

Then Commissioner Jose T. Almonte of the EIIB in a letter, dated October 26, 1990 (Exh. I), recommended the assessment and collection from the petitioner of the total amount aforementioned and stated therein that his office is transmitting the entire docket of the case to the Bureau of Internal Revenue (BIR) Commissioner.

Upon BIR's receipt of the letter of Commissioner Almonte, together with its entire docket, the same was forwarded to Atty. Ruben Buenaventura, Chief, Investigation and Intelligence Office (IIO) Division for his immediate and appropriate action (Exh. J). On January 25, 1991, Atty. Buenaventura recommended to Deputy Commissioner Victor A. Deoferio, Jr., the following:

1. That the rate of gross profit for imported items be adopted in computing underdeclared sales;

2. That underdeclared sales be computed based on underdeclared imported purchases net of advance sales tax paid;

3. That underdeclared sales be given or allowed cost of goods for income tax purposes; and

4. That imported purchases sold as is be subject to sales tax. (Exh. K)

On February 12, 1991, Deputy Commissioner Deoferio, Jr. issued a memorandum to the Assistant Commissioner, Special Operations Service, directing the latter to prepare a conference letter advising the herein petitioner of the proposed deficiency internal revenue taxes computed hereunder:

A. Data/Information from docket:

1. Sales – Imported p. 10	P 47,054,258.98
2. Cost of Sales – Imported:	
a) Inventory – Imported 01.01.87 p. 10	11,184,911.23
b) Purchases – Imported p. 10	45,538,694.57
Total Available for Sale	56,723,605.80
c) Inventory – Imported 12.31.87 p. 10	16,495,544.63
	P 40,228,061.17
3. Undeclared Import Purchases pp. 12-13	P 94,110,175.00

B. Computations:

1. Cost of Sales ratio A_2/A_1	85.492923%
2. Undeclared Sales – Imported A_3/B_1	P110,079,491.61

3. Undeclared Gross Profit $B_2 - A_3$ 15,969,316.61

C. Deficiency taxes due:

1. Deficiency Income Tax

B_3 x 35%	P 5,589,261.00
50% Surcharge C_1 x 50%	2,794,630.50
Interest to 02.28.91 C_1 x 57.5%	3,213,825.08
T O T A L	P 11,597,716.58

2. Deficiency Sales Tax

at 10% pp. 12-13	P 7,290,082.72
at 20% pp. 12-13	10,493,312.31
Total Due	17,783,395.03
Less: Advance Sales Taxes paid pp. 12-13	11,636,352.00
Deficiency Sales Tax	6,147,043.03
50% Surcharge C_2 x 50%	3,073,521.52
Interest to 02.28.91	5,532,338.73
T O T A L	P 14,752,903.28 (Exh. L)

On April 15, 1991, Asst. Commissioner for Collection Jaime Maza issued a demand letter to the petitioner for the payment of a deficiency income and sales tax for 1987 in the amounts of P13,414,226.40 and P14,752,903.28, respectively (Exh. C). On the same date, Assessment Notices Nos. FAS-1-87-91-001654 and FAS-4-87-91-001655 were issued against the petitioner, requiring the latter to pay the amounts of P13,414,226.40 (interest being increased from P3,213,825.08 to P5,030,334.90) and P14,752,903.28 as its deficiency income and sales taxes, respectively for 1987 (Exh. D and E).

Petitioner protested the aforementioned deficiency tax assessment. The same was denied by the respondent in a letter, dated December 10, 1993, which was received by the petitioner on June 8, 1994. Hence, on July 6, 1994, petitioner filed with this Court the instant petition for review.

Petitioner presents the proposition as reasons of the petition for review that the 1987 deficiency income and sales tax assessments, including increments, are void *ab initio*, on the grounds that: (a) the deficiency interests imposed on the income and percentage tax deficiency assessment notices were computed in violation of the provisions of Sec. 249(b) NIRC; (b) the percentage tax deficiency was computed on an annual basis for the year 1987, in accordance with the provisions of Sec. 193 of the NIRC of 1977, despite the fact that in 1987, percentage taxes must be computed in accordance with Sec. 162 of the NIRC of 1986 (PD No. 1994) on a quarterly basis; (c) the BIR official who signed the deficiency tax assessments was the Asst. Commissioner for Collection who has no authority under the Tax Code to sign deficiency tax assessments; and that the tax assessments were based on alleged documents which are not admissible administratively or judicially, thus, the tax assessments were not based on actual facts but on mere presumptions (pp. 2-4, Pet. for Review).

On the other hand, respondent in her Answer demurs and maintains that (1) the assessments are valid and correct and the taxpayer has the burden of proof to impugn its validity; (2) the petitioner failed miserably to present concrete evidence to overcome the presumption of validity and correctness attached to the assessments; (3) the assessments were based on facts as a result of the investigations conducted against petitioner by agents of the Economic Intelligence and Investigation Bureau and the Bureau of Internal Revenue; (4) the findings of fact of unrecorded purchases/importations which gave rise to undeclared sales were derived from copies of consumption entries filed with the Bureau of Customs which were duly authenticated as having been processed and released, after payment of duties and taxes, by the Chiefs of the Collection Division, Manila International Container Port and the Port of Manila, and from duly certified copies of Financial Statements secured from the Securities and Exchange Commission; (5) the Commissioner is not required to make his determination (assessment) on the basis of evidence legally admissible in a formal proceeding in Court; (6) the undeclared sales are considered as net taxable income of petitioner following the case of

Republic vs. Gonzales (13 SCRA 633), thus, liable to pay income tax at the rate of 35% under Section 24 of the Tax Code, as amended; (7) the imported items sold are subject to sales tax on original sales of ten percent (10%) to twenty percent (20%) based on the given value of the articles sold, less advance sales tax paid (RR No. 11-86, Exec. Order No. 36); (8) petitioner is liable to pay fifty percent (50%) surcharge and twenty percent (20%) interest pursuant to Section 248(b) and (c) in relation to Section 249 of the Tax Code, considering petitioner's substantial understatement of sales/income; and (9) the assessment notices were signed/issued by the then Assistant Commissioner for Collection, for the Commissioner, in accordance with Adm. Order No. 2-85 in relation to Rev. Memorandum Order 27-85, both dated Sept. 25, 1985 delegating the authority to sign assessment notices and demand letters to the Assistant Commissioner for Collection.

The issues in this case may be simplified into one and that is whether or not the assessments made by respondent against petitioner have valid and legal bases, thus subjecting the latter to a deficiency income and sales taxes in the amounts of P13,414,226.40 and P14,752,903.28, respectively, plus interest that may accrue thereon until actual payment of the same.

The issue should be ruled in the affirmative as petitioner has failed to rebut the validity or correctness of the aforementioned tax assessments. It is incongruous for petitioner to prove its cause by simply drawing an inference unfavorable to the respondent by attacking the source documents (Consumption Entries), which were the bases of the assessments and which were certified by the Chiefs of the Collection Division, Manila International Container Port and the Port of Manila, as having been processed and released in the name of the petitioner after payment of duties and taxes and the duly certified copies of Financial Statements secured from the Securities and Exchange Commission. Any such inference cannot operate to relieve petitioner from bearing its burden of proof and this Court has no warrant of absolution. The Court should have been persuaded to grant the reliefs sought by the petitioner should it have presented any evidence of relevance and competence required, like that of a certification from the Bureau of Customs or from any other agencies, attesting to the fact that those consumption entries did not really belong to them.

The burden of proof is on the taxpayer contesting the validity or correctness of an assessment to prove not only that the Commissioner of Internal Revenue is wrong but the taxpayer is right (Tan Guan vs. CTA, 19 SCRA 903), otherwise the presumption in favor of the correctness of tax assessment stands (Sy Po vs. CTA, 164 SCRA 524). The burden of proving the illegality of the assessment lies upon the petitioner alleging it to be so. In the case at bar, petitioner miserably failed to discharge this duty.

However, with regard to the imposition by the respondent of the 50% surcharge against the petitioner as fraud penalty, this Court cannot agree with the former. The understatement of petitioner of its sales/income will not *ipso facto* make the petitioner guilty of fraud. Pursuant to Section 282 (now 248) of the NIRC, the fraud contemplated before a 50% surcharge can be imposed is willful neglect to file a return or the "false or fraudulent return is willfully made". In other words the fraud committed is intentional. Consequently, in civil tax fraud cases, the burden of proof is always on the BIR Commissioner to prove that the taxpayer committed fraud intentionally, for the simple reason that the defendant cannot be compelled to testify against himself. In the instant case, no substantial proof was introduced by the respondent to establish the fact of fraud, thus, the imposition of the 50% surcharge as fraud penalty is considered arbitrary.

"Fraud is a question of fact and the circumstances constituting fraud must be alleged and proved in the court below. The finding of the trial court as to its existence and non-existence is final and cannot be reviewed unless clearly shown to be erroneous. x x x Fraud is never lightly to be presumed because it is a serious charge" (*Commissioner vs. Ayala Securities Co., L-29485, March 31, 1976).*

Fraud is never imputed and the Court never sustains findings of fraud upon circumstances which, at most, create only suspicion and the mere understatement of a tax is not itself proof of fraud for the purpose of tax evasion (**Yutivo Sons Hardware Co. vs. Court of Appeals, 1 SCRA 160**). The mere understatement of income in itself does not prove fraud. (**Gomez vs. Domingo, CTA Case No. 1168, February 15, 1964**).

Although the reach of the issue on which we rest our decision renders the consideration of the subsidiary issues raised by the petitioner in its petition unnecessary, suffice it to state that the same should be addressed by the Court for the proper guidance of the parties concerned.

Petitioner raised the argument that the deficiency interests imposed in the income and percentage tax deficiency was computed in violation of the provisions of

Section 249(b), NIRC. This Court believes that this is a clear inadvertence or misinterpretation of the petitioner of the provisions of laws applicable. The correct provisions of law applicable in the case at bar are Section 282 (b) and (c) (now Sec. 248 [b] and [c]) and Section 283 (now Sec. 249) of the 1987 National Internal Revenue Code (NIRC). Petitioner contends that the 50% surcharge should not be included in the computation of interest since this was not mentioned in Section 283 (now Sec. 249). This ratiocination is a clear manifestation that petitioner did not read Section 282(c) (now Sec. 248[c]) wherein it was clearly stated that the penalties imposed shall form part of the tax and the entire amount shall be subject to the interest prescribed in Section 283 (now Sec. 249). Thus, the Court finds the computation made by the respondent as correct and logical. The aforecited provisions of law are quoted hereunder, for easy reference.

> **SEC. 282.** ***Civil Penalties.*** – *(a)* x x x
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> (b) In case of willful neglect to file the return within the period prescribed by this Code or regulations, or in case a false or fraudulent return is willfully made, the penalty to be imposed shall be fifty percent (50%) of the tax or of the deficiency tax, in case any payment has been made on the basis of such return before the discovery of the falsity or fraud.

(c) The penalties imposed hereunder shall form part of the tax and the entire amount shall be subject to the interest prescribed in Section 283.

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SEC. 283. *Interest. (a) In general.* - There shall be assessed and collected on any unpaid amount of tax, interest at the rate of twenty percent (20%) per annum, or such higher rate as may be prescribed by regulations, from the date prescribed for payment until the amount is fully paid.

(b) *Deficiency interest.* - Any deficiency in the tax due, as the term is defined in this Code, shall be subject to the interest prescribed in paragraph (a) hereof, which interest shall be assessed and collected from the date prescribed for its payment until the full payment thereof.

(c) Delinquency interest. - In case of failure to pay:

(1) The amount of the tax due on any return required to be filed' or

(2) The amount of the tax due for which no return is required, or

(3) A deficiency tax, or any surcharge or interest thereon, on the due date appearing in the notice and demand of the Commissioner,

there shall be assessed and collected, on the unpaid amount, interest at the rate prescribed in paragraph (a) hereof until the amount is fully paid, which interest shall form part of the tax.

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On the issue raised by the petitioner that the percentage tax deficiency should be computed on a quarterly basis in accordance with Section 162, NIRC and not annually, the Court finds the same untenable. Precisely the respondent computed the percentage tax on an annual basis because of the fact that the petitioner did not comply with the provisions of Section 162 of the 1987 Tax Code. Petitioner did not adduce evidence that will show that it filed a correct quarterly return for sales and other percentage taxes for the period covered by the subject assessment.

The Court agrees with the respondent that the Assistant Commissioner for Collection has the authority to sign deficiency tax assessments for and in behalf of the Commissioner. This power is clearly delegated to the said official in Rev. Administrative Order No. 2-85, which took effect November 15, 1985, thus, the Court finds the contention of the petitioner as a mere ploy to divert the real issue of the case. "Administrative regulations and policies enacted by administrative bodies to interpret the law have the force of law and are entitled to great respect." (**Eslao vs. Commission on Audit, 236 SCRA 161**)

Further, petitioner, in seeking to exculpate itself from the assessments alleged that the tax assessments were based on documents which were mere xerox copies of import entries, thus, not admissible administratively or judicially against it, hence, the assessments were not based on actual facts but on mere presumptions. We ruled *en contrario* to the stand of the petitioner.

Section 16(b) authorizes the Commissioner to assess taxes on the basis of the best evidence obtainable in case of failure on the part of the taxpayer to submit the required returns, statement, records and other documents. Based on the records presented, petitioner fails to submit the required books and other financial records when requested. As held by the Supreme Court in the case of **Sy Po vs. Court of Tax Appeals,** ***supra***, the rule on the "best evidence obtainable" applies when a tax report required by law for the purpose of assessment is not available or when the tax report is incomplete or fraudulent. Hence, the questioned documents may be used by the respondent as basis for the assessment of any internal revenue tax.

> **SEC. 16.** ***Power of the Commissioner to make assessments.*** *(a) x x x*
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> *(b) Failure to submit required reports, statements, etc.* -- When a report required by law as a basis for the assessment of any national internal revenue tax shall not be forthcoming within the time fixed by law or regulation or when there is reason to believe that any such report is false, incomplete or erroneous, the Commissioner shall assess the proper tax on the best evidence obtainable.
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> In case a person fails to make and file a required return or list at the time prescribed

> by law, or makes willfully or otherwise, a false or fraudulent return or list, the Commissioner shall make the return from his own knowledge and from such information as he can obtain through testimony or otherwise. In any such case, the Commissioner may make a return or amend any return and any return so made or amended shall be *prima facie* good and sufficient for all legal purposes. (Underscoring supplied)
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By the use of this method the Commissioner makes or amends the return from his own knowledge and from such information as he can obtain thru testimony or otherwise. Assessments made as such are deemed *prima facie* correct and sufficient for all legal purposes. The taxpayer has the duty of proving otherwise. As earlier adverted to, petitioner failed to discharge this duty.

Where the taxpayer is appealing to the Tax Court on the ground that the Collector's assessment is erroneous, it is incumbent upon him to prove what is the correct and just liability by a full and fair disclosure of all pertinent data in his possession. Otherwise, if the taxpayer confines himself to proving that the assessment is wrong, the Tax Court proceedings would settle nothing, as the way would be left open for subsequent assessments and appeals in interminable succession. (Sy Po vs. Court of Tax Appeals, *supra.*)

As earlier discussed this Court affirmed the 1987 deficiency assessment made by respondent against petitioner, except the imposition of the 50% surcharge, which should only be 25%. In accordance with the said findings of the Court, the computation made by respondent of the deficiency income and sales taxes of the petitioner found on page 5 of this decision is modified, as follows:

1. Deficiency income tax	P 5,589,261.00
Plus additions to tax	
a. 25% surcharge [Sec. 282(a)] (5,589,261.00 x 25%)	1,397,315.25
b. 20% deficiency interest [Sec. 283(b)] 04-15-88 to 04-15-91 (6,986,576.25 x 20% x 1096/365)	4,195,774.01
Total income tax due and payable	P11,182,350.26
2. Deficiency sales tax	P 6,147,043.03
Plus additions to tax	
a. 25% surcharge [Sec. 282(a)] (6,147,043.03 x 25%)	1,536,760.76
b. 20% deficiency interest [Sec. 283(b)] 01-20-88 to 04-15-91 (7,683,803.79 x 20% x 1182/365)	4,976,578.67
Total income tax due and payable	P12,660,382.46

IN THE LIGHT OF ALL THE FOREGOING, judgment is hereby rendered **DENYING** the herein petition. Petitioner is hereby **ORDERED to PAY** the respondent Commissioner of Internal Revenue its deficiency income and sales taxes for the year 1987 in the amounts of P11,182,350.26 and P12,660,382.46, respectively, plus 20% delinquency interest per annum on both deficiency taxes from April 15, 1991 until fully paid pursuant to Section 283(c)(3) of the 1987 Tax Code, with costs against petitioner.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

RAMON O. DE VEYRA
Associate Judge

AMANCIO Q. SAGA
Associate Judge

CERTIFICATION

I hereby certify that the above decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge
Court of Tax Appeals