REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

BUTUAN SAWMILL, INC.,
Petitioner,

versus CTA CASE NO. 1296

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

x - - - - - - - - - - x Nov. 6/64

D E C I S I O N

This is an appeal from the decision of respondent assessing against and demanding from petitioner the payment of ₱14,486.45 as alleged deficiency franchise tax covering the period from January 1, 1948 to December 31, 1960, inclusive of the 25% surcharge for late payment thereof, under Section 259 of the 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. x x

Petitioner is a pre-war holder of a franchise granted by the Municipal Council of Cabadbaran

Agusan. Because of the destruction of its records during the war, petitioner sought for and was granted a reconstituted certificate of public convenience and necessity by the Public Service Commission, in P.S.C. Case No. 8533, May 23, 1946 (Exh. 1, p. 4, BIR rec.). The said franchise was superseded by a legislative franchise (Republic Act No. 399), which took effect on June 18, 1949. The new franchise was granted 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. Section 10 of the said Act reads 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 <u>2% of the gross earnings from electric current sold or supplied</u> under this franchise in said municipality. <u>Said tax</u> shall be due and payable quarterly and <u>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</u>, 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 <u>on its franchise rights, privileges, receipts, revenues and profits, from which taxes the grantee is hereby expressly exempted</u>. (Underscoring supplied)

On January 24, 1958, petitioner filed a claim with the Collector of Internal Revenue for the refund, as alleged overpayment, of the difference between the 3% franchise tax it paid on its gross earnings and the 2% provided for in Act 3636 (Exh. B, p. 30, BIR rec.). Said claim for refund was denied by the provincial revenue officer in a letter dated January 19, 1959, and petitioner was advised that the amount of ₱9,044.99 was being assessed against the petitioner as deficiency franchise tax and surcharges for the period from January 1, 1953 up to September 30, 1958, inclusive (Exh. E, pp. 23-24, BIR rec.).

On the theory that petitioner is subject to the higher rate of franchise tax (5% instead of 2%) and upon recommendation of the General Auditing Office, respondent, on June 7, 1961, assessed against and demanded from petitioner payment of ₱14,486.45 as deficiency franchise tax, inclusive of the 25% surcharge thereon, for the period from January 1, 1948 to December 31, 1960, computed as follows:

Total gross receipts per audit . .	₱408,285.80
5% tax due thereon	₱ 20,414.29
Less: Amount paid	8,825.13
B a l a n c e	₱ 11,589.16
Add: 25% surcharge	2,897.29
TOTAL AMOUNT DUE.	₱ 14,486.45

(Exh. 2, p. 6, BIR rec.)

On November 8, 1961, a warrant of distraint and levy was issued to enforce the said assessment against

In a letter dated August 2, 1962, addressed to the Regional Director of the Bureau of Internal Revenue in Davao City (Exhs. G & 4, pp. 31-34, BIR rec.) and in a letter dated August 23, 1962, addressed to respondent (Exhs. I & 6, pp. 39-51, BIR rec.), petitioner requested the cancellation of the aforesaid assessment and prayed that the warrant of distraint and levy be recalled. The execution of the warrant of distraint and levy was suspended (Exh. 9, p. 60, BIR rec.). Nonetheless, respondent denied the request for cancellation of the deficiency assessment in a letter dated September 7, 1962 and demanded from petitioner payment of ₱14,486.45 (Exhs. K & 10, pp. 61-63, BIR rec.).

On November 14, 1962, petitioner filed its petition for review with this Court, setting up, among others, the defense that the tax sought to be collected, or a substantial portion thereof, had already been barred by the statute of limitations.

Counsel for respondent, in her answer and by way of special and affirmative defense raised the jurisdictional issue that the appeal was not perfected within thirty (30) days from the date of receipt of respondent's decision. However, the defense was waived before the hearing because respondent found that the petition for review was filed on time

(p. 85, CTA rec.).

The issues raised by the parties ultimately boil down to:

(1) Whether or not the right of respondent to assess the deficiency franchise tax had prescribed;

(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; and

(3) Whether or not petitioner is subject to 25% surcharge for late payment of the franchise tax.

<u>First Issue</u>

Petitioner contends that the deficiency franchise tax assessment issued by respondent has partly prescribed because it was made beyond the 5-year period from the date the franchise tax returns were filed (Petitioner's Memorandum, pp. 106-107, CTA rec.).

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. <u>Period of limitation upon assessment and collection</u>. - 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.
>
> 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 filed a false or fraudulent return with 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.

In support of its stand that respondent's assessment has partly prescribed, petitioner presented its president as a witness who testified that during the period covered by the assessment, it was the procedure adopted by petitioner to pay its franchise tax at the time of filing the return (p. 47, t.s.n.). The testimony of said witness was not controverted and is even corroborated by Exhibits 1-A & N, showing the itemized gross receipts of petitioner from the 1st quarter of 1948 to the 4th quarter of 1960, inclusive, the amounts of quarterly or monthly franchise taxes paid by it, and the numbers and dates of official receipts issued therefor (Exhs. 1-A & N, pp. 1-2, BIR rec.), and Exhibit O-1, a certified copy of the record of payments of percentage tax, issued by the municipal treasurer of Cabadbaran, Agusan. We are convinced from the evidence of record that petitioner filed its franchise tax returns during the period covered by respondent's assessment. Consequently, we hold that the right of respondent to assess petitioner for deficiency franchise tax from 1948 to June 7, 1956 has prescribed.

Second Issue

We had an occasion to pass upon the second issue in the case entitled Butuan Sawmill, Inc. v. Commissioner of Internal Revenue, CTA Case No. 993, decided on August 15, 1967, involving the legal question of whether or not the petitioner herein is subject to the higher rate of franchise tax. In the said case, we held:

> 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 Phil-

ippine 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 expressed 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 peti-

tioner'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 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, 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. <u>Tax on corporate franchise.</u> - 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. v. 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, _supra_, effective on November 6, 1936, the franchise granted to petitioner was given "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." 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, _in conformity_ therewith, _not in violation_ of the provisions thereof or to the detriment of the rights thereby vested in the petitioner herein (See Balanga Power Plant Co. v. 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 find no cogent reason to deviate from the foregoing ruling.

Third Issue

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 (Connell Bros., Co. v. Collector of Internal Revenue, G. R. No. L-5470, December 13, 1963; Imus Electric Co., Inc. v. Court of Tax Appeals and the Commissioner of Internal Revenue, G. R. No. L-22421, March 18, 1967; Guagua Electric Light Plant Co., Inc. v. 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 June 8, 1956 to December 31, 1960, petitioner is liable for deficiency franchise tax of ₱6,037.43 computed as follows:

1956 (3rd & 4th quarter)	₱ 17,065.45
1957	29,177.70
1958	32,688.00
1959	38,496.90
1960	37,616.37
GROSS RECEIPTS....	₱155,044.42

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GROSS RECEIPTS	₱155,044.42
5% tax due thereon . .	₱ 7,752.22
Less: Amount already paid	1,714.79
DEFICIENCY TAX DUE. .	₱ 6,037.43

WHEREFORE, the decision of respondent appealed from is hereby modified. Petitioner is, therefore, ordered to pay respondent or his duly authorized collection agent the sum of ₱6,037.43 as deficiency franchise tax covering the period from June 8, 1956 to December 31, 1960. Without costs.

SO ORDERED.

Quezon City, November 6, 1967.

ESTANISLAO R. ALVAREZ
Associate Judge

WE CONCUR:

ROMAN M. UMALI
Presiding Judge

RAMON L. AVANCEÑA
Associate Judge