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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ETERNIT CORPORATION,
Petitioner,

- versus - **C.T.A. CASE NO. 2369**

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

2/12/92

D E C I S I O N

Before the court, petitioner prays for judgment ordering respondent to refund to it the sum of P195,379.28, representing alleged illegal/erroneous overpayment by it of the 7% manufacturer's sales tax for the years 1968 to 1970, inclusive.

Petitioner is a duly registered domestic corporation engaged in the manufacture of asbestos cement products (such as Flat and Corrugated Sheets, Moulded Goods, and Pipes) which are manufactured from asbestos fiber, cement, cartons and copper sulphate. These products were subject to the 7% manufacturer's sales tax imposed under Section 186 of the old Tax Code.

It appears from the records of the case that petitioner, in the years 1968, 1969 and 1970, paid *in the form of 7% tax on the sale of its asbestos cement products, a total of P1,377,350.74, broken down as follows:*

Year	Sales Tax Paid
1968	P 405,188.83
1969	486,969.54
1970	485,192.37
Total	P1,377,350.74

The tax was computed without deducting the cost of cement used in manufacturing the asbestos cement products sold, in accordance with respondent's consistent rulings prior to 1970 that the phrase "tax-exempt product" as used in Section 186-A of the old Tax Code refers only to "raw materials purchased from tax-exempt industries", to which category cement does not belong.

On February 18, 1970, the Supreme Court promulgated its decision in the case of ***Republic Flour Mills v. The Commissioner of Internal Revenue and The Court of Tax Appeals****, G.R. No. L-25602 (31 SCRA 520), reversing respondent's earlier rulings and holding that the phrase "tax-free product" in Section 186-A is "all encompassing" and refers ordinarily and commonly to all materials and articles exempted from payment of tax. On July 20,* *1970, this court, in the case of* ***Philippine Pipes and Merchandising Corporation v. Commissioner of Internal Revenue****, C.T.A. Case No. 1858, held that "whether cement qua cement is subject to sales tax or not, its value is apparently deductible from gross sales of manufactured products using same as raw material".*

On May 13, 1971, on the strength of the above-cited cases, petitioner filed with respondent a claim for refund of its allegedly overpaid 7% manufacturer's sales tax covering the period from January 1968 to December 1970, inclusive, in the total amount of P195,379.28. This undisputed amount is broken down by year, thus:

Year	Tax Allegedly Overpaid
1968	P 58,471.30
1969	82,116.97
1970	54,791.01
Total	P 195,379.28

The alleged overpayment was computed on the basis of cost of cement per square meter applied on the per unit sold for the year in question (as stated in the manufacturing statement). In other words, petitioner, in order to arrive at the alleged overpaid tax for any given year, first multiplied *the "Net Sales (for that given year) in Square Meters Subject to 7% Sales Tax" with the "Cost of Cement Per Square Meter (per Manufacturing Statement for the same year); and then multiplied the resulting product thereof by 7%. Petitioner's computations, which are embodied in its Exhibits "G" to "G-8", inclusive, are hereinbelow summarized as follows:*

	Y E A R		
	1968	1969	1970
Net Sales in Square Meters Subject to 7% Sales Tax	1,412,324.74	1,889,709.97	1,649,268.92
Cost of Cement Used in the Manufacture of Asbestos Cement Products for the year	P 835,304.28	P1,173,099.52	P 782,728.77
THEREOF—7%	P 58,471.30	P 82,116.97	P 54,791.01
Total for the three years			P 195,379.28

On January 11, 1972, as respondent had yet to act on petitioner's claim, the instant case was filed with this court in order to toll the running of the prescriptive period.

The issue now presented before this court for determination is: In computing the 7%

manufacturer's sales tax on asbestos cement products, is the cost of cement used in manufacturing such products deductible from their gross selling price?

Before the court proceeds to discuss the merits of this case, it must first settle the prejudicial controversy regarding whether or not the right of petitioner to recover any taxes allegedly overpaid by it prior to January 11, 1970 has already prescribed.

Respondent contends that, in accordance with Section 306 (now Section 280) of the old Tax Code, the refund of taxes allegedly paid by petitioner before January 11, 1970 is already barred by prescription. The said Tax Code provision reads as follows:

> *"Sec. 306. Recovery of tax erroneously or illegally collected. - No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund of credit has been duly filed with the Commissioner of Internal Revenue; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under*

> *protest or duress. In any case, no such suit or proceeding shall be begun after the expiration of two years from the date of payment of the tax or penalty."* (*Underscoring supplied*)

Petitioner, on the other hand, contends that it was only on February 18, 1970, when the Supreme Court rendered its decision in the case of ***Republic Flour Mills, Inc. v. The Commissioner of Internal Revenue and The Court of Tax Appeals****, G.R. No. 25602 (31 SCRA 520), that its payment of the 7% manufacturer's sales tax corresponding to the cost of the cement it used as raw material, became erroneous or illegal. In other words, petitioner claims that the two-year prescriptive period set forth in Section 306 (now Section 230) of the old Tax Code, should be reckoned in the instant case, not from the respective dates the questioned sales taxes were paid, but from February 18, 1970. Consequently, petitioner contends that its "Petitioner for Review" was seasonably filed with this court.*

Petitioner anchors its contention on the Supreme Court decision in the case of ***Commissioner of Internal Revenue v. National Power Corporation****, G.R. No. 18874, January 30, 1970 (31 SCRA 112), wherein the Court stated that:*

> *"(W)hen a tax was originally collected legally, the running of the prescriptive period of two years provided for in Section 306 of the National Internal Revenue Code should commence not from the date the tax was paid but from the happening of the supervening cause which entitled the taxpayer to a refund; and the claim for refund with the Commissioner of Internal Revenue and the subsequent action before the Court of Tax Appeals regarding the refund should be done within the said period of two years." (**Commissioner of Internal Revenue v. National Power Corporation**, 31 SCRA 112, 117-8) (Underscoring supplied)*

The court agrees with petitioner that it filed its "Petition for Review" within the two-year prescriptive period, and that its claim for refund for the years 1968 to 1970, inclusive, is not yet barred by prescription.

It is the court's view that the collection of the total sum of P1,377,350.74 paid by petitioner as 7% manufacturer's sales tax during the period from January 1968 to December 1970, inclusive, was made correctly and legally because the amount collected was computed in a manner consistent with respondent's rulings on what are "tax-free products" under Section 186-A of the old Tax Code -- that is, that since cement is not a product of a tax-exempt industry, its cost is not deductible from the gross selling price of finished products in which it is used as a raw material, for purposes *of computing manufacturer's sales tax. It was only upon the promulgation by the Supreme Court of the **Republic Flour Mills decision** that the collection of petitioner's 1968 to 1970 manufacturer's sales tax corresponding to the cost of cement used, became erroneous and illegal. In other words, it was the Supreme Court's declaration made on February 18, 1970 that "tax-free products" include all articles exempted from payment of taxes, (taken together with the fact that under Republic Act No. 1299, passed on June 16, 1955, cement is classified as a mineral product which is not subject to percentage tax under Section 188 of the old Tax Code) which is the supervening cause that gave rise to petitioner's right to claim for refund of its allegedly overpaid sales tax.*

At this point, the court would like to note that Section 306 of the old Tax Code, as above quoted, was amended by Presidential Decree No. 69, dated November 24, 1972 to read as follows:

> *"Sec. 306. Recovery of tax erroneously or illegally collected. - No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or af any sum alleged to have been excessive or in any manner*

> *wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. In any case, no such suit or proceeding shall be begun after the expiration of two years from the date of payment of the tax or penalty regardless of any supervening cause that may arise after payment: Provided, however, That the Commissioner may even without a written claim therefor, refund or credit any tax, where on the face of the return upon which payment was made, such payment appears clearly to have been erroneously paid."* *(Underscoring supplied)*

Since the instant case was instituted in this court in January, 1972, months before Presidential Decree No. 69 added the phrase "regardless of any supervening cause that may arise after payment", then the supervening cause doctrine as enunciated in the ***National Power Corporation case*** *discussed earlier, is applicable to the case at bar.*

Having settled the prescription controversy, the court now comes to crux of the case and decides the question of deductibility of the cost of cement used by petitioner.

Petitioner asserts that the proper basis of the 7% manufacturer's sales tax on its asbestos cement products is its gross selling price, less the cost of cement used in making them, in accordance with the doctrine laid down in the *earlier-cited **Philippine Pipes and Merchandising case**, C.T.A. Case No. 1858, July 20, 1970. Respondent, on the contrary, insists that the cost of cement is not properly deductible from the gross selling price of asbestos cement products manufactured using it, and that cement is not a "tax-free product" under Section 186-A of the old Tax Code, which reads:*

> *"Whenever a tax-free product is utilized in the manufacture or production of any article, in the determination of the value of such finished article, the value of such tax-free product shall be deducted." (Underscoring supplied)*

*With respect to respondent's argument that cement is not a "tax-free product", the court sustains the same. Pertinent is the following doctrine laid down by the Supreme Court in the case of **Commissioner of Internal Revenue v. Philippine Pipes and Merchandising Corporation and The Court of Tax Appeals**, G.R. No. L-32898, August 21, 1987 (153 SCRA 113):*

> *"The question whether or not cement is subject to sales tax has been laid to rest in the case of **Commissioner of Internal Revenue v. Republic Cement Corporation**, 124 SCRA 26 (1983), wherein this Court ruled that cement not being a 'mineral product' within the meaning of Section 246 of the Tax Code but a 'manufactured product,' its sale is subject to sales tax imposed by Section*

> *186, the same not being exempt under Section 188(c) of the Tax Code. Following the interpretation laid down in the 1965 case of **Cebu Portland Cement v. Commissioner of Internal Revenue**, G.R. No. L-18649, 13 SCRA 333 (February 27, 1965), that cement is a 'manufactured product,' the Court clarified the ruling the 1968 case of **Cebu Portland Cement v. Commissioner of Internal Revenue**, G.R. No. L-20563, 25 SCRA 789 (October 29, 1968), to the effect that since cement was subject to sales tax immediately before the enactment of Republic Act No. 1299, it should remain to be so subject thereafter, considering that the law intended no change of taxes whatsoever.' This ruling was affirmed in the resolution of May 7, 1987 denying the three (3) motions for reconsideration of the 1983 decision filed by Republic Cement Corporation, APO Cement Corporation and Cebu Portland Cement." (**Commissioner of Internal Revenue v. Philippine Pipes and Merchandising Corporation and The Court of Tax Appeals**, 153 SCRA 113, 118)*

Regarding the question of the deductibility of the cost of cement used in manufacturing petitioner's asbestos cement products, the court finds petitioner's position to be meritorious. While, as stated earlier, it is true that cement is not a "tax-free product" under Section 186-A of the old Tax Code, and consequently, the deductibility of its cost cannot be based on the said old Tax Code provision; it does not follow that such cost is not so deductible. A reading of Section 186 of the old Tax Code bears this conclusion. The said provision reads as follows:

> *"Sec. 186. Percentage tax on sales of other articles. - There shall be levied, assessed and collected once only on every original sale, barter, exchange, and similar transaction either for nominal or valuable considerations, intended to transfer ownership of, or title to, the articles not enumerated in sections one hundred and eighty-four, one hundred and eighty-five, one hundred and eighty-five-A, and one hundred eighty-five-B a tax equivalent to seven 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 subject to tax under this section are manufactured out of materials likewise subject to tax under this section and Section one hundred and eighty-nine, 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." (Underscoring supplied)*

Under this provision of law, in order for a material's cost to be deductible from the manufactured article's gross selling price, two conditions must be met, namely: first, that the manufactured article falls within the ambit of Section 186; and second, that the material is also subject to the tax imposed in Section 186.

Section 186 of the old Tax Code, construed together with Sections 184, 184-A, 185, 185-A and 185-B, all of the same code, shows that petitioner's asbestos cement products are among *those which are subject to the tax imposed by Section 186 of the old Tax Code. Thus, condition one, stated above, exists in the instant case.*

The court reiterates the ruling of the Supreme Court earlier adverted to, that cement is a "manufactured product" which sale is subject to the sales tax imposed by Section 186, as it is not exempt from percentage taxes under Section 188(c) of the old Tax Code. This shows that condition two, stated above, is also present in the case of cement used in manufacturing asbestos cement products; and, therefore, that the proviso of Section 186 applies. In other words, as stated by the Supreme Court in the ***Philippine Pipes and Merchandising Corporation case:***

> *"Cement being subject to sales tax, its cost therefore as raw material in the manufacture of concrete pipes and hollow blocks is deductible from the gross selling price of said articles."* ***(Commissioner of Internal Revenue v. Philippine Pipes and Merchandising Corporation and The Court of Tax Appeals,*** *153 SCRA 113, 118-9)*

WHEREFORE, in view of the foregoing considerations, respondent Commissioner of Internal Revenue is hereby ordered to refund to petitioner the amount of P195,379.28 as overpaid 7%

manufacturer's sales tax for the years 1968 to 1970, inclusive. No costs.

SO ORDERED.

Quezon City, Metro Manila, February 12, 1992.

ERNESTO D. ACOSTA
Associate Judge

I CONCUR:

CONSTANTE C. ROAQUIN
Acting Presiding 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 between the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

CONSTANTE C. ROAQUIN
Acting Presiding Judge
Court of Tax Appeals