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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

CONCRETE AGGREGATES, INC.,
Petitioner,

- versus - C.T.A. CASE NO. 2433

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

9/19/80

D E C I S I O N

In this petition for the review of the decision of respondent Commissioner of Internal Revenue dated July 24, 1972, reiterating his assessment of sales and ad valorem taxes for the first semester of 1968 in the total amount of ₱244,022.76, petitioner Concrete Aggregates, Inc., poses the issue of whether it is a manufacturer subject to the sales tax under Section 186 or a contractor subject to the 3% percentage tax under Section 191, both of the former National Internal Revenue Code. Broadly stated, the 3% percentage tax imposed by Section 191 of the then National Internal Revenue Code is essentially a tax on the sale of services, labor and materials of a contractor, while the 7% tax under Section 186 of the same Code is imposed upon the manufacturer or producer on the original sale, barter, exchange or transfer of title to the articles covered therein.

Petitioner is a domestic corporation duly organized and existing under the laws of the Philippines with business address at Longos, Quezon City. It has an aggregate plant at Montalban, Rizal, which processes rock aggregates mined by it from private lands. Petitioner also maintains and operates a plant at Longos, Quezon City, for the production of ready-mix concrete and plant-mixed hot asphalt (bituminous concrete mix).

It appears that sometime in 1968, respondent's agents conducted an investigation of petitioner's tax liabilities. As a consequence thereof, respondent assessed and demanded payment from petitioner in a letter dated December 14, 1970, the amount of ₱244,022.76 as sales and ad valorem taxes for the first semester of 1968, inclusive of surcharges. Petitioner disputed the said assessment in its letter dated February 2, 1971 without however contesting the portion pertaining to the ad valorem tax.

In his letter dated July 24, 1972, however, respondent reiterated the said assessment of sales and ad valorem taxes for the first semester of 1968 in the sum of ₱244,022.76, inclusive of surcharges, arrived at as follows:

Taxable sales	₱4,164,092.44
7% sales tax due thereon	₱ 291,486.47
Less: tax already paid	116,523.55
Deficiency tax due	₱ 174,962.92
Add: 25% surcharge	43,740.73
Total deficiency tax and surcharge	₱ 218,703.65
Add: 1½% ad valorem of ₱20,239.29	
25% surcharge thereon 5,059.82	25,299.11
TOTAL AMOUNT DUE & COLLECTIBLE..	₱ 244,002.76

Demand for payment of the said amount, within ten days from receipt of the letter, was therefore made by respondent on petitioner, otherwise, the same would be collected thru the summary remedies provided for by law. Instead of paying, petitioner however appealed to this Court.

Is petitioner a manufacturer subject to the 7% sales tax under Section 186 or a contractor subject to the 3% percentage tax under Section 191 of the former National Internal Revenue Code?

Relying on the distinction between a contract of sale and one for work, labor and materials as stated in Inchausti & Co. vs. Cromwell, 20 Phil. 345, which 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, petitioner contends that it qualifies as a contractor inasmuch as it produces ready-mix concrete and plant-mix hot asphalt only upon previous orders. Its contracts are not sales but contracts for a piece of work since it manufactures the articles at the customer's special order, and not for the general market. This is so because the articles are produced according to the specifications prescribed by the customer. (Memorandum of petitioner, pp. 83-84, CTA records.)

In subjecting petitioner to the sales tax as a manufacturer, respondent however alleges as special and affirmative defenses in his answer that:

> 5. According to its Articles of Incorporation, petitioner was organized <u>primarily</u> "to carry on all or any of the business of <u>manufacturers</u> of and dealers in rock, stone, cement, lime, plasters, whiting, clay gravel, sand, minerals, earth, coke, fuel, artificial stone and builder's requisites and conveniences of all kinds x x x." (Underlining supplied);
>
> 6. One of the primary purposes for which petitioner corporation was formed is "to manufacture, buy, sell and deal in concrete, asphalt and their products";
>
> 7. Petitioner is habitually engaged in the manufacture and sale of aggregates, concrete mix, asphalt mix and their products, and is mechanically equipped to mass produce its aggregates, concrete and asphalt products;
>
> 8. Being a manufacturer, petitioner is liable for the payment of the sales tax imposed by Section 186 of the National Internal Revenue Code, but said petitioner failed to pay said sales tax due nor did he file the sales tax returns required under Section 183 of the same code;

9. Consequently, petitioner is liable for the amount of ₱244,002.76 as sales tax, ad valorem tax and surcharge for the period corresponding to the first semester of 1968, which assessment is in accordance with law.

The significant and important component of the case to remember is that petitioner Concrete Aggregates, Inc., is formed and organized primarily "to carry on all or any of the businesses of manufacturers of and dealers and workers in rock, stone, cement, lime plasters, whiting, clay, gravel, sand, minerals, earth, coke, fuel, artificial stone, and builders' requisites and convenience of all kinds and incidental to the foregoing:

"(a) To quarry and crush rock, stone, limestone, etc. and to excavate in earth;

"(b) To sell and deal in rock and stone products and limestones in all forms;

"(c) To excavate, wash, screen, sell and deal in gravel and sand;

"(d) To mix and sell limestone and rock products, sand and gravel with binders of every description including asphalt and cement;

"(e) To manufacture, buy, sell and deal in concrete, asphalt and their products;

"(f) To acquire, own, maintain, operate and dispose of trucks, lighters, ships, barges and transportation equipments of all kinds for the corporation's own use;

"(g) To acquire, own, use, convey and otherwise dispose of and deal in real property or personal property or any interest threin." (Exh. "2", p. 18, BIR records.)

And to engage in these activities, petitioner maintains and operates: (Exh. "11", pp. 63-65, BIR records.)

(a) An aggregate plant at Montalban, Rizal, which processes rock aggregates mined by it from private lands. The manufacturing process consists of mining the rocks, brushing and screening them by machinery into different sizes for use as raw material in the manufacture or production of concrete and asphalt mixes and as base materials in road constructions.

(b) A concrete batching plant at Longos, Quezon City. By means of machineries, specified aggregates from its plant at Montalban are mixed with sand and cement after which water is added and the concrete mixture is sold and delivered to its customers.

(c) And at its plant site at Longos, Quezon City, petitioner has also an asphalt mixing machinery where bituminous asphalt mix is manufactured. The process employed is the same as that of the concrete mix, except that in the asphalt mix, asphalt is used as binder instead of cement.

That petitioner is engaged in the production or manufacture of ready-mix concrete and plant-mixed hot asphalt (bituminous concrete mix) is admitted by petitioner itself. (Memorandum of petitioner, p. 81, CTA records.) Manufacturers and producers of the articles enumerated in the then Sections 184 to 186 (now Sections 194 to 201) of the National Internal Revenue Code are subject to the sales tax. A "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 such process alters the quality of any such raw material or manufactured or partially manufactured products 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

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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. (Sec. 194[x], now Sec. 187[x], National Internal Revenue Code; Op. No. 210, s. of 1947, Secretary of Justice; Gen. Cir. No. V-39, No. V-39, Sept. 30, 1947.)

The term "producer" does not differ essentially from "manufacturer" except that it is more commonly used to denote a person who raises agricultural crops and puts them in a condition for the market. (50 C.J. 631.) However, the term "producer" has a distinct meaning for purposes of the sales tax under Sections 184-186 (now Sections 194-201) of the National Internal Revenue Code. To "produce" is to make available for the satisfaction of human wants. Therefore, a producer is one who makes available an article for human consumption other than a manufacturer, like a person who gathers sand and gravel from beds for the purpose of sale. (Umali, R.M., Reviewer in Taxation, 1980 Edition, p. 374.)

The fact that concrete mix and bituminous asphalt mix are manufactured by petitioner only when customers place their orders, according to their specifications which may vary in strength, aggregate size or cement/asphalt content, does not make petitioner a contractor engaged in the sale of services, and taxable as such under the then Section 191 of the National Internal Revenue Code. Petitioner merely sells, in line with the regular and legal business for which it was organized, the goods which it habitually produces - limestone and rock products, sand and gravel with binders of every description, concrete and asphalt and their products - and it is obvious that it accepted and filled such job orders for the manufacture and sale of concrete and asphalt mix according to specifications of customers for the employment and sale of the goods it produces in the ordinary course of its business to make available its articles to the public for the satisfaction of varying human wants and consumption. Where the articles made upon previous orders are those which the manufacturer makes or produces for sale to the public, the fact that a sale of such article is made upon previous order, because there was none in stock at the time, will not affect the taxability of the transaction as a sale. (Art. 1467, Civil Code; Inchausti vs. Cromwell, 20 Phil. 345; Celestino Co & Co. vs. Collector of Internal Revenue, L-8506, August 31, 1956, 99 Phil. 841; Commissioner of Internal Revenue vs. Engineering Equipment and Supply Company, L-27452, June 30, 1975, 64 SCRA 590.) And it is self-evident that due to the highly perishable nature of asphalt and concrete-mix, as petitioner itself argues, it makes impossible for them to be carried in stock because they cool and harden with time; and once hardened, they become useless. (Memorandum of petitioner', p. 86, CTA records.)

It is of common knowledge that some builders and construction work contractors, for convenience or because of lack of the necessary equipment and facilities, would prefer to order and buy ready-mix concrete or asphalt mix for their constructions or projects from manufacturers who are mechanically equipped to mass-produce the same rather than purchase sand, gravel, limestone, concrete and asphalt, and carry out the mixing themselves in such proportion as needed by them. And invariably the ready-mix concrete or asphalt ordered by them may vary in strength, aggregate size, cement or asphalt content, depending on the requirements of their respective projects or constructions. The fact therefore that ready-mix concrete or asphalt are made only when customers place their orders according to such strength, aggregate size and cement/asphalt contents as may suit or conform to the needs and project of customers does not alter the nature of the seller as a manufacturer. Surely, petitioner will not refuse filling such orders for it can easily mass-produce the ready-mix concrete or asphalt desired and needed by its various customers, and for which it is mechanically equipped to do so.

Petitioner Concrete Aggregates, Inc., does nothing more than sell the articles that it mass-produces or habitually manufactures - limestone and rock products, sand and gravel with binders of every description, concrete, asphalt and cement and their products - crushing, mixing and combining them to such form, strength, aggregate size and asphalt or cement content as its customers may desire. Anyone needing its goods, whether builder, contractor, homeowner, paver, with sufficient money, may order aggregates, concrete mix or bituminous asphalt mix of the kind manufactured by petitioner. Whoever needs and likes its manufactured goods may order and purchase them provided he pays the price. Indeed, petitioner does not serve special customers only or confines its services to them alone. That the aggregates, concrete mix or bituminous asphalt mix must meet desired specifications is neither here or there. Nobody will say that when a sawmill cuts lumber in accordance with the peculiar specifications of a customer, it thereby becomes an employee or servant of the customer, not the seller of lumber. The same consideration applies to a manufacturer of aggregates, concrete mix or bituminous asphalt. (See Celestino Co & Co. vs. Collector of

Internal Revenue, L-8505, August 31, 1956, 99 Phil. 841.)

Petitioner would, however, attempt to draw support from the words "other construction work contractor" or "other independent contractor" found in the 1968 version of the then Section 191 of the National Internal Revenue Code by contending that a majority of its contracts for ready-mix concrete and asphalt mix include delivery to job sites which involve laying the products furnished with machineries or pavers. Since in performing the laying work it is not subject to the supervision of the customer as to how the job is done but only as to the final results, petitioner would infer that it falls under the term "other independent contractor" or "other contruction work contractor" inasmuch as its work deals exclusively with the construction of roads, buildings and other building or construction works. (Memorandum of petitioner, pp. 89-90, CTA records.)

As aptly observed by respondent, no evidence was presented by petitioner to substantiate this assertion. No contracts were presented nor did petitioner cite a single road, building or construction contracted by it. What was proven, as already discussed above, was that petitioner supplies either concrete mix or asphalt mix to contractors. The supply and sale of these products can never be considered as "other construction work contractor" or "other independent contractor" under Section 191 of the then in force National Internal Revenue Code. And to enter into the construction of roads, buildings and other construction projects requires the involvement of engineers, architects, surveyors, equipped with heavy construction machineries, such as bulldozers, cranes, lifters, movable mixers, etc. (Memorandum of respondent, pp. 120-121, CTA records.)

Nevertheless, we are at a loss to see how the delivery to job sites of plant-mix bituminous concrete and asphalt which petitioner habitually manufactures and sells to its customers, in accordance with its "contract for furnishing" (Exhs. "F" & "G", pp. 71-72, CTA records), can be considered as being engaged in the business of an "independent contractor". Delivery (or furnishing) by the seller to the address of the buyer of the goods which he habitually manufactures and sells to the public, in accordance with the contract of sale, cannot by any stretch of the imagination be considered as in the pursuit of the business of an "independent contractor." Surely, it can never be seriously contended that a sawmill operator who delivers or furnishes sawn lumber of the kind, size and specification desired by the builder, in accordance with the terms of the contract of sale, is a contractor engaged in selling services. And inasmuch as the business of the sawmill operator deals with the construction of buildings, he falls under the category of "other construction work contractor." The result would be that all manufacturers and sellers of construction materials who deliver their mass-produced or mechanically-made products to job sites, in accordance with the contract of sale, would become "independent contractors" or "construction work contractors" selling services instead of articles.

And assuming arguendo that in some instances petitioner's contracts for furnishing or delivering plant mix concrete or asphalt also involve laying, as alleged by it although no evidence was presented to this effect, that does not take the transaction out of the category of sales. It is at once apparent that in such instances petitioner did not sell services but the goods that it is mechanically equipped to mass-produce. A manufacturer of refrigerators who sells a unit of the kind, type, model and specification desired by the customer does not became a contractor selling his services simply because he also delivers and installs the refrigerator in the kitchen of the customer in accordance with the contract of sale.

In view of these findings, we need not discuss the effect of the allegation of petitioner that it is registered and was issued a contractor's license by the Philippine Licensing Board for Contractors. Taxation is not so much concerned with the formalities of a license as it is with the manner in which the business is actually conducted and undertaken. A person who really manufactures and sells articles subject to the sales tax under the Revenue Code does not become a contractor for tax purposes simply because he was able to secure a licensure in the contracting business. And as to petitioner's point on the deductibility of the cost of raw materials to arrive at taxable gross selling price, the records of the case show that in computing the sales tax due and payable by petitioner, the cost of raw materials was duly allowed as deduction by respondent. (p. 35, BIR records.)

Having reached the conclusion that petitioner is a manufacturer subject to the 7% sales tax under Section 186 of the then National Internal Revenue Code, the decision of respondent dated July 24, 1972 should therefore be sustained. Accordingly, petitioner Concrete Aggregates, Inc., is hereby ordered to pay to respondent Commissioner of Internal Revenue the total amount of ₱244,022.76 representing sales and ad valorem taxes for the first semester of 1968 inclusive of surcharges, plus interest at the rate of 14% per centum from January 1, 1973 up to the date of full payment thereof pursuant to Section 183 (now 193) of the National Internal Revenue Code.

WHEREFORE, the decision appealed from is hereby affirmed at petitioner's costs.

SO ORDERED.

Quezon City, Metro Manila, September 19, 1980.

AMANTE FILLER
Presiding Judge

WE CONCUR:

CONSTANTE C. ROAQUIN
Associate Judge

ALEX Z. REYES
Associate Judge