REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

SECOND DIVISION

PACIFIC CONCRETE PRODUCTS, INC., Petitioner,	**C.T.A. CASE NO. 7408** Members:
- versus -	**CASTAÑEDA, JR.,** *Chairperson* **UY,** *and* **PALANCA-ENRIQUEZ,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	**Promulgated:** NOV 2 5 2009 10:05 a.m.

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DECISION

CASTAÑEDA, JR., J.:

Before this Court is a Petition for Review praying that a judgment be rendered canceling the assessment for deficiency excise tax issued against petitioner in the sum of ONE MILLION THIRTY-FOUR THOUSAND ONE HUNDRED NINETY-NINE PESOS AND 43/100 (P1,034,199.43), for the quarry resources it supplied for the construction and upgrading of the Manila North Tollways Project in the year 2003.

As stipulated by both parties, the following are the facts of the case:[1]

"a). Pacific Concretes Products Inc., (Petitioner) is a corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal office located at No. 15 West Avenue, Quezon City. It is duly registered with the Securities and Exchange Commission and duly authorized by law to engage in the business of manufacturer of concrete products and construction services.

b). Petitioner may be served with papers, orders, and other processes of this Honorable Court through the undersigned counsel at his office address set forth below.

c). Respondent is the Commissioner of Internal Revenue ('CIR'), duly appointed to perform the duties of his office, including, inter alia, the power to decide disputed assessments, subject to the exclusive appellate jurisdiction of this Honorable Court, pursuant to Section 4 of the National Internal Revenue Code of 1997 (1997 Tax Code).

d). Respondent holds office and may be served with all papers, orders, and other legal processes of this Honorable Court at the 5th Floor, Bureau of Internal Revenue National Office Building, Agham Road, Diliman, Quezon City.

e). On March 28, 2005, Petitioner received from Respondent's Large Taxpayers Service, through Ms. Kim S. Jacinto-Henaes, Deputy Commissioner for Special Concerns, a Formal Letter of Demand dated March 31, 2005, assessing among others the petitioner a deficiency excise tax in the amount of P2,751,727.05, inclusive of penalties, under Assessment No. TF 123-11-03.[2]

f). On May 3, 2005, Petitioner filed with the Respondent a letter-protest dated April 29, 2005,[3] followed up by another letter-protest, dated May 10, 2005 and received by the Respondent on May 11, 2005 disputing the afore-said assessment.[4]

g). On January 9, 2006, the Petitioner received from the Respondent, through Ms. Elvira R. Vera, Head Revenue Executive Assistant-Excise Large Taxpayers Service, dated December 27, 2005, its final decision on the disputed

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[1] Joint Stipulation of Facts and Issues, docket, pp. 168- 170.
[2] Exhibit "B".
[3] Exhibit "C".
[4] Exhibit "D".

assessment, which after taking into account petitioner's arguments contained in its letter-protest, finds the petitioner liable for deficiency excise tax in the recomputed amount of P1,034,199.43.[5]

h). In the said final decision, it is stated by Ms. Elvira R. Vera that 'xxx in case you are not agreeable to this decision, you may file our appeal with the Court of Tax Appeals within thirty (30) days from date of receipt hereof xxx'.

i). On April 28, 2005, Petitioner received from the Respondent a Formal Letter of Demand dated March 31, 2005 assessing the former deficiency excise tax, under Assessment No. TF 123-11-03 in the amount of P2,751,727.05, computed as follows:

Total Market Value xxx of Excisable Materials Used	P 96,177,272.73
Multiplied by Tax Rate	2%
Excise Tax Due	P 1,923,545.45
Less: Payments	15,565.36
Excise Tax Due Thereon	P 1,907,980.09
Add: 20% Interest per annum from 2-14-03 to 4-30-05	843,746.96
TOTAL AMOUNT DUE	**P 2,751,727.05**

j). In the attached schedule, the Respondent delineates the details of discrepancies it had discovered in a table verification.

k). On May 3, 2005, Petitioner filed with the Respondent a letter-protest dated April 29, 2005 disputing the assessment pursuant to the provisions of the 1997 Tax code. The letter protest was followed-up with another letter of protest made by the Petitioner dated May 10, 2005. This was received by the Respondent on May 11, 2005.

l). Acting on these letters of protests, the Respondent through Ms. Elvira R. Vera, Head Revenue Executive Assistant-Excise Large Taxpayers Service, sent to the Petitioner its final decision on the disputed assessment through a letter dated December 27, 2005, which the Petitioner received on January 9, 2006, wherein the Respondent, after reviewing the arguments and points raised by the Petitioner, nonetheless finds it liable for deficiency excise tax in the recomputed amount as follows, to wit:

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[5] Exhibit "E".

Total Market Value of Excisable Materials Used	P	33,243,713.41
Multiplied by Tax Rate	x	2%
Excise Tax Due	P	664,874.27
Less: Payments		15,565.36
Excise Tax Due Thereon	P	649,308.91
Add: 20% Interest per annum from 2-14-03 to 1-31-06		384,890.52
Total amount Due	P	1,034,199.43

xxx xxx xxx"

Hence, petitioner filed before this Court a Petition for Review on February 8, 2006.

On April 3, 2006, respondent filed his Answer and alleged, among others, that: (1) petitioner is liable for deficiency excise tax on quarry resources that it supplied for the construction and upgrading of the Manila North Tollways Project from Balintawak to Sta. Ines for the year 2003 under Section 151(A)(2) of the NIRC of 1997; (2) in the Mineral Production Sharing Agreement (MSPA), Asensio-Pinzon Aggregates Corporation (APAC) virtually transferred the undertaking to pay the excise tax due on the quarry materials processed and delivered to Leighton Contractors (Asia) Ltd. to petitioner; (3) as provided also in Paragraph 20 of the Supply Contract between petitioner and Leighton (Asia) Ltd., petitioner was required to pay all taxes and import duties under the acts, ordinance, regulations or by-laws applicable in the Philippines; and petitioner, its employees and agents have to comply with taxation laws and requirement of the Government of the Philippines.

On September 14, 2006, a pre-trial was conducted.[6]

On June 6, 2007, this Court issued a Resolution approving the parties' "Joint Stipulation of Facts and Issues" and terminating the pre-trial.[7]

[6] Docket, p. 114.
[7] Docket, p. 174.

On August 13, 2007, petitioner presented its sole witness Atty. Alexander T. Lopez. On November 7, 2007, petitioner formally offered its documentary exhibits,[8] which this Court admitted in Resolutions dated March 6, 2008[9] and October 7, 2009.

On July 9, 2008, respondent presented Ms. Elma S. Sta. Ana as his lone witness.[10] Acting on respondent's Formal Offer of Evidence[11] filed on July 22, 2008, this Court issued a Resolution dated September 30, 2008 admitting respondent's exhibits.[12]

After both parties have filed their respective memorandum, this Court issued a Resolution dated December 12, 2008, declaring the case submitted for decision.

The lone issue submitted for this Court's resolution is: whether petitioner is liable to pay excise tax given the fact that (1) the excise tax is a tax on quarry resources; (2) the petitioner is not the possessor of the product; and (3) there is an existing agreement wherein APAC, and not petitioner, shall pay the excise tax.[13]

Excise tax is imposed on goods manufactured or produced in the Philippines. Section 129 of the National Internal Revenue Code (NIRC) of 1997 reads:

> "**SEC. 129. Goods Subject to Excise Taxes.** - Excise taxes apply to goods manufactured or produced in the Philippines for domestic sale or consumption or for any other disposition and to things imported. The excise tax imposed

[8] Docket, pp. 225-311.
[9] Docket, pp. 331-332.
[10] Docket, p. 353.
[11] Docket, pp. 354-357.
[12] Docket, pp. 369-370.
[13] Docket, p. 170.

herein shall be in addition to the value-added tax imposed under Title IV.

For purposes of this Title, excise taxes herein imposed and based on weight or volume capacity or any other physical unit of measurement shall be referred to as *'specific tax'* and an excise tax herein imposed and based on selling price or other specified value of the good shall be referred to as *'ad valorem tax'*."

Under the Mineral Production Sharing Agreement (MPSA)[14] executed on July 29, 1997 by APAC and the Republic of the Philippines,[15] APAC was granted exclusive mining operations in the Contract area.[16] In return, APAC shall pay all other taxes and fees mandated by existing laws, rules and regulations.[17]

The MPSA recognized the Memorandum of Agreement[18] (MOA) which APAC and petitioner executed on November 19, 1991. In said agreement, APAC allowed and authorized petitioner to extract, mine, and haul basalt and other materials found in Montalban, Rizal covered by AQP-IV-1067. However, there was no provision identifying who should pay excise taxes due on the extracted, mined, and hauled basalt and other materials in the Contract area.

In determining who is liable to pay excise tax due on the basalt resources used for the construction and upgrading of the Manila North Tollways Project, the Court refers to the Tax Code. Section 130 of the NIRC of 1997 provides: *Jr*

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[14] MPSA No. 070-97-IV, Exhibit "G".
[15] Represented by the Secretary of the Department of Environment and Natural Resources.
[16] Par. 1.2 of the MPSA No. 070-97-IV.
[17] Par. 9.1 (l) of the MPSA No. 070-97-IV.
[18] Exhibit "F".

"**SEC. 130. Filing of Return and Payment of Excise Tax on Domestic Products.** –

(A) Persons Liable to File a Return, Filing of Return on Removal and Payment of Tax. -

(1) Persons Liable to File a Return. - Every person liable to pay excise tax imposed under this Title shall file a separate return for each place of production setting forth, among others, the description and quantity or volume of products to be removed, the applicable tax base and the amount of tax due thereon: xxx.

Should domestic products be removed from the place of production without the payment of the tax, **the owner or person having possession thereof shall be liable for the tax due thereon**.

(2) Time for Filing of Return and Payment of the Tax. – Unless otherwise specifically allowed, the return shall be filed and the excise tax paid by the manufacturer or producer before removal of domestic products from place of production: xxx *Provided, further,* **That the excise tax on nonmetallic mineral or mineral products, or quarry resources shall be due and payable upon removal of such products from the locality where mined or extracted**, but with respect to the excise tax on locally produced or extracted metallic mineral or mineral products, the person liable shall file a return and pay the tax within fifteen (15) days after the end of the calendar quarter when such products were removed subject to such conditions as may be prescribed by rules and regulations to be promulgated by the Secretary of Finance, upon recommendation of the Commissioner. For this purpose, the taxpayer shall file a bond in an amount which approximates the amount of excise tax due on the removals for the said quarter. The foregoing rules notwithstanding, for imported mineral or mineral products, whether metallic or non-metallic, the excise tax due thereon shall be paid before their removal from customs custody." (*Emphasis supplied*)

Uncontroverted are the facts that petitioner was granted authority to extract, mine, and haul basalt and other materials found in Montalban, Rizal; and that it supplied basalt for the construction and upgrading of the Manila North Tollways Project from Balintawak to Sta. Ines for the year 2003. Thus, petitioner was in possession of the basalt resources when the same were removed from the Contract area, and petitioner also delivered the basalt resources at the Pulilan Site of the Leighton Contractors (Asia) Limited, in the Manila North Tollway pursuant to the Agreement and Form of Supply Contract.[19] As petitioner was in possession of the basalt resources at the time of removal from the locality of Montalban, Rizal, it is therefore liable to pay the excise tax.

The Supreme Court consistently ruled that excise tax is imposed on the taxpayer's privilege of severing or extracting minerals or mineral products from the earth. The Government's right to exact said impost springs from the Regalian theory of State ownership of its natural resources. Said tax is due and payable only **upon removal of the minerals or mineral products, or quarry resources from the locality where mined or extracted.**[20]

Proceeding therefrom, petitioner is liable to pay excise tax of two percent (2%) based on the actual market value of the gross output of basalt, which petitioner supplied for the construction and upgrading of the Manila North Tollways Project, at the time of removal. Section 151 of the NIRC of 1997 provides:

> "**SEC. 151. Mineral Products.** -
>
> **(A) Rates of Tax.** - There shall be levied, assessed and collected on minerals, mineral products and quarry resources, excise tax as follows:
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> xxx xxx xxx

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[19] Exhibit "J".
[20] *Commissioner of Internal Revenue vs. Court of Appeals and Atlas Consolidated Mining and Development Corporation* (G.R. No. 86785, November 21, 1991[204 SCRA 182]); *Republic Cement Corporation v. Commissioner of Internal Revenue* (No. L-20660, June 13, 1968 [23 SCRA 971]); and *Cebu Portland Cement Co. vs. Commissioner of Internal Revenue*, (No. L-18649, February 27, 1965 [13 SCRA 333]).

(2) **On all nonmetallic minerals and quarry resources, a tax of two percent (2%) based on the actual market value of the gross output thereof at the time of removal, in the case of those locally extracted or produced**; or the value used by the Bureau of Customs in determining tariff and customs duties, net of excise tax and value-added tax, in the case of importation.

xxx xxx xxx

(B) For purposes of this Section, the term -

(1) *'Gross output'* shall be interpreted as the actual market value of minerals or mineral products, or of bullion from each mine or mineral land operated as a separate entity, without any deduction from mining, milling, refining (including all expenses incurred to prepare the said minerals or mineral products in a marketable state), as well as transporting, handling, marketing or any other expenses: xxx.

xxx xxx xxx

(4) *'Quarry resources'* shall mean any common stone or other common mineral substances as the Director of the Bureau of Mines and Geo-Sciences may declare to be quarry resources such as, but not restricted to, marl, marble, granite, volcanic cinders, **basalt**, tuff and rock phosphate: *Provided,* That they contain no metal or other valuable minerals in economically workable quantities." (*Emphasis supplied*)

In his Final Decision on Disputed Assessment dated December 27, 2005, respondent ruled:

"xxx xxx xxx

This Office fully agrees with your position that the excise tax due must be based on the actual quantity of quarry materials used on the completed portion. Thus, the previously assessed taxable base covering the period August 31, 2004 is correspondingly adjusted using the value stated in the Subcontract Payment Summary Sheet submitted to this Office.

xxx xxx xxx

It is advised that pursuant to Section 151(A) of the Tax Code, the excise tax on quarry resources shall be based on the actual market value of the gross output at the time of removal, in the case of those locally extracted or produced. For this

> purpose, gross output shall be interpreted as the actual value of mineral products without any deduction from mining, as well as transporting, handling, marketing or any other expenses. In other words, the excise tax shall be based not upon the cost of production or extraction but on the price which the same would command in the ordinary course of business, that is to say, when offered for sale by a willing seller but not under obligation to sell and purchased by another who is willing to buy, but under no obligation to purchase. Consistent with the position of this Office in issue no. 2, the actual market value of the quarry materials for excise tax purposes includes transportation and handling charges. Relative thereto, your position that the delivery charge be excluded in the taxable base cannot be given due course. It is informed further that the value-added tax included in the selling price was not considered in the computation of your deficiency excise tax. Hereunder is the recomputed deficiency excise tax due:

Total Market Value of Excisable Materials Used	P 33,243,713.41
Multiplied by Tax Rate	x 2%
Excise Tax Due	P 664,874.27
Less: Payments	15,565.36
Excise Tax Due Thereon	P 649,308.91
Add: 20% Interest per annum from 2-14-03 to 1-31-06	384,890.52
Total Amount Due	**P 1,034,199.43**

xxx xxx xxx"

This Court reviewed the records of the case and found no evidence showing that respondent made an error in the re-computation of deficiency excise tax. Also, petitioner failed to present evidence showing that the re-computed deficiency excise tax is erroneous. Long-settled is the rule that assessments are presumed correct and made in good faith. The taxpayer has the duty of proving otherwise. In the absence of proof of any irregularities in the performance of official duties, an assessment will not be disturbed. Even an assessment based on estimates is *prima facie* valid and lawful where it does not appear to have been arrived at arbitrarily or capriciously. The burden of proof is upon the complaining party to show clearly that the assessment is erroneous. Failure to present proof of error in the assessment will justify the judicial affirmance of said assessment.[21]

WHEREFORE, premises considered, the instant Petition for Review is hereby **DENIED**. Accordingly, petitioner is hereby **ORDERED** to **PAY** respondent the deficiency excise tax in the amount of ONE MILLION THIRTY-FOUR THOUSAND ONE HUNDRED NINETY-NINE PESOS AND 43/100 (P1,034,199.43) for the quarry resources it supplied for the construction and upgrading of the Manila North Tollways Project for taxable year 2003.

In addition, pursuant to Sections 248 and 249 of the NIRC of 1997, petitioner is hereby **ORDERED** to **PAY** a penalty equivalent to twenty five percent (25%) of the amount due, and a delinquency interest equivalent to twenty percent (20%) per annum on the amount of P1,034,199.43 from February 8, 2006 until such amount is paid in full.

SO ORDERED.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

WE CONCUR:

ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

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[21] *Marcos II vs. Court of Appeals*, G.R. No. 120880, June 5, 1997 (273 SCRA 47).

ATTESTATION

I attest that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court's Division.

JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ERNESTO D. ACOSTA
Presiding Justice