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ANGELES ELECTRIC CORPORATION,
Petitioner,

versus

C.T.A. CASE NO. 1773

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

12/8/75

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DECISION

Petitioner appealed from the decision of respondent dated March 22, 1966 holding it liable for deficiency franchise and percentage taxes inclusive of 25% surcharge, in the amount of ₱28,883.72 covering the period from January 1, 1956 to September 30, 1960.

It appears that on April 17, 1923, the Municipal Council of Angeles, Pampanga, granted a franchise to Teresa G. de Nepomuceno to install, operate and maintain an electric plant and power system in Angeles, Pampanga, and to supply the municipality with electric light, heat and power for a period of thirty five (35) years. Among the conditions set forth in the franchise was the payment quarterly by the grantee of 1% of her gross income during the first twenty (20) years and 2% during the next 15 years remaining life of the franchise. Subsequently, under a deed of agreement dated November 15, 1949, the original grantee transferred to petitioner Angeles Electric Corporation for a valuable consideration, all her rights over the franchise.

The said municipal franchise granted under the Authority of Act 667, as amended, expired on April 22, 1958. However, petitioner-taxpayer was granted under Republic Act No. 2341, approved on June 20, 1959, a new franchise subject to the terms and conditions of Act 3636.

In a letter dated March 3, 1961, respondent assessed petitioner and demanded payment for deficiency franchise and percentage taxes, inclusive of 25% surcharge, in the amount of ₱170,288.02 covering the period from October 1, 1952 to September 30, 1960, computed as follows:

Total gross receipt per audit ...	₱6,007,505.77
5% franchise and 3% percentage taxes due thereon	279,121.27
Less: Amount paid	169,173.89
Balance	₱ 109,947.38
Add: 25% surcharge	27,486.85
Amount erroneously refunded . . .	32,853.79
TOTAL AMOUNT DUE	₱ 170,288.02.

Petitioner filed a request for cancellation and withdrawal of the assessment on March 29, 1961 which was denied by respondent in a letter dated March 22, 1966. The original assessment of ₱170,288.02 was reduced to ₱88,443.72 covering the period from January 1, 1956 to September 30, 1960, computed as follows:

Period	Gross Receipts	Tax Due	Kind of Tax
1-1-56 to 4-22-58	₱1,717,062.55	₱85,853.12	Franchise 5%
4-23-58 to 6-19-59	1,062,699.71	31,880.99	Percentage 3%
6-20-59 to 9-30-60	1,438,310.20	71,915.51	Franchise 5%
TOTALS	₱4,218,072.46	₱189,649.62	
Less: Amount Paid		118,894.64	
Balance		₱ 70,754.98	
Add: 25% surcharge		17,688.74	
TOTAL AMOUNT DUE		₱ 88,443.72	

Respondent computed the aforesaid revised assessment on the theory that:

> (a) For the period from 1 January 1956 to 22 April 1958 when petitioner had a municipal franchise it was subject to the 5% franchise tax in accordance with the Supreme Court decision in the Hoa Hin cases (G.R. No. L-9616, May 25, 1959; G.R. No. L-11783, May 25, 1959);
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> (b) For the period from 23 April 1958 to 19 June 1959, when petitioner was operating without a franchise, it was subject to 3% tax imposed under section 191 of the Tax Code; and
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> (c) For the period from 20 June 1959 to 30 September 1960, it was subject to the 5% franchise tax in accordance with the ruling of the Supreme Court in the cases Carcar Electric & Ice Plant Co., Inc. (G.R. No. L-9257, October 17, 1956) and Visayan Electric Co., S.A. (G.R. Nos. L-1009 and 10100, August 30, 1957).

Not satisfied with the reduction petitioner, on June 28, 1966, appealed to this Court.

The issues posed to this Court for resolution are as follows:

1. Whether or not the right of respondent to collect from the petitioner the sum of ₱88,443.72 as deficiency franchise and percentage taxes covering the

period from January 1, 1956 to September 30, 1960 has prescribed;

2. Whether or not respondent is estopped from assessing and collecting the aforesaid taxes in view of the resolution of the Board of Tax Appeals in Tax Appeal Case No. 160; and

3. Whether or not petitioner is liable to pay a surcharge of 25% for failure to pay the aforesaid deficiency taxes.

Petitioner contends that from November 12, 1966, the date the Answer of respondent was filed in Court to March 3, 1961, the date the original assessment was issued, more than five years lapsed and, therefore, the right of respondent to collect the aforesaid assessment had prescribed in accordance with Section 332(c) of the Tax Code. We find petitioner's contention without merit.

It is a settled rule that the five-year prescriptive period fixed by the Revenue Code within which the government may collect the tax is to be counted from the last revised assessment made at the instance of the taxpayer (Querol v. Collector of Internal Revenue, 6 SCRA 304). The record of this case in effect shows that after receipt of petitioner's motion for reconsideration respondent ordered the Regional Director of Pampanga for further investigation and, as a result thereof a revised assessment was issued reducing the amount of the deficiency tax.

It is likewise a established doctrine that an appeal by the taxpayer to the Court of Tax Appeals is at the same time an action for collection by the government since the latter is a concomitant of the appeal (Collector v. Bohol Land Transportation, 107 Phil. 965, 973; General Insurance and Surety Co. v. Comm. of Int. Rev., G.R. No. L-29895, April 30, 1963).

In the light of the foregoing doctrines, the right of respondent to collect the deficiency tax in question had not prescribed when petitioner appealed to this Court on June 28, 1966 since the period for collection started to run only on March 22, 1966 when respondent revised his previous assessment reducing it to ₱88,443.72. Less than four months had elapsed.

Respondent assessed the deficiency tax from January 1, 1956 to April 1958 at the rate of 5%; 3% from April 23, 1958 to June 19, 1959 while petitioner operated without a franchise which expired on April 22, 1958; and 5% from June 20, 1959, when petitioner obtained a new franchise, to September 30, 1960. This assessment is to our mind correct, and as a matter of fact petitioner does not question its correctness.

However, petitioner raises the defense of <u>res adjudicata</u>. It claims that respondent is barred from using the aforesaid rates because of a prior judgment rendered on December 3, 1953 by the defunct Board of

Tax Appeals in a case entitled In Re Claim for Refund of Overpaid Franchise Tax - Angeles Electric Corporation, Tax Appeal No. 160, wherein the Board held that under its municipal franchise of April 17, 1923 petitioner is only liable for 1% franchise tax for the first 20 years of its existence and 2% for the remaining 15 years. In this respect it is well to note that Case No. 160 involved taxes for the 2nd quarter of 1951 to the third quarter of 1953.

In the defense of res adjudicata there should be identity of parties, identity of subject matter and identity of cause of action (Moran's Commentaries of the Rules of Court, Vol. II, p. 363, 170 ed.). This case involves the deficiency tax from January 1, 1956 to September 30, 1960 while Case No. 160 aforesaid involves taxes before said period. Moreover, Case No. 160 involved the municipal franchise tax of petitioner while the present case involves not only the municipal franchise but also the law applicable after the expiration of the life of said franchise on April 22, 1958 and the new franchise which petitioner obtained on June 20, 1959. Needless to say there is no identity of subject matter between the two cases.

Petitioner having failed to pay the tax due the government, it follows that the 25% surcharge is imposable pursuant to Section 259 of the Tax Code. The imposition neither the Commissioner nor the Courts may waive the same. (Koppel [Phils.] Inc. v. Collector of Internal Revenue, G.R. No. L-1977, September 21, 1950, 48 Off. Gaz. p. 98; Yutivo Sons Hardware Co. v. Coll. of Int. Rev., 1 SCRA 160; Purakan Plantation Co. v. Domingo, 15 SCRA 151.)

WHEREFORE, the decision appealed from is hereby affirmed. Without pronouncement as to costs.

SO ORDERED.

Quezon City, December 8, 1975.

RAMON L. AVANCEÑA
Associate Judge

WE CONCUR:

ROMAN M. UMALI
Presiding Judge

ESTANISLAO R. ALVAREZ
Associate Judge