REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ALHAMBRA INDUSTRIES, INC.,
Petitioner,

- versus -

C.T.A. Case No. 4619

THE COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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12/01/93

DECISION

There is no dispute as to the basic facts of the case at bar.

Petitioner is a domestic corporation engaged in the manufacture and sale of cigar and cigarette products.

On May 7, 1991, petitioner received from respondent a letter dated April 26, 1991 with the information that there was found due from it deficiency ad valorem tax in the total amount of P488,396.62, inclusive of increments, on the removals of cigarettes during the period starting November 2, 1990 to January 22, 1991 (Annex "A").

The computation is shown hereunder:

Total AVT Due per Manufacturer's Declaration	P4,279,042.33
Less: AVT Paid under BIR Ruling No. 473-88	3,905,348.85
Deficiency AVT	P 373,693.48
Add: Penalties:	
25% Surcharge (Sec. 248(c)(3) NIRC)	93,423.37
20% Interest (P467,116.85 x 82/360 days	21,279.77
Total Amount Due	P 488,396.62

On May 6, 1991, the parties met in a formal conference pursuant to Section 229 of the Tax Code. Petitioner registered its protest to the proposed assessment in the said conference

In a letter dated May 22, 1991 which was received by respondent on even date, petitioner thru counsel filed a protest against the proposed assessment with a request that the same be withdrawn and cancelled (Annex "B").

On May 31, 1991, petitioner received respondent's letter dated May 27, 1991 denying its protest and request for cancellation and withdrawal of said disputed assessment stating that this decision is final, and at the same time requested payment of the revised amount of P520,835.29, interest updated, within ten(10) days from receipt thereof (Annex "C").

In a letter dated June 10, 1991, which respondent received on the same day, petitioner requested for a reconsideration of respondent's denial of its protest (Annex "D").

Without waiting for respondent's reply to its request for reconsideration, petition filed on June 19, 1991 the instant petition for review with the prayer that the deficiency excise tax assessment be cancelled and withdrawn (pp. 1-7, C.T.A. Records).

On June 25, 1991, petitioner received from the respondent a letter dated June 21, 1991, denying its request for reconsideration declaring again that this decision is final and reiterating its demand for the payment of the deficiency excise tax assessment of P520,835.29 within ten (10) days from receipt thereof (Annex "E").

On July 8, 1991, petitioner paid under protest the disputed ad valorem tax assessment in the sum of P520,835.29, inclusive of increments, as evidenced by the following documents:

Annex "G" CB Confirmation Receipt No. B22711233 dated July 8, 1991 for P520,835.29

Annex "H" BIR Payment Order No. C1131497 dated July 8, 1991 for P520,835.29

On July 11, 1991, petitioner filed with the Bureau of Internal Revenue, Appellate Division its claim for tax refund in the amount of P520,835.29, representing the alleged deficiency ad valorem tax paid under protest (Annex "I").

On July 24, 1991, petitioner filed with this Court an Amended Petition for Review with the prayer that the deficiency excise tax assessment be cancelled and withdrawn and that respondent be ordered to grant the refund claimed (pp. 20-26, C.T.A. records).

The issue which this Court has to resolve is whether or not petitioner is entitled to the refund of P520,835.29, representing its payment under protest of the disputed deficiency excise tax assessment for the period from November 2, 1990 to January 22, 1991.

To be entitled to the refund claimed, petitioner has to establish that respondent's deficiency excise tax assessment has no legal basis and should be cancelled and withdrawn.

The subject deficiency excise tax assessment resulted out of petitioner's use of the computation mandated by B.I.R. Ruling No. 473-88 dated October 4, 1988 (Annex "J") as basis for computing the 15% ad valorem tax due on its removals of cigarettes for the period November 2, 1990 to January 22, 1991. The correct computation, pursuant to said ruling, is illustrated by way of example as follows:

P44.00 x 1/11	=	P4.00	VAT
P44.00 - P4.00	=	P40.00	Price without VAT
P40.00 x 15%	=	P6.00	Ad valorem tax

The above computation which shows that VAT is excluded from the tax base in computing for the 15% excise tax due is allegedly in accordance with Section 127(b) of the Tax Code, as amended by Executive Order No. 273, to wit:

> "SEC. 127. Payment of excise taxes on domestic products. -
>
> xxx xxx xxx
>
> (b) Determination of gross selling price of goods subject to ad valorem tax. - Unless otherwise provided, the price, <u>excluding the</u>

> value-added tax, at which the goods are sold at wholesale in the place of production or through their sales agents to the public shall constitute the gross selling price. xxx" (Underscoring supplied)

xxx xxx xxx

Thereafter, respondent issued BIR Ruling No. 017-91 on February 11, 1991 (Annex "K") revoking BIR Ruling No. 473-88. It include back the value-added tax to the gross selling price in determining the tax base for computing the 15% ad valorem tax on native cigarettes. Cited as basis by respondent is Section 142 of the Tax Code, as amended by E.O. No. 273 quoted below:

> "SEC. 142. Cigar and cigarettes. -
>
> xxx xxx xxx
>
> For purposes of this section, "manufacturer's or importer's registered wholesale price" shall include the ad valorem tax imposed in paragraphs (a), (b), (c) or (d) hereof and the amount intended to cover the value added tax imposed under Title IV of this Code. (Underscoring supplied)

Respondent sought to apply the revocation retroactive to petitioner's removals of cigarettes for the period starting from November 2, 1990 to January 22, 1991 on the ground that petitioner allegedly acted in bad faith which is an exception to the rule on non-retroactivity of B.I.R. rulings. Section 246 of the Tax Code provides as follows:

> "SEC. 246. Non-retroactivity of rulings.- Any revocation, modification or reversal of any of the rules and regulations promulgated in

accordance with the preceding section or any of the rulings or circulars promulgated by the Commissioner shall not be given retroactive application if the revocation, modification, or reversal will be prejudicial to the taxpayers except in the following cases: (a) where the taxpayer deliberately misstates or omits material facts from his return or in any document required of him by the Bureau of Internal Revenue; (b) where the facts subsequently gathered by the Bureau of Internal Revenue are materially different from the facts on which the ruling is based; or (c) where the taxpayer acted in bad faith." (Underscoring supplied.)

To be noted is the difference in the taxable base on which the excise tax is to apply as mandated by the two incompatible BIR rulings. The deficiency excise tax assessment can be attributed to the said difference.

The question as to the correct computation of the excise tax on cigarettes in the case at bar has been sufficiently addressed by BIR No. 17-91 dated February 11, 1991, revoking BIR Ruling No. 473-88 dated October 4, 1988, to wit:

> "It is to be noted that Section 127(b) of the Tax Code as amended applies in general to domestic products and excludes the value-added tax in the determination of the gross selling price, which is the tax base for purposes of the imposition of ad valorem tax. On the other hand, the last paragraph of Section 142 of the same Code which includes the value-added tax in the computation of the ad valorem tax, refers specifically to cigar and cigarettes only. It does not include/apply to any other articles or goods subject to the ad valorem tax. Accordingly, cigarettes must perforce prevail over Section 127(b), a general provision of law insofar as the imposition of the ad valorem tax on cigar and cigarettes is concerned.

> Moreover, the phrase "unless otherwise provided" in Section 127(b) purports of exceptions to the general rule contained therein, such as that of Section 142, last paragraph thereof which explicitly provides that in the case of cigarettes, the tax base for purposes of the ad valorem tax shall include, among others, the value-added tax.

This Court agrees with said ruling and interpretation.

Upon knowledge and information of the existence and effectivity of BIR Ruling No. 017-91, Petitioner immediately implemented the method of computation mandated therein by including back that VAT in computing for the tax base for purposes of the 15% ad valorem tax.

Well-entrenched also is the rule that "rulings and circulars, rules and regulations, promulgated by the Commissioner of Internal Revenue would have no retroactive application if to so apply them would be prejudicial to taxpayers, except in the three instances enumerated in Section 246 of the NIRC.". (**PLDT vs. CIR**, CTA Case No. 4056, December 28, 1988 citing **ABS-CBN Broadcasting Corporation vs. CTA and CIR**, 108 SCRA 142 and **CIR vs. Buroughs, Ltd. and CTA**, 142 SCRA 324.) Without doubt, petitioner would be prejudiced by a retroactive application of the revocation as it would be assessed deficiency excise tax.

What is left to be answered is whether petitioner acted in bad faith in using BIR Ruling No. 473-88 in computing its excise tax liabilities for the period from November 2, 1990 to January 22, 1991 to warrant a retroactive application of BIR Ruling No. 017-91.

Respondent's allegation of bad faith is anchored on the following:

> (1) BIR Ruling No. 473-88 dated October 4, 1988 was allegedly never published or circularized and even Insular-Yebana Tobacco Corporation which requested said ruling did not implement the same and neither did the big cigarette factories availed of it.
>
> (2) Petitioner allegedly, in violation of Section 127(c) of the NIRC, failed to submit its amended Manufacturer's Declaration before shifting its manner of computing the ad valorem tax due on the cigarettes it produced and did not secure the approval of the BIR unlike other cigarette manufacturers which made official consultation with the BIR and were duly informed.

On the other hand, petitioner's claim that it acted in good faith is based on the following:

> (1) BIR Ruling No. 473-88 was published on February 20, 1989 in Business World, a newspaper of general circulation in the Philippines and until BIR Ruling 017-91 was never qualified nor disclaimed by the Bureau of Internal Revenue such that petitioner's reliance thereon for the period under review cannot be faulted.
>
> (2) The aforesaid BIR ruling was clear and categorical, leaving no room for any other interpretation that petitioner did not see the need to consult BIR before implementing the same.
>
> (3) Following the procedure it adopted through the years, petitioner find no practical reason to file an amended Manufacturer's Declaration since it is only in instances where the gross selling price is adjusted that petitioner files one. In the instant case, it

is only the excise tax due that was changed.

> (4) After the subsequent revocation of BIR Ruling No. 473-88 by BIR Ruling No. 017-91, petitioner immediately reverted to the previous method by which it computes for the excise tax due, which includes the VAT.

Bad faith does not simply connote bad judgment or negligence, it imports a dishonest purpose or some moral obliquity and conscious doing of wrong. It partakes of the nature of fraud. **(Board of Luquidators vs. Kalaw.** 20 SCRA 1007). It is a breach of a known duty through some motive of interest or ill will. **(Lopez vs. Pan American Airways,** 16 SCRA 438.). Being a state of mind, it is indicated by acts and circumstances and is provable by circumstantial evidence. **(Laig vs. Court of Appeals,** 82 SCRA 305.)

Going over the records of the case, We find no convincing evidence that petitioner's implementation of the computation mandated by BIR Ruling No. 473-88 was ill motivated or attended with dishonest purpose that partakes of the nature of fraud. We observed that BIR Ruling No. 473-88 was dated October 4, 1988 and published on February 20, 1989 but petitioner used the computation therein only for the period starting November 2, 1990 to January 22, 1991. In the intervening period after October 4, 1988 but prior to November 2, 1990, petitioner used the previous computation but did not file a claim for refund of the excise tax it overpaid. Even with the publication of BIR Ruling No. 473-88 in a newspaper of general circulation on February 20, 1989, respondent did not disclaim or bother to correct it. Only upon the issuance of BIR Ruling No. 017-91 dated February 11, 1991 that the aforesaid ruling was revoked. Upon knowledge thereof, petitioner immediately reverted to the computation mandated by BIR Ruling 017-91.

It is a established doctrine that "a taxpayer cannot be convicted for taking the tax authorities at their word." (**International Business Machines vs. U.S.**, 343 F 2d [1965] p. 923.) To impute bad faith and slap deficiency assessment on petitioner for merely relying on respondent's own assurance in the form of a ruling that it is the correct computation is reprehensible for it is inconsistent with justice and fair play.

While it is true that the Government is never estopped from collecting taxes legally due it because of mistakes or errors on the part of its agents, this stands qualified by Section 246 of the Tax Code in the sense that rulings issued by the Commissioner of Internal Revenue would have no retroactive application if to so apply them would be prejudicial to taxpayers, except in the three instances enumerated therein.

The publication of BIR Ruling No. 473-88 in a news paper of general circulation serves as sufficient notice to all which are similarly situated and petitioner's availment thereof cannot be taken against it. The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes or altogether avoid them, by means which the law permits, cannot be doubted. (**Delpher Trades Corp. vs. Intermediate Appellate Court,** 157 SCRA 349.)

As to the contention that petitioner's failure to submit the amended Manufacturer's Declaration for respondent's approval is tantamount to bad faith, We find said conclusion untenable in the light of the explanation given by petitioner. The evidence on hand do not warrant such inference.

Premises considered, We resolve that the deficiency excise tax assessment issued by respondent against petitioner in the amount P520,835.29, inclusive of increments, is without legal basis because of the prohibition against the retroactive application of the revocation of BIR rulings in the absence of bad faith on the part of the petitioner. The aforementioned deficiency excise tax assessment is hereby cancelled and withdrawn.

Inasmuch as petitioner has already paid under protest the foregoing deficiency excise tax assessment of P520,835.29 as clearly established by the evidence submitted, the same should be refunded to petitioner.

WHEREFORE, respondent Commissioner of Internal Revenue is hereby ordered to refund to petitioner the amount of P520,835.29.

SO ORDERED.

Quezon City, Metro Manila, December 1, 1993.

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

MANUEL K. GRUBA
Associate Judge

RAMON O DE VEYRA
Associate Judge

CERTIFICATION

I hereby certify that this decision was reached after due consultation among the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge
Court of Tax Appeals