REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

WIDMARK & PLATZER, AB,
Petitioner,

versus

C.T.A. CASE NO. 1962

5/31/71

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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# D E C I S I O N

This is a petition to review the decision of respondent, dated August 27, 1968, holding petitioner liable for the amount of ₱20,880.46, as deficiency contractor's tax and 25% surcharge for the period from 1962 to 1964, computed as follows:

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|---|---|
| Gross receipts per books (1962-1964) .. | ₱3,291,392.41 |
| Add: Additional receipts per investigation ............... | 536,812.72 |
| Total receipts subject to tax . . | ₱3,828,205.13 |
| 3% contractor's tax due thereon | 114,846.15 |
| Less: Tax already paid . . . . . | 98,141.78 |
| Deficiency tax due . . . . . | ₱ 16,704.37 |
| Add: 25% surcharge . . . . . | 4,176.09 |
| TOTAL AMOUNT DUE . . . . . | ₱ 20,880.46 |

Petitioner is a foreign corporation duly licensed to transact business in the Philippines. In August, 1962, it entered into a contract with the Calvento Paper Corporation to construct the Calvento Paper Manufacturing Plant at Barrio Manggahan, Pasig, Rizal. Among the pertinent provisions of the contract are the following:

III. GUARANTEED SUM - The BUILDER shall construct for the OWNER, at the place hereinabove stated, the Calvento Paper Manufacturing Plant, in accordance with the plans and specifications and related documents (Annexes A to F) at a Guaranteed Maximum Total Cost of FIVE HUNDRED SIXTY-FIVE THOUSAND (₱565,000.00) PESOS, Philippine Currency, with saving participation.

By guaranteed maximum total cost is meant, the total cost of construction of the said work, including cost of materials, labor, Workmen's Compensation, Fire and Liability Insurance, rental of equipment, fuel, transportation and the Builder's fee of 15% of the total "Cost of Work" as hereunder defined, but excluding expenses for such items as are, pursuant to the provisions hereinafter set out, chargeable to the OWNER.

For the purpose of this agreement, the "Cost of Work" shall be understood to embrace all expenses on labor, materials, as well as other expenses incidental to the performance of the construction as follows:

1. All labor directly employed for the construction of the said plant, (including workmen's compensation insurance thereon and social security system), salaries of Project Engineer, timekeeper, storekeeper and other men assigned permanently in the job;

2. Cost of materials incorporated into the construction including incidental expenses for testing of concrete samples, transportation, handling, storage, taxes, and similar charges, if any;

3. All payments made to subcontractor, if any, for any

trade or phase of work within the scope of this agreement;

4. All freight expenses, trucking, telegraph, telephone and like charges;

5. All expenses incurred in temporary water connection and electric service installation as may be necessary for the prosecution of the work, cost of maintaining the same throughout the period of construction, and cost of water and electric power consumption;

6. Plumbing Fees;

7. Cost of maintaining security guards to protect the premises throughout the period of construction;

8. Rental of equipment, machinery, etc.

9. Any and all other charges incurred in the prosecution of the work covered by this agreement, other than those specifically excluded as itemized below.

That for the purpose of this agreement, the following expenses necessary for the prosecution of the work shall be paid for by or charged to the OWNER and are excluded from the computation of the guaranteed maximum total cost.

1. Licenses, permits and easements of a permanent nature or permanent use, for permanent structure, or permanent changes in existing facilities;

2. Salaries of, as well as expenses incurred by, the Resident Inspector or Inspectors maintained by the Owner, or the Engineer at the Job site as the Owner or the Engineer's representative for the proper

execution of the work;

3. Cost of survey work on the property, involving relocation of monuments or verification of property lines;

4. Cost of construction and maintenance of the Access Road to the Project;

5. All other incidental expenses which are expressly and specifically set forth in the specifications and in the General Conditions of the Construction Agreement as having to be borne directly by the OWNER.

That the following incidental expenses necessary for the execution of the work shall be for the direct account of the BUILDER:

1. Construction permits, inspections, fees and licenses of temporary nature necessary for the prosecution of the work;

2. The builder's general overhead expenses and salaries of the builder's staff.

In the event that the cost of the said work exceeds the Guaranteed Maximum Total Cost of FIVE HUNDRED SIXTY FIVE THOUSAND (₱565,000.00) PESOS, the excess amount shall be charged to the BUILDER, payment of which shall be guaranteed by the Performance Payment Bond hereinafter stipulated; Provided, however, that should the actual cost of the said work, including the BUILDER'S fee of 15% be less than the Guaranteed Maximum Total Cost, the savings shall accrue to the OWNER but the BUILDER shall be entitled to an additional fee equivalent to 50% of the savings.

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V. PAYMENTS - The BUILDER shall received from the OWNER, upon signing of this contract, a Revolving Fund in the amount of TWENTY THOUSAND (₱20,000.00) pesos, for the payment of labor and minor purchases that may be necessary for the execution of the work; provided, however, that the OWNER may withdraw said Revolving Fund should the BUILDER use the same for any other purpose not related to this agreement. The OWNER shall replenish the said Revolving Fund, upon presentation by the BUILDER of a statement of expenses for labor and reimbursement of cost of materials and minor purchases paid for during the period proceeding each replenishment, which statement of expenses shall be duly certified by the OWNER'S Resident Engineer or any other duly authorized representative.

The OWNER may directly pay for materials ordered by the BUILDER upon the latter's request, provided that such materials are within the scope of this agreement, and provided further that such request for payment are accompanied by proper receipts, invoices, or the like, duly certified by the Resident Inspector.

The BUILDER'S fee of 15% of the "Cost of the Work" shall be paid to the BUILDER at the termination of the job provided that:

1. The Guaranteed Maximum Total Cost shall not have been exceeded;

2. The work is finally acceptable to the OWNER; and

3. The BUILDER shall have presented all certificates of inspection issued by the authorities concerned, and the BUILDER's own sworn statement relative to full payment of labor and materials employed

in the work under the terms of this agreement.

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VII. PERFORMANCE BOND - The BUILDER, upon signing of this contract shall furnish and execute in favor of the OWNER a surety bond, for Eighty Four Thousand Seven Hundred Fifty Pesos (₱84,750.00), 15% of the guaranteed maximum total cost, conditioned upon the faithful performance of the work as well as payment of labor and materials employed in the work under this agreement; conditioned further that in case changes in the work, or in the plans and specifications are ordered in writing by the OWNER even without prior notice to the bondsmen as provided in Article VI hereinabove, such changes shall not in any way invalidate the bond hereto referred, but shall continue to remain in effect for the duration of the guaranteed. Such bond shall be taken from a surety company acceptable to the OWNER. (See Exhs. B & 1, pp. 14-19, BIR rec.)

In 1965, after the completion of the Calvento Paper Manufacturing Plant, petitioner's books of accounts and pertinent records were examined by examiners of the Bureau of Internal Revenue. As a result thereof, said examiners recommended that an assessment be made against petitioner for deficiency contractor's tax and 25% surcharge because of unreported gross receipts realized from the Calvento contract from 1962 to 1964 amounting to ₱536,812.72. However, before making an assessment against petitioner, as recommended by the examiners, respondent asked petitioner to show cause why it should not be held liable for the contractor's tax on the said sum of ₱536,812.72.

In a reply dated September 30, 1966, petitioner's representatives, Sycip, Gorres, Velayo & Co., alleged that the said sum of ₱536,812.72 was not part of the taxable gross receipts of petitioner on the following grounds:

> This deficiency assessment proposed against the corporation arose out of your treating the entire cost of construction of the Calvento Paper Corporation building in the amount of ₱536,812.72 as subject to the 3% contractor's tax. . .
>
> . . . We do not dispute the fact that the corporation is engaged in the business of construction. However, what we dispute is the basis of the contractor's tax. In construing the building contract with Calvento Corporation, it is necessary that the provisions of the entire contract should be considered and not isolating the various provisions from one another. <u>You will please note from the terms of the contract that the Calvento Corporation purchased directly the materials used for the building. It also gave to the contractor a revolving fund of ₱20,000 which is replenished from time to time to meet the needs of construction. Likewise, the owner agreed</u> to <u>pay 15% of the total cost of the work as builder's fee. Under these terms, we believe that the corporation should not be made liable for the 3% contractor's tax on the total cost of the building. If it were required to pay the contractor's tax on the total cost of the building, then it would be paying on an amount which it never received at all. Under Section 191 of the Tax Code, the contractor's tax is based on the gross receipts. Certainly, the total cost of the building cannot</u>

<u>be considered as the gross receipts of the corporation</u>. (pp. 59-60, BIR rec.; underlining supplied.)

After further investigation to determine the correctness of the claim of petitioner, respondent finally held that the former is liable for the contractor's tax on the said sum of ₱536,812.72. The protests of petitioner against the assessment having been denied, respondent's decision was appealed to this Court.

Petitioner admits that it was an independent contractor in connection with the construction of the Calvento Paper Manufacturing plant. The only issue raised is whether or not the entire construction cost of the Calvento Paper Manufacturing Plant in the amount of ₱536,812.72 forms part of petitioner's gross receipts under Section 191 of the Revenue Code, which provides for a tax of 3% of the gross receipts of building and other construction work contractors.

Petitioner vehemently contends that, for purposes of the contractor's tax, its gross receipts consist merely of the builder's fee of 15% of the cost of construction of the Calvento Paper Manufacturing Plant. On the other hand, respondent claims that the taxable gross receipts of petitioner include the entire construction cost of ₱536,812.72

and not merely the builder's fee of 15% of said construction cost.

The allegation of petitioner that the Calvento Paper Corporation purchased directly the materials used in the construction is not supported by evidence. Under the contract (pertinent provisions are quoted above) entered into between the Calvento Paper Corporation and petitioner, the latter undertook to construct the Calvento Paper Manufacturing Plant at a maximum cost of ₱565,000.00, which covers the total cost of materials, labor and other incidental expenses specified in the contract. There is nothing in the contract to show that the total cost of construction was for the account of the owner (Calvento Paper Corporation). It does not appear that the owner actually made direct purchases of the materials used in the construction of the Calvento Paper Manufacturing Plant. It was petitioner that actually made the purchases of materials and paid the cost of labor. While it is true that the contract provides that the owner shall provide a "revolving fund" of ₱20,000 to enable petitioner to pay for the cost of labor and materials, to be replenished upon presentation of a statement of expenses, there is no indication that this provision of the contract in any way affects the obligation of petitioner to furnish labor and materials as part of its undertaking to construct the paper plant. The revolving fund was intended merely to help petitioner fulfill its obligations under the contract. This is shown by the provision that the revolving fund could be withdrawn if petitioner should use the fund for purposes not related to the construction work. And it appears that there was no occasion when the revolving fund was ever withdrawn, which shows that the cost of labor and materials was defrayed in full by petitioner and that it received full payment for the cost of construction from the owner. And it is a fact, which is not disputed, that the said amount of ₱536,812.72 was actually received by petitioner from the Calvento Paper Corporation.

Petitioner having received from the Calvento Paper Corporation the entire sum of ₱536,812.72 as part of the consideration for the construction of the paper plant, the said amount constitutes taxable gross receipts of petitioner under Section 191 of the Revenue Code.

In its memorandum, petitioner raised for the first time the defense that the assessment for contractor's tax for 1962 has already prescribed because the original assessment was issued only in

March, 1968. This defense of prescription was never raised in the Bureau of Internal Revenue or in the petition for review filed with this Court. To entertain this defense would be to deprive respondent of his right to show the contrary, this matter being evidentiary in nature (see Sy Chiuco v. Coll. of Int. Rev., 107 Phil. 428).

WHEREFORE, the decision appealed from is hereby affirmed. Accordingly, petitioner is ordered to pay to respondent Commissioner of Internal Revenue, or his duly authorized representative, the total amount of ₱20,880.46, representing deficiency contractor's tax and 25% surcharge for the period from 1962 to 1964, with costs.

SO ORDERED.

Quezon City, May 31, 1971.

R M Umali
ROMAN M. UMALI
Presiding Judge

WE CONCUR:

Estanislao R Alvarez
ESTANISLAO R. ALVAREZ
Associate Judge

Ramon L Avanceña
RAMON L. AVANCEÑA
Associate Judge