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August 4, 1960

REPUBLIC OF THE PHILIPPINES,
Plaintiff,

- versus -

MANILA CIVIL
CASE NO. 15566

JOSE RAZON and JAI-ALAI
CORPORATION,
Defendants.

x - - - - - - - - - - - - - - x

DECISION

This is an action instituted by the Republic of the Philippines to collect from defendant Jose Razon the amount of ₱73,522.62, as alleged income tax due from Haig Assadourian for the year 1946, including surcharges and interests up to December 31, 1951, and from defendants Jose Razon and Jai-Alai Corporation, jointly and severally, the sum of ₱30,080.00, exclusive of penalties, surcharges and interests, as income taxes due also from Haig Assadourian, for the years 1947 and 1948.

The original complaint was filed with the Court of First Instance of Manila on January 8, 1952 solely against defendant Jose Razon. On January 16, 1953, the plaintiff amended its complaint, including the Jai-Alai Corporation as party defendant, and asserting two (2) causes of action. Under the first cause of action, the plaintiff seeks to recover from defendant Jose Razon as attorney-in-fact of Haig Assadourian, the amount of ₱73,522.62 as the latter's income tax liability for the year 1946, computed as of December 31, 1951; and, under the second cause of action, the plaintiff seeks to recover jointly and severally from defendants Jose Razon and Jai-Alai Corporation as withholding agents, the 12% withholding tax amounting to ₱30,080.00, exclusive of penalties, surcharges and interests, due on the income received by Haig Assadourian for the years 1947 and 1948 pursuant to the provisions of Section 53 (b) and (c) of the National Internal Revenue Code. In addition, defendant Jose Razon is sought to be held liable for the payment of the said sum of ₱30,080.00 for being the attorney-in-fact of Haig Assadourian.

On February 6, 1953, defendant Jose Razon filed his answer to the amended complaint. On July 23, 1953, defendant Jai-Alai Corporation filed its answer to the amended complaint, with a cross-claim against its co-defendant Jose Razon, who in turn filed, on August 1, 1953, his answer to the cross-claim. On April 6, 1955, the Court of First Instance of Manila remanded this case to this Court for final determination and disposition pursuant to Section 22 of Republic Act No. 1125.

Anent the first cause of action, the following facts were established: Haig Assadourian, a citizen of Egypt, was previously admitted to the Philippines for permanent residence. (Exh. 2-Jose Razon, p. 42 CTA rec.) He was considered a legal resident of the Philippines as of September 13, 1940 (Exh. 1-Jose Razon, pp. 40-41 CTA rec.), and resided in the Philippines from 1940 to 1945. (Exhs. A & 14-Jai-Alai, p. 470 BIR rec.) He had his residence at the University of Santo Tomas, España St., Manila, and was the general manager of the Jai-Alai Corporation. (Exh. 1-Jose Razon, p. 40 CTA rec.)

With the intention of going to the United States for rest and business, Haig Assadourian filed, on October 19, 1945, an application for a re-entry permit with the Bureau of Immigration, stating in his application among others, that the length of his proposed absence in the Philippines was indefinite. He was granted the permit to reenter the Philippines as a non-immigrant, with expiry date on October 19, 1946, which was extended for another year ending on October 19, 1947. (Exh. 2-Jose Razon, p. 42 CTA rec.)

On March 4, 1946, a certain Jack George, residing at 529 Aviles, Manila, executed a "Guaranty" (Exhs. 3-Jose Razon & 4-Jai Alai, p. 215 BIR rec.), assuming the tax responsibility of Haig Assadourian and binding himself "to pay such internal revenue taxes, surcharges and interests as may be found to be due from him" (Haig Assadourian) prior to his departure or during his absence from the Philippines.

On March 5, 1946, Haig Assadourian filed an application for a tax clearance certificate (Exhs. A & 14-Jai Alai, p. 470 BIR rec.) with the Bureau of Internal Revenue, stating among others, that he was leaving the Philippines for the United States on March 8 or 9, 1946, and that for the purpose of filing his tax returns, paying and compromising taxes that may be assessed against him during his absence, he has appointed defendant Jose Razon. On the same day, Haig Assadourian was issued Tax Clearance Certificate No. V-2257 (Exhs. 9-Jai Alai & 12-Jose Razon, p. 94, BIR rec.) on the strength of the guaranty signed by Jack George. (Exh. 9-A Jose Razon, p. 257 BIR rec.) He departed in 1946 and since then he never returned to the Philippines. His last known address is Los Angeles, California, U.S.A. (Exh. K, p. 57 CTA rec.).

During his stay in the Philippines, Haig Assadourian did not engage in trade or business. However his wife, Mrs. Valentina Assadourian, was a partner in the business firm known as Alaska Ice Cream Factory (Exh. Z, p. 183 BIR rec.). He had no properties, real or personal, except the 100 shares of stock in the Jai-Alai Corporation and another 100 shares in the name of his wife in the same corporation. (Exh. Y, p. 184 BIR rec.)

On March 1, 1947, Jose Razon, in behalf of Haig Assadourian, filed an income tax return for 1946 (Exh. B, p. 469 BIR rec.), showing a net income of ₱156,194.93 and giving as source thereof his salary and other income from the Alaska Ice Cream Factory. On the same day, Jose Razon, as the "duly named attorney-in-fact" of Haig Assadourian, wrote the Collector of Internal Revenue (Exh. C, p. 468 BIR rec.), requesting approval of an installment plan for the payment of the income tax liability for 1940, 1941 and 1946.

On March 19, 1947 (Exh. D, pp. 466-467 BIR rec.), the Deputy Collector of Internal Revenue approved the installment plan for the payment of the 1940 and 1941 deficiency income tax of Haig Assadourian, but denied the request for the payment of the 1946 income tax by installment, and at the same time enclosed a tax assessment notice (Exh. E, p. 369 BIR rec.) calling for the payment of ₱48,731.87. As the assessment was not paid, the Collector of Internal Revenue, on September 13, 1948, addressed another letter to Jose Razon (Exh. F, pp. 464-465 BIR rec.) again demanding the payment of the 1940, 1941 and 1946 income tax liability of Haig Assadourian, which, as of October 15, 1948, was in the total amount of ₱64,506.34.

Meanwhile, on May 2, 1950, the Collector of Internal Revenue wrote a letter to Jack George (Exh. 18-Jose Razon, p. 187 BIR rec.), the guarantor of the tax liabilities of Haig Assadourian, demanding from him the payment of the 1940, 1941 and 1946 tax liability of Haig Assadourian. Since Jack George refused to pay the tax liability of Haig Assadourian, the Collector of Internal Revenue, on January 9, 1951, wrote the Solicitor General (Exh. 8-Jose Razon, pp. 194-197 BIR rec.), requesting that a civil action be filed against Jack George, as guarantor of Haig Assadourian to collect the income tax liabilities for 1940, 1941 and 1946 of the latter in the total amount of ₱77,142.03 as of November 21, 1950.

Subsequently, on July 3, 1951 (Exh. G, p. 463 BIR rec.), August 3, 1951 (Exh. H, p. 462 BIR rec.), September 25, 1951 (Exh. I, p. 459 BIR rec.) and December 11, 1951 (Exh. J, p. 458 BIR rec.), the Collector of Internal

Revenue sent follow-up letters to Jose Razon for the payment of the assessed tax liability of Haig Assadourian. According to the latest letter, Exhibit J (p. 458 BIR rec.), the 1946 income tax liability of Haig Assadourian amounted to ₱73,522.62 as of December 31, 1951.

Relative to the second cause of action, the following facts were established. In 1949, while BIR Examiner Narciso Rosales was examining the books of the Jai-Alai Corporation for income tax purposes, he came across an indenture (Exh. K, pp. 57-58, CTA rec.) executed between Haig Assadourian and the Jai-Alai Corporation. It appears from this indenture that on August 5, 1947, the Jai-Alai Corporation, duly represented by its Vice-President, Jose Razon, entered into a contract in the City of Los Angeles, California, U.S.A. with Haig Assadourian, as manager of the Jai-Alai Corporation, whereby the latter, in consideration of the amount of ₱200,000.00, acknowledged full payment of the latter's claim for management percentage fees earned for the years 1946 to 1950 and any or all future claims against the Jai-Alai Corporation. The payment of percentage fees to Haig Assadourian was in accordance with certain management contracts, dated July 30, 1939 and November 18, 1940, with the Jai-Alai Corporation, by virtue of which Haig Assadourian operated the Jai-Alai Fronton, and which contracts were to continue up to the end of the year 1950, but were terminated by the indenture. Finally, under the terms of the indenture, the sum of ₱200,000.00 was to be paid by the Jai-Alai Corporation in installments as follows: (1) ₱40,000.00 on or before August 20, 1947; and (2) ₱20,000.00 on or before the 20th day of each month, beginning the month of September of 1947 up to and including the month of April, 1948.

On the basis of the payments to Haig Assadourian, Examiner Rosales filed for Haig Assadourian an income tax return for 1947 (Exh. L, p. 456 BIR rec.; Exh. 2-Jai Alai p. 426 BIR rec.), showing the income of ₱120,000.00 and another income tax return for 1948 (Exh. M, p. 455 BIR rec.; Exh. 3-Jai Alai, p. 428 BIR rec.), showing an income of ₱80,000.00.

On November 10, 1952, the Collector of Internal Revenue, wrote a letter to defendant Jai-Alai Corporation, demanding the payment of taxes corresponding to 12% of the amount of ₱20,000.00 which it allegedly paid to Haig Assadourian and which it should have withheld according to Section 53 (b) and (c) of the Tax Code (Exh. N, pp. 453-454, BIR rec.), enclosing therewith assessment notices Nos. AR-1060-52/47 and AR-1061-52/48 for the years 1947 and 1948, respectively, in the total amount of ₱30,080.00 (Exhs. O & P, pp. 452 & 450 BIR rec.).

On November 22, 1952, J. Laurea, in behalf of the Jai-Alai Corporation, wrote a letter (Exh. 8-Jai Alai, p. 328 BIR rec.) to the Collector of Internal Revenue, requesting the latter to rescind the assessment on the ground that, owing to the financial inability of the Jai-Alai Corporation "to pay the purchase price to Mr. Haig Assadourian, decided to subrogate its rights to one of the stockholders of the Corporation, Senator Vicente Madrigal" and "instead of the Jai-Alai Corporation paying for the price contracted, Senator Madrigal paid the agreed price to the legal representative of Mr. Assadourian, who was then in the United States".

On December 19, 1952, a similar letter of demand (Exh. Q, pp. 447-448 BIR rec.) was sent to Jose Razon, enclosing the same assessment notices for the years 1947 and 1948, in the total amount of ₱30,080.00 (Exhs. R & S, pp. 444 & 443, BIR rec.).

Acting on the information contained in the letter of J. Laurea, the Collector of Internal Revenue, on December 29, 1952, wrote a letter (Exh. 12-Jai Alai, pp. 335-336 BIR rec.) to Vicente Madrigal, assessing and demanding from him the payment of the withholding tax in the amount of ₱30,080.00 on the ₱200,000.00 he paid to Haig Assadourian for the years 1947 and 1948 and which he should have withheld pursuant to Section 53 (b) and (c) of the Tax Code. Meanwhile, on January 9, 1953, the Collector of Internal Revenue wrote to the Solicitor General, requesting the inclusion of Vicente Madrigal as party defendant in this case. (Exh. 13-Jai Alai, p. 339 BIR rec.)

On January 10, 1953, J. Laurea, this time acting for and in behalf of Vicente Madrigal, wrote a letter (Exh. 6-Jai Alai, p. 442 BIR rec.) to the Collector of Internal Revenue in connection with the letter of demand dated December 29, 1952, claiming among others, that as "Senator

Madrigal has made the payment of the purchase price of the right to the legal representative of Mr. Assadourian in Manila", he is not liable for the payment of withholding tax.

Anent the first cause of action, the only issue to be decided is whether or not defendant Jose Razon is the guarantor of Haig Assadourian's income tax liability for the year 1946. Regarding the second cause of action, the issues are (1) whether or not defendants Jose Razon and Jai-Alai Corporation are liable as withholding agents under Section 53 (b) and (c) of the Tax Code on the amount paid to Haig Assadourian during the years 1947 and 1948; and (2) whether or not defendant Jose Razon is liable as attorney-in-fact and guarantor of Haig Assadourian for the withholding tax due on the income received by the latter.

We shall resolve these issues in the order they appear under the two causes of action.

With regard to the issue under the first cause of action, the plaintiff maintains that defendant Jose Razon is liable as guarantor for the payment of the 1946 income tax of Haig Assadourian. Upon the other hand, defendant Jose Razon contends that he was not the guarantor of Haig Assadourian. It should be noted that, as far as could be gathered from the allegations in the amended complaint, defendant Jose Razon was never sued as a guarantor. But, it is alleged that defendant Jose Razon is the attorney-in-fact, who is charged with the obligation to pay and compromise the tax liabilities of Haig Assadourian during the absence of the latter. On the basis of this allegation, plaintiff now seeks to hold the said defendant Jose Razon personally liable for the tax liabilities of Haig Assadourian.

The plaintiff, realizing the futility of holding defendant Jose Razon personally liable as attorney-in-fact for Haig Assadourian, finally abandoned its stand. Instead, it now seeks to bind defendant Jose Razon to pay as guarantor solely on the basis of the evidence that, as shown in the application for a tax clearance certificate filed by Haig Assadourian, the latter has appointed Jose Razon as his attorney-in-fact, charged with the duty and obligation to pay the taxes which may be assessed against him.

Defendant Jose Razon admits that he is the attorney-in-fact of Haig Assadourian for the purpose of filing the income tax returns, paying and compromising the taxes of the latter (Par. 3, First Cause of Action, Amended Complaint; & par. 1, First Cause of Action, Defendant Jose Razon's Answer; see Exhs. A & 14, p. 470 BIR rec.). Aside from this admission, a contract of agency between Haig Assadourian and defendant Jose Razon can also be reasonably implied from the acts of the latter in filing the 1946 income tax returns of the former and in his subsequent acts of representing himself as attorney-in-fact to the Collector of Internal Revenue. However, there is no evidence showing that the scope of the agency includes the obligation on the part of the agent, Jose Razon, to pay the tax liabilities of Haig Assadourian, and be personally liable therefor in the event of non-payment by the latter. Much less was there evidence to the effect that defendant Jose Razon obligated himself, as guarantor, to pay the tax liabilities of Haig Assadourian. Hence, we are of the opinion and so hold that defendant Jose Razon is not liable for the income tax liability of Haig Assadourian for the year 1946.]

We shall now come to the determination of the two issues under the second cause of action which we shall discuss jointly.

It should be noted that in order that an income may be subject to withholding tax under the provisions of Section 53 (b) and (c) of the Tax Code, the following requisites must be present: (1) The income must be fixed or determinable annual or periodical; (2) the income must be derived from sources within the Philippines; and (3) the income must be paid to a nonresident alien individual, not engaged in trade or business in the Philippines and not having an office or place of business therein.]

There is no dispute that the amount of ₱200,000.00 paid to Haig Assadourian was an income and had its sources in the Philippines. The said amount was fixed, definitely pre-determined and paid to him by installment in accordance with a contract. The only question to be considered in order that there should be withholding is whether Haig

Assadourian is a nonresident alien, not engaged in trade or business in the Philippines and not having an office or place of business therein.

To our mind, Haig Assadourian is under the law a nonresident alien. A nonresident alien is defined as "an individual whose residence is not within the Philippines and who is not a citizen thereof". (Sec. 84, Tax Code.) Haig Assadourian is a citizen of Egypt and since he left the Philippines in 1946, he has been a resident of the United States. Under Section 84 of the Tax Code, he is a nonresident of the Philippines. Haig Assadourian, having left the Philippines in 1946, and has since not returned, at most, we may consider him for tax purposes as a resident alien during the year 1946 (see Walter J. Baer v. Commissioner of Internal Revenue, 6 TC 1195).

There is no evidence that since he departed from the Philippines in 1946, Haig Assadourian has engaged in trade or business in the Philippines, nor maintained an office or place of business here. The income of ₱200,000.00 having been paid to a nonresident alien, withholding of the tax due thereon is required by law.

The record shows that the ₱200,000.00 was paid to Haig Assadourian in the following manner: ₱40,000.00 was paid by the Jai-Alai Corporation direct to Haig Assadourian; ₱40,000.00 was paid by the Jai-Alai Corporation through Jose Razon; and ₱120,000.00 was paid by Vicente Madrigal also through Jose Razon. During the years in question, it is conceded that defendant Jose Razon was the Vice-President of the Jai-Alai Corporation. When the payments were made by the Jai-Alai Corporation, and then by Vicente Madrigal through defendant Jose Razon, the latter was then acting merely as their agent in the delivery of the payments to Haig Assadourian. Being the personal representative of the Jai-Alai Corporation and Vicente Madrigal, defendant Jose Razon was but an extension of their personalities. The acts, therefore, performed by the agent, the herein defendant Jose Razon, in receiving and then transmitting the payments to Haig Assadourian, were, in legal contemplation, as if personally done by his principals, Jai-Alai Corporation and Vicente Madrigal.

Not being the source of income, nor in legal possession and control of the income, defendant Jose Razon was not bound to withhold the 12% tax on the amounts paid to Haig Assadourian. He can not also be held liable as resident agent or guarantor of Haig Assadourian. The amounts paid by the Jai-Alai Corporation and Vicente Madrigal were in their legal possession and control before their receipt by Haig Assadourian (Tonopah & T. R. Co. Ltd. v. Commissioner of Internal Revenue, 112 F 2d 970, 972), and the payments made were pursuant to the obligation of the Jai-Alai Corporation under a contract (Korfund Co., Inc. v. Commissioner of Internal Revenue, 1 TC 1180). Hence, defendant Jai-Alai Corporation and Vicente Madrigal were constituted as withholding agents under Section 53 (b) and (c) of the Tax Code and required by law to withhold the 12% tax on the amount each paid to Haig Assadourian.

Defendant Jai-Alai Corporation can not be held liable for the payment of the withholding tax on the amount paid by Vicente Madrigal because it did not have possession and control over said amount. (Tonopah Co., Ltd. v. Commissioner of Internal Revenue, supra; W. E. Branch v. Commissioner of Internal Revenue, 38 BTA 1139, 1144-1145.)

Hence, defendant Jai-Alai Corporation is liable to pay the 12% withholding tax only on the amount of ₱80,000.00 which it actually paid to Haig Assadourian. And as Vicente Madrigal was not included as party defendant in this case, he can not be adjudged to pay the 12% withholding tax on the amount of ₱120,000.00 which he paid to Haig Assadourian.

In connection with the defense of defendant Jai-Alai Corporation that the right to collect the tax has already prescribed, the record shows that it failed to file a withholding tax return for the amount of ₱80,000.00 paid to Haig Assadourian in 1947. For its omission to file a withholding tax return, Section 332(c) of the Tax Code, which provides that "a proceeding in court for the collection of such tax may be begun without assessment, at any time within ten years after the discovery of the x x x omission", should be applied. The failure to file a return was discovered in 1949, during the investigation conducted by BIR examiner Narcisco Rosales. The judicial suit was initiated on January 16, 1953 when the Jai-Alai Corporation was included as party defendant in the amended complaint. Only 4 years elapsed from the time of the discovery of the omission to file a return to the filing of a judicial action against the Jai-Alai Corporation, consequently, the right to judicially collect the withholding tax has not prescribed.

FOR THE FOREGOING CONSIDERATIONS, defendant Jai-Alai Corporation is hereby ordered to pay to plaintiff Republic of the Philippines the amount of ₱12,000.00, representing the 12% withholding tax on the amount of ₱80,000.00 it paid to Haig Assadourian, plus surcharge, computed as follows:

Amount paid in 1947 to Haig Assadourian by Jai Alai Corporation	₱80,000.00
12% Withholding tax thereon	₱ 9,600.00
25% Surcharge for failure to file withholding tax return	2,400.00
TOTAL AMOUNT DUE	₱12,000.00

The complaint filed by plaintiff Republic of the Philippines insofar as it affects defendant Jose Razon and the cross-claim filed by defendant Jai-Alai Corporation against defendant Jose Razon are hereby dismissed for lack of merit. With costs against defendant Jai-Alai Corporation.

SO ORDERED.

Manila, August 4, 1960.

MARIANO NABLE
Presiding Judge

I CONCUR:

AUGUSTO M. LUCIANO
Associate Judge

ROMAN M. UMALI
Associate Judge
did not take part

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