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RAFAEL GERONA,
Petitioner,

- versus - C.T.A. CASE NO. 203

March 30, 1959

THE COLLECTOR OF INTERNAL REVENUE,
Respondent.

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D E C I S I O N

This is an appeal from a decision of the respondent Collector (now Commissioner) of Internal Revenue as contained in his letter of September 9, 1955 to the petitioner holding the latter liable for the payment of the sum of ₱423.19 as transportation contractor's fixed and percentage taxes and surcharge covering the period from January 4, 1949 to March 8, 1952; the amount of ₱6,347.80 as deficiency building contractor's fixed and percentage taxes and surcharge for the period from January 16, 1948 to December 31, 1952; and, the sum of ₱2,404.74 as transportation contractor's percentage tax and surcharge for the period from February 11, 1949 to December 31, 1952 or a total of ₱9,175.73 exclusive of the sum of ₱200.00 as penalty.

As regards the first amount of ₱423.19, we find it unnecessary to pass upon it in review the petitioner having abandoned his appeal with respect to this particular item with the express admission of his counsel (Exh. 6-A, p. 81, BIR rec.; p. 3, Memorandum for Petitioner appearing on p. 107, C.T.A. rec.) that said assessment is regular in every respect and in accordance with law.

Likewise, it could be implied from paragraph 6 of the "Stipulation of Facts" of the parties that the petitioner has also abandoned his appeal with respect to the third assessment of ₱2,404.74, the petitioner having agreed therein "that the sole issue to be determined is whether or not petitioner's receipts derived in connection with these contracts denominated as 'Pacquiao Contracts' are subject to the contractor's percentage tax as prescribed in Section 191 of the National Internal Revenue Code."

The memorandum of the petitioner itself shows that the discussion has been focused solely on the second assessment of ₱6,347.80 representing the fixed and percentage taxes and surcharge as building contractor imposed by Sections 182, 183 and 191 of the National Internal Revenue Code. We shall, therefore, limit the resolution of the case to the latter amount of ₱6,347.80 which is the only item in controversy.

Here are the basic facts as agreed upon by the parties:

> "1. That petitioner is engaged in the business as transportation and building contractor in Masbate, Masbate; while respondent is the Collector of Internal Revenue and has his office at the Department of Finance Building, Manila, Philippines;
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> "2. That respondent has demanded from petitioner the payment of the sums of ₱423.19 and ₱2,404.74, or a total of ₱2,827.93 as deficiency transportation contractor's fixed and percentage tax and surcharge, and the sum of ₱6,327.80 as building contractor's fixed and percentage tax and surcharge, plus the sum of ₱200.00 as penalty, or a total of ₱9,375.73, computed as follows:
>
> A. As Transportation Contractor -

1. Gross receipts for the period from January 4, 1949 to March 8, 1952 (Hauling of supplies and crushed stones) .... ₱15,327.62
   2% tax thereon ... ₱ 306.55
   25% surcharge 76.64
   Fixed tax .... 40.00 ₱ 423.19
2. Gross receipts for the period from February 11, 1949 to December 31, 1952 (Hauling of sand and gravel) ..... ₱96,189.43
   2% tax thereon ... ₱ 1,923.79
   25% surcharge 480.95 2,404.74
   TOTAL .... ₱2,827.93

B. As Building Contractor -

Gross receipts for the period from January 16, 1948 to September 21, 1950..₱206,647.36
Gross receipts for the period from September 22, 1950 to December 31, 1952 .... ₱ 98,686.28

C-4 (Fixed tax, 1948-1952)	₱ 50.00	
Less: Payment	30.00	
Balance		₱ 20.00
2% on ₱206,647.36..	₱ 4,132.95	
3% on ₱98,686.28 ..	2,960.59	
Total	₱ 7,093.54	
Less: Payment	2,031.30	
Balance		5,062.24
25% surcharge		1,265.56
		₱6,347.80

RESUME

Transportation Contractor's tax	₱2,827.93
Building Contractor's tax	6,347.80
Compromise	200.00
GRAND TOTAL	₱9,375.73

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"3. That the first letter of demand of respondent dated March 7, 1953 is for the amount of ₱15,103.82 (p. 13 and 14, BIR. records); that in the second letter of respondent to petitioner dated September 9, 1955 (Annex A, Petition for Review) said amount of ₱15,103.82 was reduced to ₱9,375.73;

"4. That the aforestated assessment of ₱6,347.80 representing building contractor's tax is based on individual contracts entered into by and between the District Engineer of Masbate, Masbate, and petitioner, sample contracts of which are found on pages 40, 41, 42, 43, 44, 45, 46, 47, 48 and 49 of the BIR records;

"5. That these contracts are denominated 'Pacquiao Contracts', which are distinct and separate from each other;

"6. That the sole issue to be determined is whether or not petitioner's receipts derived in connection with these contracts denominated as 'Pacquiao Contracts' are subject to the contractor's percentage tax as prescribed in section 191 of the National Internal Revenue Code; and

"7. That the parties hereby reserve their rights to present further or additional oral or documentary evidence in support of their respective causes." (Stipulation of Facts, pp. 84-86, CTA rec.)

In addition, the petitioner introduced the deposition of Mr. Hilario Pulido, District Engineer of Masbate during the years 1949 to 1952, to show that the petitioner Rafael Gerona as "Paquiao Contractor" of several public school buildings erected in said province after the liberation was under the supervision and control of the District Engineer of Masbate. The petitioner also submitted as additional documentary evidence, Exhibit A, which consists of a blank form of a standard Government contract; Exhibits B, E, E-1 and E-2 which are his "Paquiao Contracts" with the Government now in question, and, Exhibits C, D to D-5, consisting of certified true copies of the official communications authorizing the award of the "Paquiao Contracts" now in question to the petitioner herein.

As agreed upon by the parties in their "Stipulation of Facts" quoted above, the only issue in the present appeal is "whether or not petitioner's receipts derived in connection with these contracts denominated as 'Pacquiao Contracts' are subject to the contractor's percentage tax as prescribed in Section 191 of the National Internal Revenue Code."

The pertinent provisions of Section 191 of the Tax Code read as follows:

> "Sec. 191. Percentage tax on road, building, irrigation, artesian well, waterworks, and other construction work contractors, proprietors or operators of dockyards, and others.- Road, building, irrigation, artesian well, waterworks, and other construction work contractors; x x x shall pay a tax equivalent to two per centum (three per centum) of their gross receipts. xx x x"

The petitioner admits that he is a building contractor but contends that as regards his gross receipts derived from his "Paquiao Contracts" of several public works projects in Masbate, he is not subject to the contractor's tax. The petitioner claims that a "Paquiao Contractor" is not an "Independent Contractor" and therefore not within the meaning and purview of the words "building x x x and other construction work contractors" as used in Section 191 of the National Internal Revenue Code.

On the other hand, the respondent contends that the question of being an independent contractor is immaterial and maintains that it is enough, for purposes of the contractor's tax prescribed in Section 191 of the Tax Code, that a person is engaged in an occupation specifically enumerated in said section. And moreover, the respondent argues, assuming for the sake of argument that the question of whether the petitioner is an independent contractor is material in deciding this case, the petitioner is in truth and in fact an independent contractor, and therefore should be held liable for the contractor's percentage tax.

Without necessarily deciding the question of whether or not petitioner's being an independent contractor is material to the decision of the instant case, we shall proceed to consider the question whether or not the petitioner herein is in fact an "Independent Contractor" as regards his "Paquiao Contracts" with the provincial government of Masbate in the construction of several public works projects.

We have carefully examined the principal terms and conditions of the "Paquiao Contracts" entered into by and between the petitioner and the provincial government of Masbate (pp. 40-49, BIR rec.) and we have arrived at the conclusion and so hold that the petitioner acted as an independent contractor in the performance of said "Paquiao Contracts". In the first place, "Paquiao" or "Pakyawin" as the contracts were appropriately denominated by the parties strongly indicates that said contracts were intended by the parties to be for a lump sum. We also note that each of the "Paquiao Contracts" in question is a contract for a piece of work whereby the petitioner bound himself to execute a piece of work for the Provincial Government of Masbate, in consideration of a certain price or compensation. (Art. 1713, Civil Code of the Phil.; Chartered Bank vs. Constantino, 56 Phil. 717.) And the circumstance that the person employed undertakes to perform the stipulated work as a whole for a specific sum is an indication of an independent contractor relationship (27 Am. Jur., Independent Contractors, Sec. 13) and the contractor is an independent contractor (Padilla, Civil Code Annotated, Vol. 4, p. 172, 1956 Edition).

The first general condition provides that "all work x x x shall be constructed in accordance with the plans and specifications, copies of which are on file in the office of the District Engineer x x x and changes from the plans and specifications shall not be valued unless approved by the District Engineer in writing." A stipulation that the work shall be done in accordance with the plans and specifications furnished by the employer does not destroy the independence of a contract (20 A.L.R. 694). If such stipulation does not affect the independent status of the contractor, we see no valid reason why a condition that changes from the plans and specifications shall not be valid unless approved in writing by the employer should make the contractor less independent in character.

The second general condition states that the "Paquiao Contracts" may be cancelled "if in the opinion of the District Engineer the work is not being done in accordance with the instructions, conditions, plans and specifications or is unnecessarily delayed and will not be completed within the stipulated time" and the next condition provides that "the failure of the contractor to execute the work in accordance with the terms thereof, or his abandonment of the same, will be sufficient cause for the cancellation" of the "Paquiao Contracts".

The rule is that the provision in a contract that the employer has the right to see to it that the work is done in accordance to the plans and specifications does not operate to create the relation of master and servant between the employer and those engaged to work. Nor is this rule altered by the fact that the employer may stop the work which is not properly done, or is not performed in accordance with the instructions of the employer. Such provisions are frequently contained in building or construction contracts. (27 Am. Jur., Independent Contractors, Sec. 9.)

The fourth general condition is that the "paquiao contractor shall without fail pay all his laborers their just dues within twenty-four (24) hours from the time the money is paid to him by the Government." This stipulation of the contract under review is another indication that the petitioner herein is an independent contractor. As a general rule, independent contractors furnish the labor (27 Am. Jur., Independent Contractors, Sec. 12; see p. 41, t.s.n.) and the circumstance that the wages of the laborers are paid by the contractor himself, shows that the contractor is not a mere servant but an independent contractor. (27 Am. Jur., Independent Contractors, Sec. 16.)

The measure of compensation for work done is an important element to be considered in determining whether one is an independent contractor. And the fact that the remuneration of the person employed is computed with reference to the quantity of work performed by him tends to indicate an independent contractor relationship (27 Am. Jur., Independent Contractors, Sec. 13). The presence of this particular circumstance in the case at bar is evidenced by the fifth contractual condition that the "payment shall be made semi-monthly based upon the quantity of work completed, ten per centum (10%) of the sum due to the contractor being withheld pending the completion of the work."

Conditions Nos. 6 and 7 of the "Paquiao Contracts" under review also indicate that the petitioner herein is an independent contractor. These agreed terms of the contract provide that "the acceptance of the work from time to time for the purpose of making partial payments x x x shall not be considered as a final acceptance of the work in question, neither shall it be construed to waive the rights of the District Engineer to reject the whole or any portion of the work x x x or to require the contractor to complete same in accordance with the provisions thereof, should the work be found to have been constructed in violation of any of the conditions of the contract, or have been destroyed prior to the final acceptance" and that "whenever this contract, in the opinion of the District Engineer, shall have been completely performed on the part of the contractor, the District Engineer shall proceed promptly to inspect the work and prepare the necessary voucher for the final payment x x x."

An independent contractor relationship exists where the contractor doing the work is subject to the will of the employer only as to the result. Thus, a person employed to perform certain work is not necessarily a mere servant because the contract provides as in the case at bar that the work shall be subject to the approval or satisfaction of the employer. Such a provision is not an assumption by the employer of the right to control the person employed as to the details or method of doing the work, but is only a provision that the employer may see that the contract is carried out according to the plans (27 Am. Jur., Independent Contractors, Sec. 7).

And furthermore, the fact that the District Engineer could require the petitioner to complete the work if the same has been destroyed before it is finished and finally accepted, could only mean that the petitioner is an independent contractor. He assumes the risk whereas an ordinary workman, or a hired laborer is paid for the labor he performs, whatever the result of the work assigned to him, and even should it be destroyed by accident for he does not assume any risk. (Chartered Bank vs. Constantino, 56 Phil. 717.)

Another important factor tending to show that the petitioner is an independent contractor is the stipulation in the "Paquiao Contracts" for the payment of liquidated damages for non-completion of work, and therefore considers time to be of the essence of the contract (20 A.L.R. 791). This is provided for as condition No. 8 of the "Paquiao Contracts". More specifically, the agreement provides that "time is an essential feature of the contract" and that "upon failure to complete the said contract within the time stipulated, the contractor will be required to pay to the Government the sum of FIVE PESOS (₱5.00) Philippine Currency, per diem for each day of delay x x x in the completion of the contract". Undoubtedly, a person engaged to do a certain work as a mere servant or hired laborer, and not as an independent contractor, can not be made to pay for liquidated damages for non-completion of the work within the contemplated time for in such a case the completion or non-completion of the work is not within the control of the servant or the unindependent contractor, but on the employer himself. Hence, the stipulated condition under consideration is another circumstance which shows that the petitioner is an independent contractor.

All the foregoing considerations as gathered from the terms and conditions of the "Paquiao Contracts", establish clearly and satisfactorily the status of the petitioner as an independent contractor with regard to the performance of the "Paquiao Contracts" that he entered into with the provincial government of Masbate. Consequently, he is subject to the building contractor's tax under Section 191 of the National Internal Revenue Code which the respondent herein seeks to collect.

With regard to the testimony of Mr. Hilario Pulido, District Engineer of Masbate during the period under review, it shall suffice to state that Mr. Pulido merely exercised the functions of the District Engineer as required of him by Section 1911 of the Revised Administrative Code, and did not affect the essential character of the "Paquiao Contracts" agreed by and between the petitioner and the provincial government of Masbate, as could be seen from the terms and conditions of the said contracts. At any rate, it must be noted that, like the ship's officers supervision over the stevedore's work in loading and unloading vessels, the supervision exercised by District Engineer Pulido over the petitioner as regards the "Paquiao Contracts", has nothing to do with petitioner's tax liability under Section 191 of the Tax Code. (Cebu Arrastre Service vs. Collector of Internal Revenue, 53 O.G. 2487.)

WHEREFORE, the decision of the respondent appealed from is hereby affirmed, and the petitioner is ordered to pay to the respondent the sum of ₱423.19 as transportation contractor's fixed and percentage taxes and surcharges covering the period from January 4, 1949 to March 8, 1952; the amount of ₱6,347.80 as deficiency building contractor's fixed and percentage taxes and surcharge for the period from January 16, 1948 to December 31, 1952; and, the sum of ₱2,404.74 as transportation contractor's percentage tax and surcharge for the period from February 11, 1949 to December 31, 1952 or a total of ₱9,175.73.

With regard to the compromise penalty of ₱200.00, this Court has no jurisdiction to compel the petitioner to pay the said amount (Collector of Internal Revenue vs. University of Santo Tomas, G. R. No. L-11274, November 28, 1958). With costs against the petitioner.

SO ORDERED.

Manila, March 30, 1959.

AUGUSTO M. LUCIANO
Associate Judge

I CONCUR:

ROMAN M. UMALI
Associate Judge

Presiding Judge MARIANO NABLE did not take part.