REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

APPLE II PASTRIES & TAKE HOME COUNTER, INC.,
Petitioner,

- versus - C.T.A. CASE NO. 4284

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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

9/17/91

D E C I S I O N

This case involves a claim for refund of sales taxes and penalties erroneously paid by petitioner for the second, third and fourth quarters for the years 1986 and 1987 amounting to P44,466.35 and P60,775.37, respectively, totalling P105,241.72.

Petitioner is a domestic corporation engaged in business as an operator of a small chain of eating and take-out counters. Petitioner bakes its own bread, pastries and other bakery products which it sells through said eating and take-out counters.

For the second, third and fourth quarters for the years 1986 and 1987, petitioner filed its quarterly percentage tax returns and paid the 10% sales tax as manufacturer (Exhs. B, E, G, I, K, M, and O, pages 64, 67, 69, 71, 73, 75, and 77, respectively, CTA rec.) under former Section 165 (A) (3) of the National Internal Revenue Code (NIRC) on the sales of its bakery products. It also paid the 4% caterer's tax under former 172(1) of the NIRC on the sale of other food items.

On January 14, 1988, petitioner wrote to respondent requesting for an opinion as to whether its operations are subject to the 10% VAT. Respondent in its reply to said letter issued BIR Ruling No. 114, Series No. 000-00-012-88, dated January 28, 1988 (Exh. A, p. 63, CTA rec.,). Reproduced below is the said ruling.

> Gentlemen:
>
> This refers to your letter dated January 14, 1988 requesting a ruling as to whether or not you are subject to the 10% value-added tax.
>
> You have presented that you are operating a small group of eating and take out counters in Legaspi Village, selling sandwiches and pastries to office employees; that to save on raw material costs, you bake your own bread together with other bakery products which you sell.
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> In reply, please be informed that under the foregoing facts, you are an operator or proprietor of a refreshement parlor or eating place; hence, your gross receipts are subject to the 4% caterer's tax under Section 114 (formerly Section 171) of the Tax Code, as amended by Executive Order No. 273. However, a take out counter is considered incidental to the operation of an eating place which is

> the main line of business. In other words, the take out counter is not ordinarily taxed as an independent business, in which case, the sales in said counter forms part of the gross receipts of the operator of the eating place subject to the 4% caterer's tax. Such being the case, the sales in the take out counter are not subject to the 10% value added tax pursuant to Section 103 (j) of the Tax Code, as amended by Executive Order No. 273.
>
> **(SGD.) BIENVENIDO A. TAN, JR.**
> Commissioner of Internal Revenue

In view of said letter/ruling, it appears that an excess payments arose on account of the error of petitioner in paying the 10% sales tax instead of paying only caterer's tax at 4% on the total gross receipts. Hence, the issue of this case. Petitioner in its letter dated 8 April 1988 filed with the respondent on April 11, 1988 a claim for refund of sales taxes and penalties erroneously paid (Exhs. Q and R, p. 79-87, CTA rec.,). Respondent, however, never acted upon petitioner's request, hence this petition for review.

Respondent in its answer argued that "judicial recourse in the instant case is premature. Petitioner has not yet fully exhausted all administrative remedies as provided by law. Perforce, the rule on primary jurisdiction bars the instant petition". Since no action was taken by the respondent on the alleged claim for tax refund, petitioner was compelled to file a petition for review to this Court without awaiting the decision of the respondent Commissioner of Internal Revenue so as not to bar its claim and in order to prevent the tolling of the statute of limitation.

It was ruled that "if, however, the Collector takes time in deciding the claim, and the period of two years is about to end, the suit or proceeding must be started in the Court of Tax Appeals before the end of the two-year period without awaiting the decision of the Collector. This is so because of the positive requirements of Section 306 and the doctrine that delay of the Collector rendering decision does not extend the peremptory period fixed by statute". (U.S. v. Michel 282 U.S. 656, 51 S. Ct. 284; P.J. Kiener & Co., Ltd., v. David, L-5163, April 22, 1953; College of Oral & [illegible] Surgery v. C.T.A. G.R. No. L-10446, January 28, 1958).

However, the ultimate issue presented before this Court is whether or not petitioner as Operator of a chain of eating and take-out counters is liable to the 10% manufacturers sales tax on its sales of bakery products inspite its being liable to the normal caterers tax.

The provisions of the National Internal Revenue Code involved are as follows:

> Sec. 165 - Sales Taxes A - on original sales of articles - there shall be levied, assessed-collected once only on every original sale, barter, exchange, or similar transaction intended to transfer ownership of, or title to, the articles hereinbelow enumerated, a sales tax to be paid by the manufacturer, producer, or importer:
>
> > (3) Essential Articles - 10% of the gross selling price or gross value in money of the following articles as sold, bartered, exchanged or transferred:
> >
> > (F) Bread and ordinary bakery products
>
> and
>
> Sec. 172 (now Sec. 114) - Caterers - A caterer's Tax is hereby imposed as follows:
>
> > (1) on proprietors or operators of restaurants, refreshment parlors and other eating places, including clubs and caterers, four (4%) percentum of their gross receipts;

From the various evidences presented particularly the quarterly percentage tax returns filed by Petitioner for taxable years 1986 and 1987, the following facts were gathered by this Court:

1986

Quarter	Gross Receipt Caterer/Food	Gross Receipt as Manufacturer of Bakery Products	Tax Paid
Second	P185,269.99	P 605,070.02	P 7,410.80 60,50[illegible]
Third	103,555.60	424,739.26	4,142.20 42,473.92
Fourth	98,218.26	458,239.18	3,928.74 45,823.91
Total	P387,043.85	P1,488,048.46	

Caterer Tax	P 15,481.74
Manufacturer sales Tax	148,804.83

1987

Quarter	Gross Receipt Caterer/Food	Gross Receipt as Manufacturer of Bakery Products	Tax Paid
First	P151,363.60	P 429,201.39	P 6,054.62 42,920.11
Second	210,790.83	389,380.27	38,938.03 8,4[illegible]
Third	231,918.48	461,072.26	46,107.22 9,276.74
Fourth	179,263.95	460,341.02	46,034.10 7,170.56
Total	P773,336.86	P1,739,995.14	

Caterer Tax	P 30,933.56
Manufacturer sales Tax	173,999.46

Clearly, from the above gross receipts of sales by petitioner for the years 1986 and 1987 we can conclude that actually petitioner is more of a manufacturer of bakery products than as an operator of a refreshment parlor or eatery place. We can safely say that mainly petitioner is a Baker and that it is the operation of the eating place which is merely incidental to the main business and not the other way around as ruled by the respondent in his BIR Ruling No. 012-88. However, respondent may not be blame for the ruling as the above facts may not have been presented to him by the petitioner when it requested for the said ruling.

As held in the case of Crispulo Malicse, Petitioner vs. Collector of Internal Revenue, Respondent, (G.R. L-7578 Phillippine Reports Vol. 99, July 24, 1956), the facts of the petitioner in paying three (3%) percent of gross receipts as hotel keeper of Palo Alto Hotel and Restaurant and for his business as keeper of a restaurant where wines of liquors are served, he paid five (5%) percent percentage tax prescribed in Section 191 of the Tax Code are in order. The Supreme Court dismissed the contentions of the petitioner, that the operation of said restaurant is merely incidental to and necessarily connected with the hotel business and as such his receipts from said restaurant should be considered receipts of his hotel business subject to the 3% percentage tax due him as hotel keeper. Furthermore, contrary to the contention of the petitioner that Section 191 applies only to purely drinking establishments, the Supreme Court agrees with the Solicitor General that "if the theory is sustained, it would be easy for taxpayers to evade the payment of the 5 percent percentage tax prescribed in Section 191 on bars and cafes where wines or liquors are served by simple expedient of not maintaining a purely drinking establishment and keeping just a sort of an eating establishment but at the same time serving therein wines or liquors which could not have been the intentions of the legislators". The same ruling was held by the Supreme Court in the case of <u>Bay View Hotel Inc. and Mariano Zamora, petitioners vs. Collector of Internal Revenue and Court of Tax Appeals, respondent,</u> G.R. No. L-11116 June 30, 1959, Vol. 109 Philippine Reports, pp. 1357 - 1358.

Similarly in the case at Bar, the acts of the petitioner in paying the 4% caterers tax as an operator of a refreshment parlor or eating place and at the same time paying 10% as manufacturer of Bakery products & selling them to the public are in order. To rule otherwise, will open the gate for possible evasion of the payment of the higher ten (10%) percent manufacturer sales tax by the simple expedient of maintaining a refreshment parlor or any eating place inside the bakery establishments and treat the selling of the bakery products as incidental to its operation of the eating place. This court believes that the most equitable manner of interpreting the law is to give force and effect to each and every provisions of the law. A statute must be read or construed as a whole or in its entirely. All parts, provisions or sections must be read, considered or construed together and each must be read, considered with respect to all others and in harmony with the whole. (Chartered Bank vs. Imperial, 48 Phil. 931; Lopez et al vs. El Hogar Filipino, 47 Phil. 249; Almeda vs. Florentino, G.R. No. L-23800 Dec. 21, 1965). In the instant case, this Court believes Sections 165 and 172 of the National Internal Revenue Code may be given equal force and effect as there appears no conflict at all. If the business establishment manufactures and sells its bakery products to the public, it is liable to the 10% manufacture sales tax and if it maintains at the same time an eating place inside the establishment it is liable to the 4% caterers tax for the food and drinks it serves. This manner of paying taxes, the petitioner has correctly followed as shown in its quarterly percentage tax returns.

WHEREFORE, the instant Petition for Review is hereby dismissed. The amount sought to be refunded is consequently **DENIED.**

No pronouncement as costs.

SO ORDERED.

Quezon City, Metro Manila, September 17, 1991.

ERNESTO D. ACOSTA
Associate Judge

WE CONCUR:

ALEX Z. REYES
Presiding Judge

CONSTANTE C. ROAQUIN
Associate Judge

C E R T I F I C A T I O N

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

ALEX Z. REYES
Presiding Judge
Court of Tax Appeals