REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

CEPOC INDUSTRIES, INC.,
Petitioner,

- versus -

C.T.A. CASE NO. 2103

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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

10/21/87

D E C I S I O N

This is a companion case of CTA Case No. 2075, Cepoc Industries, Inc., (formerly Cebu Portland Cement Company) vs. Commissioner of Internal Revenue, involving the same parties and the same issues, wherein this Court in its decision dated October 7, 1987 ordered petitioner Cepoc Industries, Inc., to pay the 7% sales tax on cement, subject-matter therein, the same to be computed on the basis of the gross selling price, less appropriate deductions corresponding to the costs of raw materials used in the manufacture of cement, conformably with Section 186 of the applicable National Internal Revenue Code, and without the imposition of 25% surcharge.

The factual setting of this case is also similar to that of CTA Case No. 2075.

Petitioner is a government owned and controlled corporation, duly organized and existing under and by virtue of the laws of the Philippines, formerly engaged in the production of Apo Portland cement and other products, with principal office at the Apo Cement Building, corner Dasmariñas and Barraca Sts., Manila.

Respondent is a public officer entrusted with the proper collection of internal revenue taxes.

During the period from January 1 to June 30, 1963, petitioner produced Apo Portland cement, more than 80% of which consist of limestone and clay quarried by petitioner from its own mineral land located in the Philippines.

During the period in question, petitioner filed with respondent quarterly returns of the gross sales of the cement produced, on the basis of which respondent assessed and collected only *ad valorem* tax as respondent was then of the opinion that petitioner's cement was not liable to the payment of sales tax by virtue of the provisions of Republic Act No. 1299 which took effect on June 17, 1955;

the said protest filed by petitioner against the assessment in question.

On April 17, 1970, petitioner was served by respondent a warrant of distraint and levy of the personal and real properties of petitioner, No. N-13B-69, to enforce the collection of the foregoing assessment.

On May 8, 1970, petitioner filed the instant petition for review with this Court.

The issues are: (a) whether petitioner's sales of cement are subject to sales tax, and (b) whether respondent's assessment had already prescribed.

On the question of prescription, respondent alleges as affirmative defense that since petitioner has not filed sales tax return on its gross sales of cement from January 1 to June 30, 1963 as required under Section 183 of the applicable National Internal Revenue Code, respondent has a period of ten (10) years from the discovery of said omission within which to assess the deficiency sales tax in accordance with Section 332(a) of the then in force Tax Code. Since the deficiency sales tax disputed in this case was assessed on May 8, 1968 or within that said *ad valorem* tax is the subject of an action for refund docketed as C.T. A. Case No. 1617.

Respondent, after the promulgation on February 27, 1965, of the decision of the Supreme Court in G.R. No. L-18649 entitled "Cebu Portland Cement Company vs. Commissioner of Internal Revenue," wherein the Supreme Court sustained the contention of petitioner that the basis for the computation of the *ad valorem* tax is the costs of the raw materials quarried from its mines, subjected petitioner, as producer of cement, to the payment of sales tax.

On June 14, 1968, petitioner received a letter from respondent dated May 8, 1968, assessing petitioner the amount of ₱202,226.97 as alleged deficiency sales tax and surcharge on its sale of cement produced by petitioner from January 1 to June 30, 1963.

On June 14, 1968, petitioner filed with respondent a letter protesting the said assessment on the ground that cement is not subject to the sales tax and that the assessment had already prescribed.

On April 17, 1970, petitioner received from respondent a letter dated March 10, 1970, denying ten (10) years from April 8, 1968, the date of discovery of petitioner's omission to file a sales tax return, the deficiency sales tax herein was assessed on time by respondent.

Upon request of the parties, action on this case was held in abeyance to await the decision of the Supreme Court in similar cases involving the same issues which were then pending therein under G.R. Nos. L-35668, 35670, 35671, 35672, 35683 and 35677 entitled "Republic Cement Corporation, Filipinas Cement Corporation, Apo Cement Corporation, Bacnotan Consolidated Industries, Inc., Philippine Portland Cement Co., Inc., and Cepoc Industries, Inc. vs. Commissioner of Internal Revenue."

On August 10, 1983 the Supreme Court promulgated its decision in Commissioner of Internal Revenue vs. Republic Cement Corporation, Filipinas Cement Corporation, Apo Cement Corporation, Bacnotan Consolidated Industries, Inc., Rizal Cement Company, Inc., Philippine Portland Cement Co., Inc., and the Court of Tax Appeals, G.R. Nos. L-35668-72 & L-35683; and Commissioner of Internal Revenue vs. Cepoc Industries, Inc. and the Court of Tax Appeals, L-35677, 124 SCRA 46, wherein the High Tribunal unequivocally ruled that cement is a "manufactured product" and its sale is not exempt from the sales tax imposed by Sections 186 & 188(c) of the then in force National Internal Revenue Code. As a consequence of this ruling, the Supreme Court ordered the private respondents therein to pay the sales tax. Buttressed by the law, precedent and reason, we find unnecessary to re-echo the rationale of the ruling of the Supreme Court that cement is subject to the sales tax.

For purposes of computing the correct tax liability of petitioner, however, some qualifications as pointed out in the decision are in order. To quote:

> (1) The disputed assessments carry a 25% surcharge pursuant to Section 183 (a) of the Tax Code /now Sec. 193 (a) (3)/ which prescribes the said surcharge for late tax payment.
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> In Connell Bros. Co. (Phil.) vs. Collector of Internal Revenue (10 SCRA 469 at 470-471), the then Justice Makalintal, speaking for the Court, rejected therein the imposition of 25% surcharge for late payment:
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> xxx xxx xxx
>
> xxx xxx xxx

In the case at bar, the assessments are not undisputed or indisputable. The dispute as to the tax liability of private respondents for sales tax on the sale of cement arose not simply because of ordinary divergence of views in good faith vis-a-vis the interpretation of the law; the position of private respondent was founded upon the original stand of the Bureau of Internal Revenue itself that cement is a mineral product rather than a manufactured product and is therefore subject to ad valorem tax, not sales tax. As pointed out above, this stand was apparently given implied support in CEPOC vs. Collector, G.R. No. L-20563 (1968), 25 SCRA 789, penned by Justice Angeles. That the posture of private respondents is plausible - despite the subsequent BIR position that cement is a manufactured product subject to sales tax - is supported by the fact that the Court of Tax Appeals, the specialized body handling tax cases, sustained the private respondents in the decisions under review.

Under the circumstances, the 25% surcharge imposed in the disputed assessment must be deleted.

(a) The assessments in question seem to have computed the sales tax liability of private respondents on the basis of the total selling price of cement sold. If this was so, a recomputation is in order so as to deduct from the tax base the costs of raw materials used in the production of cement, such as gypsum, conformably with the provisions of Section 186 /now Sec. 199(a)7

> of the Tax Code as it stood during the tax period here involved:
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> xxx xxx xxx
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> Before closing, it may be noted in passing that in order to obviate any further controversy, cement <u>qua</u> cement has been expressly made subject to sales tax at the reduced rate of 5% on the implicit assumption that it is a manufactured product and therefore outside the purview of "mineral product" under Section 246 of the Tax Code. (See Presidential Decree No. 1358.)

And on the issue of prescription of the government's right to make the subject assessment, which was upheld by the Supreme Court, we quote the pertinent portions of the resolution of the Supreme Court dated May 7, 1987 denying the motion for reconsideration of the decision.

> 3. Finally, the Motion for Reconsideration filed by private respondent CEPOC raises anew the issue of prescription of the government's right to make the subject assessment in the light of Sec. 331 of the Tax Code. Unlike the non-retroactivity issue, prescription has been ventilated by the movant even during the pendency of the case in the Court of Tax Appeals, and in its pleadings filed with this Court. Both the Court of Tax Appeals decision and the decision sought to be reconsidered are, however, silent on that point. We clarify.

Considering that the decision on the tax liability of private respondents, as in fact, the dispositive portion thereof ordered them to pay the 7% sales tax, the prescription issue with regard to the movant CEPOC merits clarification. Left unresolved, it will only serve to nurture the lingering doubt which CEPOC continues to harbor insofar as its tax liability is concerned. Besides, the issue was squarely raised at the proper time and in the proper forum. We elect to discuss the issue, but as already said, only as a clarification of the decision which needs no reconsideration on its merits.

In order to avail itself of the benefits of the five-year prescription period under Sec. 331 of the Tax Code, the taxpayer should have filed the required return for the tax involved, that is, a sales tax return. (Butuan Sawmill Inc. v. CTA et al., G.R. No. L-21516, April 29, 1966, 16 SCRA 277). Thus CEPOC should have filed sales tax returns of its gross sales for the subject periods. Both parties admit that returns were made for the ad valorem mining tax. CEPOC argues that said returns contain the information necessary for the assessment of the sales tax. The Commissioner does not consider such returns as compliance with the requirement for the filing of tax returns so as to start the running of the five-year prescriptive period.

We agree with the Commissioner. It has been held in Butuan Sawmill Inc. v. CTA, supra, that the filing of an income tax return cannot be considered as substantial compliance with the requirement of filing sales tax returns, in the same way that an income tax return cannot be considered as a return for compensating tax for the purpose of computing the period of prescription under Sec. 331. (Citing Bisaya Land Transportation Co., Inc. v. Collector, G.R. Nos. L-12100 and L-11812, May 29, 1959). There being no sales tax returns filed by CEPOC, the statute of limitations in Sec. 331 did not begin to run against the government. The assessment made by the Commissioner in 1968 on CEPOC's cement sales during the period from July 1, 1959 to December 31, 1960 is not barred by the five-year prescriptive period. Absent a return, or when the return is false or fraudulent, the applicable period is ten (10) years from the discovery of the fraud, falsity or omission. The question in this case is: When was CEPOC's omission to file the return deemed discovered by the government, so as to start the running of said period?

It may be recalled that prior to the interpretation made by the Court in the first CEPOC case in 1965 on the nature and taxability of cement, the Commissioner of Internal Revenue was of the opinion that sales tax was not due on cement. Consequently, said private respondent did not file the required sales tax returns on its gross sales of cement for the period from July 1, 1959 to December 31, 1960. However, it was only in 1968, and by reason of said interpretation, that the Commissioner changed his opinion and assessed sales tax against the private respondents, including the movant CEPOC.

The Commissioner contends that his duty to assess the sales tax in question arose only after the Court ruled in the first CEPOC case (G.R. No. L-18649, February 27, 1965) that cement was subject to the tax. Thus, according to him, the statute of limitations began to run only in 1967, when the Motion to Reconsider said decision was denied. The net effect of this argument is that the prescription period for the assessment of the sales tax was suspended during the time that the Commissioner held the opinion that cement was not liable to tax. For its part, CEPOC maintains that the statute of limitations cannot be suspended because of the Commissioner's erroneous interpretation of the Tax Code which is not among the grounds for suspension under Section 333. Following this line of argument, the omission of CEPOC would be deemed "discovered" by the government as early as 1960, after the filing of CEPOC's *ad valorem* returns.

Whether We consider the discovery of CEPOC's omission to file a sales tax return to have taken place in 1960, immediately after the filing of its returns for *ad valorem* tax, or in 1967, when the Commissioner changed his erroneous ruling, We will arrive at the same result. Since the subject assessment was made in 1968, the same still falls within the ten-year prescriptive period either from 1960 or from 1967.

WHEREFORE, the decision appealed from is affirmed; and it is hereby ordered that petitioner Cepoc Industries, Inc., pay to respondent Commissioner of Internal Revenue the 7% sales tax on cement, subject of this case, the same to be computed on the basis of the gross selling price, less appropriate deductions corresponding to the costs of raw materials used in the manufacture of cement, conformably with Section 186 of the applicable National Internal Revenue Code, and without the imposition of 25% surcharge. No costs.

SO ORDERED.

Quezon City, Metro Manila, October 21, 1987.

AMANTE FILLER
Presiding Judge

WE CONCUR:

CONSTANTE C. ROAQUIN
Associate Judge

ALEX Z. REYES
Associate Judge