PHILIPPINE ACETYLENE CO.,
Petitioner,

- versus - C.T.A. CASE NO. 324

SILVERIO BLAQUERA, as
Collector of Internal
Revenue,
Respondent.

1/10/58

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DECISION

The petitioner is a domestic corporation engaged in the manufacture and sale of oxygen and acetylene gases. In a letter dated June 8, 1956, received by petitioner on July 5, 1956, respondent assessed against petitioner a deficiency sales tax and surcharge amounting to ₱10,879.03, covering the period from 1951 to the second quarter of 1955, computed as follows:

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| Taxable sales ............. | ₱1,584,728.54 |
| 7% tax due thereon ........ | 110,931.00 |
| Less: amount paid ......... | 102,227.78 |
| Deficiency sales tax ...... | 8,703.22 |
| 25% surcharge ............. | 2,175.81 |
| Total ..................... | ₱ 10,879.03 |

Petitioner was also asked to pay the sum of ₱500.00, in addition to the sum of ₱10,879.03, if it desired to settle extrajudicially its violation of Sections 183 and 186 of the National Internal Revenue Code, penalized under Section 209 of the same Code.

Petitioner sought a reconsideration of the assessment, and, upon denial thereof, appealed to this Court.

Two issues have been raised in this appeal, to wit: (1) whether or not the appeal was filed within the statutory period of 30 days prescribed in Section 11 of Republic Act No. 1125, and (2) whether or not the deficiency assessment is in accordance with law.

If the request or petition for reconsideration of the assessment filed by petitioner with the office of respondent is to be considered as having suspended the running of the period within which to appeal, counsel for the Government concede that the herein petition for review was filed on time. They insist, however, on their time-worn and oft-rejected theory that a petition for reconsideration of a decision of the Collector of Internal Revenue does not suspend the running of the period within which to appeal. They claim that they have no intention of abandoning this theory, in the absence of a clear-cut Supreme Court ruling on the matter. We quote from a recent decision of the Supreme Court:

> "We find that in proceedings before the courts as well as in those before administrative officials, the constant practice has been to permit motions for reconsiderations and to deduct the time used in the consideration thereof from the period for perfecting an appeal. We have found no reason for deviating from this practice in matters coming from the Auditor General; as a matter of fact, the practice is in consonance with the principle of exhaustion of administrative remedies. The claim of respondent that the appeal was perfected out of time can not, therefore, be sustained." (Libuet v. Auditor General, G.R. No. L-10160, June 28, 1957.)

We find, therefore, that the petition for review was filed within the statutory period.

Now for the second issue relating to the validity of the deficiency assessment. It is admitted that petitioner is subject to the percentage tax of 7% on its sales of oxygen and acetylene gases based on the "gross selling price or gross value in money of the articles so sold", in accordance with Section 186 of the Revenue Code. The taxable gross selling price of an article where the manufacturer uses raw materials subject to tax under the same section and Section 189 is the total amount paid by the buyer to get the goods less the value of the raw materials used. Since the enactment of the National Internal Revenue Code in 1939, the Bureau of Internal Revenue has also allowed the deduction from the gross selling price of the amount corresponding to the tax, if such tax is billed as a separate item in the invoice issued to the customer. (See B.I.R. General Circulars Nos. 431 and 440, dated July 29, 1939 and October 12, 1939, respectively.) No question is raised in regard to the validity of General Circulars Nos. 431 and 440. We shall, therefore, limit ourselves to the consideration of the question whether the assessment is in accordance with law and said circulars.

The following facts and figures are not disputed:

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| Total selling price of oxygen and acetylene gases from 1951 to the second quarter of 1955, as indicated in the invoices, without the tax but including the value of tax-paid imported raw materials ...................... | ₱1,793,732.97 |
| Tax billed to customers on the basis the gross selling price of ₱1,793,732.97, without deducting the value of the raw materials ........... | 125,561.31 |

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| Gross amount billed to customers .................. | ₱1,919,294.28 |
| Cost of imported raw materials used .............. | ₱ 334,465.74 |
| 7% tax actually paid by petitioner ................. | ₱ 102,227.78 |

It will be noted from the above facts and figures that while petitioner billed to and collected from its customers the total amount of ₱125,561.31 as tax, allegedly under General Circulars Nos. 431 and 440, cited above, it actually paid to the Government only the sum of ₱102,227.78. The difference lies in the fact that when petitioner issued invoices to its customers, it computed the tax on the basis of the gross selling price without the tax but without deducting the cost of the raw materials, but when it filed its returns it deducted not only the amount corresponding to the tax but also the value of the raw materials. In other words, petitioner collected more from its customers by way of tax but it paid less to the Government, thereby profiting from its method of computing the tax, at the expense not only of its customers but also of the Government. Not satisfied with said method of computation, respondent assessed the deficiency tax on the basis of the gross selling price, including the tax billed to the customers, less the value of the raw materials, as shown below:

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| Total gross selling price billed to customers without tax ........................ | ₱1,793,732.97 |
| Total tax billed to customers .. | 125,561.31 |
| Total gross selling price ...... | ₱1,919,294.28 |
| Less cost of raw materials ..... | 334,465.74 |
| Taxable gross selling price .... | ₱1,584,728.54 |

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| 7% tax on ₱1,584,728.54 ........ | ₱ | 110,931.00 |
| Less amount already paid ....... | | 102,227.78 |
| Deficiency sales tax .......... | ₱ | 8,703.22 |
| 25% surcharge ................. | | 2,175.03 |
| Total deficiency tax and surcharge ................. | ₱ | 10,879.03 |

We agree with the method of computation of the sales tax due from petitioner which has been resorted to by respondent as indicated above. It is exactly in accordance with the provisions of Section 186 of the Revenue Code, which permits deduction from the gross selling price of articles sold the value of raw materials subject to tax under that section and Section 189. The amount of the sales tax billed to the customers is properly a part of the taxable gross selling price, because the correct amount of tax was not billed to the customers. In authorizing the deduction of the tax from the taxable gross selling price, if such tax is billed as a separate item in the invoice, General Circular No. 431, provides:

> "'Gross selling price' or 'gross value in money' of the articles sold, bartered, exchanged, or transferred, as the term is used in the aforecited sections of the National Internal Revenue Code, is the total amount of money or its equivalent which the purchaser pays to the vendor to receive or get the goods. However, if a manufacturer, producer, or importer, in fixing the gross selling price of an article sold by him, has included an amount intended to cover the sales tax in the gross selling price of articles, the sales tax shall be based on the gross selling price less the amount intended to cover the tax, if the same is billed to the purchaser as a separate item. To illustrate: In case an automobile dealer fixes the price of an automobile at ₱2,400 and charges an additional of ₱120 to cover the sales tax which he bills as a separate item on the sales invoice, the tax of 5% prescribed in section 185 of the Code (the rate of tax then in force) shall be imposed on ₱2,400."

In order that the sales tax may not be considered as part of the taxable gross selling price of an article, it is essential that the tax be billed as a separate item in the invoice issued to the customer. "The tax", as used in General Circular No. 431, means the correct amount of the tax. If the amount billed to the customess does not represent the correct amount of the tax, the requirement of the circular is not complied with because what has been billed is not the tax within the meaning of said circular and Section 186 of the Revenue Code (in case of an article taxable under that section), but a different amount. In the instant case, the total amount that should have been billed to its customers by petitioner, as authorized by General Circular No. 431, is ₱103,673.83. Instead, it billed to its customers the total amount of ₱125,561.31. The amount of the tax (₱103,673.83) not having been billed as separate items in the invoices issued to its customers, the total taxable gross selling price of the articles sold by petitioner on which the sales tax must be imposed is the total sum paid by the customers for the goods, which is ₱1,584,728.54, including the tax but exclusive of the value of the deductible raw materials, as the "amount added because of the tax is paid to get the goods and for nothing else." (Lash's Products v. U. S., 278 U.S. 175.) The requirement that the tax be billed as a separate item in the invoice being merely a privilege granted to the taxpayers, the same must be strictly complied with. Failure to do so results in the denial of the privilege.

> "Unless billed to the purchaser as separate items in the invoice, the amounts intended to cover the sales tax shall be considered as part of the gross selling price of the articles sold, and deduction thereof will not be allowed." (Gen8eal Circular No. 440, October 12, 1939.)

It does not sit well on the lips of petitioner to contest the legality of the assessment which is actually less than what it had collected from its customers by way of sales tax. Certainly, it has never been the intention of the law and General Circulars Nos.431 and 440 to permit taxpayers to collect more from their customers by way of tax and at the same time to pay to the Government an amount which is even less than what the law provides.

It occurred to us that petitioner might be justly required to pay not the sum of ₱10,879.03, as assessed by respondent, but the sum of ₱23,333.53, which is the difference between the amount petitioner collected from its customers as tax and the amount already paid to the Government, on the ground that petitioner should not be allowed to enrich itself at the expense of its customers who were misled as to the amount of the tax that they had to pay. Upon a careful consideration of the matter, we can not find any legal justification for requiring a taxpayer to pay more than what the law requires. The Government should set the example of fair and honest dealings with the taxpayers. What is an illegal exaction can not be legalized by requiring the amount illegally collected by private parties to be turned over to the Government without providing for its return to the proper party. At any rate, the sum of ₱125,561.31 which petitioner collected from its customers as sales tax has been treated in this opinion not as a tax but merely as an additional amount paid by the customers and as part of the purchase price of the goods bought from petitioner. Therefore, in legal contemplation, petitioner did not charge the tax on its sales to its customers.

With respect to the sum of ₱500.00, it appears that respondent merely suggested to petitioner the payment of said amount if it desired "to extrajudicially settle the penal liability arising from (its) . . . violation" of Sections 183 and 186, penalized under Section 209 of the Revenue Code. (See Exh. C for petitioner; Exh. 2 for respondent.) Respondent here has attempted to exercise his power to compromise criminal violations of the Revenue Code by virtue of the authority conferred upon him by Section 309. We have already held in decisions too numerous to be cited that an offer in compromise made by the Collector of Internal Revenue, in order to be binding, must be accepted by the taxpayer. No person may be compelled to enter into a compromise agreement against his will. It does not appear that petitioner has accepted the offer or suggestion of respondent. Accordingly, petitioner is under no obligation to pay the said sum of ₱500.00. (See Bislig Bay Lumber Co., Inc. vs. Collector of Internal Revenue, C.T.A. Case No. 155, October 9, 1957.)

Finding the assessment made by respondent against petitioner, except with respect to the sum of ₱500.00, in order, the same is hereby affirmed. With costs against petitioner.

SO ORDERED.

Manila, January 10, 1958.

ROMAN M. UMALI
Associate Judge

WE CONCUR:

MARIANO NABLE
Presiding Judge

AUGUSTO M. LUCIANO
Associate Judge