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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

WACK WACK GOLF AND
COUNTRY CLUB,
Petitioner,

- versus - C.T.A. CASE NO. 1977

COMMISSIONER OF
INTERNAL REVENUE,
Respondent.
x - - - - - - - - - - - - x

Aug 30/72

D E C I S I O N

This is a petition to review the decision of the respondent Commissioner of Internal Revenue assessing against and demanding from petitioner the sum of ₱268,909.30, representing percentage tax, surcharge and compromise penalties on the total gross receipts of its bar and restaurant for the period covering 1953 to 1962.

Petitioner is a non-stock and non-profit corporation organized under the laws of the Philippines, for the following purposes, to wit:

> "SECOND: - That the purposes for which the said corporation is formed are to foster, promote and conduct legitimate athletic exercises, sports and entertainments of all kinds; to establish, maintain and conduct a club house or club room; to purchase, lease or otherwise acquire such real and personal property, athletic or other equipment as may be necessary or convenient in connection with the conduct of the affairs of the corporation; and, generally, to do and perform such acts and things, and to exercise such powers as are ordinarily done, performed and exercised by social and athletic clubs and associations." (Articles of Incorporation, p. 2, BIR rec.; admitted in par. 1, Answer.)

To carry out these purposes, petitioner constructed its clubhouse and established within its premises, among others, a bar and restaurant wherein food and drinks are served. According to the by-laws of petitioner's club, the bar and restaurant cannot be availed of by the general public and the food and drinks are to be served exclusively to its members, as well as to the immediate families of members and to the guests and visitors of such members.

Petitioner has never paid percentage tax on the gross receipts of its bar and restaurant nor has it ever paid fixed tax for its operation. The articles of incorporation and by-laws of petitioner do not contain provisions for the accumulation of profits, much less for the distribution thereof. Its income or profit does not inure to the benefit of any individual member or stockholder, the same being retained to provide for further improvements of the club.

Upon examination of the books and other accounting records of petitioner's bar and restaurant, respondent's examiner, Akmadul Sarapuddin, reported that it was being operated for profit and, hence, in a letter dated March 1, 1963, recommended to his superior, the Provincial Revenue Officer of Quezon City, that the club be assessed for percentage tax, in connection with the operation of its bar and restaurant, in the amount of ₱268,909.30, inclusive of surcharge and compromise penalties for the period covering 1953 to 1962.

Pursuant to said recommendation, a "Notice To Taxpayer" was sent to petitioner proposing adjustment of its tax liability in the sum of ₱268,909.30. In a letter dated March 26, 1963, petitioner, through its auditor, J. S. Zulueta & Co., disputed the alleged tax liability and requested the bureau to desist from effecting the proposed adjustment. Because of petitioner's opposition, the Regional Director, Regional District No. 4, Quezon City, endorsed the matter to the respondent for the resolution of the legal issues raised by petitioner. In a letter dated January 15, 1964, respondent required the Regional Director to conduct another investigation of petitioner's tax liability.

Whereupon, in a letter dated September 23, 1964, respondent assessed petitioner in the sum of ₱268,909.30 as percentage tax, surcharge and compromise penalties based on the gross receipts of its bar and restaurant covering the period from 1953 to 1962. Petitioner wrote respondent a letter on November 18, 1964, contesting the validity of the assessment and requesting that it be cancelled and withdrawn on the ground that it is exempt from taxation being a non-stock and non-profit corporation. In a letter dated October 28, 1968, respondent denied the request for the cancellation and withdrawal of the assessment alleging that petitioner's bar and restaurant was being conducted not on a strict non-profit basis. Hence, this appeal.

Prior to the assessment in question, petitioner had been similarly assessed by respondent for deficiency percentage tax covering the period from 1948 to 1952, as keeper of a bar and restaurant, which was likewise appealed to this Court, but subsequently withdrawn by respondent on the ground that similar cases have already been decided by the Supreme Court and Court of Tax Appeals exempting corporations, similarly situated as petitioner, from fixed and percentage taxes in connection with the operation of their bar and restaurant.

The dominant issues raised in this appeal are twofold:

1. Whether or not the right of respondent to assess the percentage tax corresponding to the years 1953 to 1959 has already prescribed; and

2. Whether or not petitioner is liable for the payment of percentage tax, surcharge and compromise penalties in connection with the operation of its bar and restaurant during the period from 1953 to 1962.

Petitioner alleges that the right of the respondent to assess the percentage tax corresponding to the years 1953 to 1959 has already prescribed. Apparently, petitioner is of the impression that respondent's right to assess is limited to a period of 5 years as prescribed in Section 331 of the Revenue Code the pertinent provisions of which follows:

> Except as provided in the succeeding section, internal-revenue taxes shall be assessed within 5 years after the return was filed, x x x. (Underlining supplied.)

We are, however, of the opinion that the petitioner's case is governed by Section 322(a) of the Revenue Code, which provides in part:

> In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return, the tax may be assessed, x x x, at any time within ten years after the discovery of the falsity, fraud or omission. (Underlining supplied.)

It is undisputed that petitioner had not filed any percentage tax return on the gross sales of its bar and restaurant because it has been claiming exemption from taxation since its organization. Under this circumstance, the percentage tax may be assessed within ten (10) years from and after the discovery of the omission to file the return under Section 332(a). (Republic v. Tan, 28 SCRA 325; Butuan Sawmill, Inc. v. Court of Tax Appeals, 16 SCRA 277; Taligaman Lumber Co., Inc. v. Coll. of Int. Rev., 4 SCRA 842.) It appears that the omission was discovered on March 1, 1963, when examiner Akmadul Sarapuddin submitted his report which became the basis of the assessment. Hence, the Government had ten (10) years from that date, or until March 1973, within which to assess petitioner. Petitioner was assessed on September 23, 1964, or less than 2 years after the discovery of the omission, so that it is clear that the assessment was made well within the 10 year prescriptive period.

We will now dwell on the merits of this case.

The law upon which respondent predicated his assessment is found in Sections 178, 183 and 191 of the Revenue Code, the relevant portion of which are hereinbelow quoted for convenience:

> SEC. 178. Payment of privilege taxes.- A privilege tax must be paid before any business or occupation hereinafter specified can be lawfully begun or pursued. The tax on business is payable for every separate or distinct establishment or place where business subject to the tax is conducted; and one line of business or occupation does not become exempt by being conducted with some other business or occupation for which such tax has been paid.
>
> x x x x x x
> (Underlining supplied.)
>
> SEC. 183. Payment of percentage taxes - (a) In general.- It shall be the duty of every person conducting a business on which a percentage tax is imposed under this Title, to make a true and complete return of the amount of his, her or its gross monthly sales, receipts or earnings, or gross value of output actually removed from the factory or mill warehouse and within twenty days after the end of each month, pay the tax due thereon; x x x x (Underlining supplied.)
>
> SEC. 191. Percentage tax on road, building, irrigation, artesian well, waterworks, and other construction work contractors, proprietors or operators of dockyards, and others.- x x x x
>
> Keepers of restaurants, refreshment parlors and other eating places, except those inside public market places, and caterers, shall pay a tax of three per centum of their gross receipts. Keepers of bars and cafes where wines or liquors are served shall pay a tax of seven per centum of their gross receipts: x x x x x

Interpreting Sections 183 and 191 of the Revenue Code, the Supreme Court in the case of Collector of Internal Revenue v. The Club Filipino Inc. de Cebu, 5 SCRA 321, stated:

> x x x x x Section 183 provides in general that "the percentage taxes on business shall be payable at the end of each calendar quarter in the amount lawfully due on the business transacted during each quarter; etc." And section 191, same Tax Code, provides "Percentage tax x x x x Keepers of restaurants, refreshment parlors and other eating places shall pay a tax three *per centum*, and keepers of bar and cafes where wines or liquors are served, five *per centum* of their gross receipts x x x." It has been held that the liability for fixed and percentage taxes, as provided by these sections, does not *ipso facto* attach by mere reason of the operation of a bar and restaurant. For the liability to attach, the operator thereof must be engaged in the business as a barkeeper and restaurateur. The plain and ordinary meaning of *business* is restricted to activities or affairs where profit is the purpose or livelihood is the motive, and the term *business* when used without qualification, should be construed in its plain and ordinary meaning, restricted to activities *for profit* or livelihood (The Coll. of Int. Rev. v. Manila Lodge No. 761 of the BPOE /Manila Elks Club/ & Court of Tax Appeals, G.R. No. L-11176, June 29, 1959, giving full definitions of the word "business"; Coll. of Int. Rev. v. Sweeney, et al. /International Club of Iloilo, Inc./, G.R. No. L-12178, Aug. 21, 1959, the facts of which are similar to the ones at bar; Manila Polo Club v. B.L. Meer, etc., No. L-10854, Jan. 27, 1960.)

It is the contention of respondent that petitioner was engaged in the business of operating a bar and restaurant for gain or profit as shown by these circumstances, to wit: (1) that the bar and restaurant catered indiscriminately to the public; and (2) that the profits derived from its operation, although not inuring to the benefit of any individual member have been spent for permanent improvements, acquisition of equipment and other fixed assets, which ultimately inure to the benefit of its members.

Well established is the rule that the determination or assessment by the respondent is presumptively correct and the taxpayer has the burden of proving its incorrectness. It is true that all presumptions are in favor of the correctness of the assessments. However, such presumption is proper only if the assessment is based on actual facts but does not arise if it is based merely on mere inferences. (Benipayo v. Coll. of Int. Rev., CTA Case No. 251, Jan. 23, 1958, aff'd in G.R. No. L-13656, Jan. 31, 1962; Viterbo v. Coll. of Int. Rev., CTA Case No. 363, Dec. 26, 1958; Samson v. Coll. of Int. Rev., CTA Case No. 232, June 30, 1958; Medina v. Comm. of Int. Rev., CTA Case No. 1245, Dec. 27, 1971.)

The bases of respondent in arriving at the conclusion that petitioner catered indiscriminately to the public are: (1) the numerous social affairs held in the club; (2) the personal experience of his examiner; (3) the records of sales; and (4) the enormous profits allegedly derived from the operation of the bar and restaurant.

The assertion of examiner Akmadul Sarapuddin that numerous social affairs were being held at the club was based on alleged newspaper reports that social affairs had been held therein and that he attached in his memorandum-report to respondent two newspaper clippings as proof thereof.

An examination of the records of this case, however, reveals that the alleged newspaper clippings are not attached to the examiner's report; neither are they in the BIR records. During the trial of this case, no attempt was made to present these newspaper clippings. But with this kind of testimony how are we to determine when the social affairs were held? It could be that the affairs were held before or after the period in question and would therefore be immaterial to the case at bar. (Coll. of Int. Rev. v. Benipayo, 4 SCRA 182.) How are we to know if the food and drinks served during the occasions were supplied by the club, by the hosts or by an independent caterer? How are we to ascertain whether the said affairs were hosted by members of the club or not? Saraspuddin, on cross-examination, admitted that he could not remember the names of the people who held parties at the club; that he did not investigate the persons who were named in the newspaper clippings to determine if they are members or guests of the club; and that he did not bother to find out who hosted the affairs, supplied the food and drinks served thereat.

We find more worthy of belief petitioner's evidence, that while social affairs were held during the period under review, they were hosted, sponsored and paid by members of the club.

laws. Food and drinks served at such affairs were paid by the club's members and never by their guests. We accordingly hold that respondent failed to establish by convincing evidence that the social affairs held at the club were open indiscriminately to the public and not exclusively to its members and their guests.

Examiner Sarapuddin also testified that on two occasions he personally went to the club's restaurant and after ordering food and drinks paid the same and was issued a chit by the waiter. Based on these incidents, he concluded that petitioner's bar and restaurant was catering indiscriminately to the public.

We do not think that the fact that a non-member of the club was served food and drinks on two occasions in its restaurant justifies the sweeping conclusion that the club catered indiscriminately to the public, assuming Sarapuddin's testimony to be true. The by-laws of the club prohibits the use of its facilities, or the sale of food and drinks, to non-members. The sale of food and drinks to the examiner, who is not a member of the club, was a violation of its by-laws. There is no evidence to show that petitioner has knowledge or abetted the violation committed by its employees. In fact, the club's general manager, General Molina, when informed of the incident by Sarapuddin reprimanded the waiter for having violated the by-laws of the club, according to Sarapuddin himself. Isolated infractions are bound to arise since some waiters may not know all the members of the club and fear of offending a member may make them reluctant to inquire from the man asking for food or wine if he is a member. Such waiters would be prone to presume that one who is in the restaurant or bar is a member otherwise he has no business being there.

Another thing that militates against the hasty conclusion reached by respondent is that the period in question is from 1953 to 1962 while the experience related by the examiner took place sometime in 1963 when petitioner's case was assigned to him for investigation. In other words, the incidents testified to by the examiner refers not to the period in question and there is no proof that the same practice obtained during the time involved in this case. (See Coll. of Int. Rev. v. Benipayo, supra.)

Respondent likewise argues that the voluminous records of sales of petitioner's bar and restaurant are indicative that it was catering not only to its members, their guests and friends but to the general public as well.

As shown by the evidence, the total sales of the bar and restaurant for the years in question were ₱1,773,452.05 and ₱2,762,175.29, or a total combined sales of ₱4,535,627.36. Based on these figures, respondent concludes that the sales appear to be grossly disproportionate to the number of members of the club entitled to the services of the bar and restaurant.

Looking into the club's by-laws, we find the following membership: (1) proprietary, (2) associate, (3) playing, (4) social, (5) special associate, (6) courtesy service, (7) service, and (8) junior members. Proprietary members are limited to only 400 for the first 15 years from its incorporation but may be increased afterwards. Other kinds of members are not subject to limitation in number.

Petitioner claims that the membership in the club average 800 a year during the period in question. Assuming that the 400 proprietary members have not increased since the club's incorporation up to the period involved here, it would not be unreasonable to assume that the rest of the members (7 kinds) numbered about 400, or a total average membership of 800 a year for the period under review.

The average daily sales of the bar and restaurant based on its gross sales of ₱4,535,627.36 for the period involved here (10 years) would only be about ₱1,200,00. Taking as basis an average membership of 800 a year, the average daily purchases per member, including his family and guests, would only amount to ₱1.50, or ₱45.00 a month. We are unable to see how a daily purchase of ₱1.50 per member which includes his family and guests would be voluminous so as to indicate that the sales were being made indiscriminately to the public. On the contrary, it shows that not very many avail themselves of the services of the club facilities and that the prices of food and drinks are reasonable. As a matter of fact, there is credible evidence showing that petitioner, for the years 1954 to 1957 and 1961, had reduced the prices for food and drinks to provide the members maximum comfort but short of entailing a loss in its general operation, so as to conform the more to the character and spirit of a non-profit organization.

Respondent further contends that enormous profits have been realized in the operation of the bar and restaurant which indicates that petitioner was engaged in business. Petitioner for its part claims that the bar and restaurant, except for the year 1953, did not realize profits but instead incurred losses.

Both parties arrived at different results of the operation of the bar and restaurant because they differ as to the manner of determining net income. Respondent arrived at the net profits of the bar and restaurant by deducting from its gross sales only "direct expenses", which according to respondent's examiner consisted only of the cost of purchases and salaries of employees of the bar and restaurant. Petitioner, on the other hand, determined the net profits by deducting from the gross sales of the bar and restaurant not only "direct expenses" but also the "General Club Expenses".

We agree with the petitioner that in determining the profits of the bar and restaurant, its share in the general club expenses must be deducted and not only limited to the cost of purchases and salaries of the employees of the bar and restaurant, as claimed by respondent. The "General Club Expenses" consisted of such services and expenses which are common to all its facilities but are not capable of allocation to a particular facility for the reason that they cannot be apportioned with certainty. These for instance include, among others, legal and audit expenses, salaries of administrative employees, SSS employer's contributions, printing expenses, water and electric expenses. We cannot see any valid reason why the bar and restaurant should not share in these general expenses when it undoubtedly availed itself of all of them in its operations. The bar and restaurant is admittedly an incidental activity in the purposes for which the club was organized. It was operated not as a separate or distinct entity but as an adjunct of the club for the convenience of its members; thus rental for the space it occupied was not charged against it. Viewed from all these circumstances, we think that it is but proper for the bar and restaurant to share in the general expenses of the club.

At any rate, assuming that petitioner derived profit from the operation of its bar and restaurant, such fact does not necessarily convert it into a profit-making enterprise. That a club makes some profit, does not necessarily make it a profit-making club. As has been remarked a club should always strive, whenever possible, to have surplus.) Said the Supreme Court in Coll. of Int. Rev. v. Club Filipino Inc. de Cebu, supra:

> It is conceded that the Club derived profit from the operation of its bar and restaurant, but such fact does not necessarily convert it into a profit-making enterprise. The bar and restaurant are necessary adjuncts of the Club to foster its purposes and the profits derived therefrom are necessarily incidental to the primary object of developing and cultivating sports for the healthful recreation and entertainment of the stockholders and members. That a Club makes some profit, does not make it a profit-making Club. As has been remarked a Club should always strive, whenever possible, to have surplus (Jesus Sacred Heart College v. Collector of Int. Rev., G.R. No. L-6807, May 24, 1954; Collector of Int. Rev. v. G. Sinco Educational Corp., G.R. No. L-9276, Oct. 23, 1956).

Lastly, respondent calls our attention that profits realized from the operation of the bar and restaurant have been spent for permanent improvements of the club. In this respect we can do no better than quote the following language of the Supreme Court in Coll. of Int. Rev. v. G. Sinco Educational Corp., 100 Phil. 134:

> Another point raised by appellant to show that appellee is not entitled to the exemption of the law refers to the use made by it of part of its income in acquiring additional buildings and equipment which, it is claimed would in the end redound to the benefit of its stockholders. Appellant claims that "by capitalizing its earnings in the aforementioned manners, the value of the properties of the corporation was enhanced and, therefore, such profits inured to the benefit of the stockholders or mem-

bers. The property of the corporation may be sold at any time and the profits thereof divided among the stockholders or members."

This claim is too speculative. While the acquisition of additional facilities, may redound to the benefit of the institution itself, it cannot be positively asserted that the same will redound to the benefit of its stockholders, for no one can predict the financial condition of the institution upon its dissolution. x x x x x x

WHEREFORE, the decision of respondent appealed from is hereby reversed; without pronouncement as to costs.

SO ORDERED.

Quezon City, August 30, 1972.

RAMON L. AVANCEÑA
Associate Judge

WE CONCUR:

ROMAN M. UMALI
Presiding Judge

ESTANISLAO R. ALVAREZ
Associate Judge