DR. ROMULO V. RAMOS
Petitioner,

- versus -

C.T.A. CASE NO. 1320

JOSE B. LINGAD, Acting
Commissioner of Internal
Revenue,
Respondent.

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

5/10/74

D E C I S I O N

This is a petition to review the decision of respondent Commissioner of Internal Revenue holding petitioner liable for deficiency franchise tax and surcharge in the sum of ₱32,543.06 for the period from July 1, 1956 to December 31, 1960, plus the amount of ₱4,820.04 representing alleged erroneously refunded franchise tax, or a total of ₱37,363.10.

Petitioner is the owner and operator of the Rural Electrification Corporation - a public utility which generates and supplies electric light, heat and power in the municipalities of Sta. Cruz, Digos, Bansalan, Padada and Malalag, Province of Davao. Originally, on November 15, 1947 petitioner obtained a municipal franchise under Act No. 667 which provides that:

> x x x The said grantee, in consideration of the franchise hereby granted shall pay quarterly into the Provincial Treasury of Davao one per centum of the gross earnings obtained thru this privilege during the first twenty years and two percentum during the remaining fifteen years of the

life of said franchise.

From the start of his operation, petitioner had been paying a franchise tax of 1% on his gross earnings based on the aforesaid franchise.

On June 19, 1960, Republic Act No. 3014 was enacted, granting petitioner a franchise for electric light and power subject to the terms and conditions of Act No. 3636, as amended, which provides a franchise tax equal to 2% of his gross earnings for electric current sold under said franchise. Despite the new rate of 2% prescribed in his legislative franchise, petitioner continued to pay only the 1% franchise tax provided in his municipal franchise.

On August 11, 1961, based upon the letters and recommendations of the General Auditing Office dated November 16, 1960 and July 18, 1961, respondent assessed petitioner the total amount of ₱49,826.10, as deficiency franchise tax and surcharge from April 1951 to December 1960, inclusive of the amount of ₱4,820.04, representing alleged erroneously refunded franchise tax. The details of the said assessment are stated in the aforesaid letter of August 11, 1961 thus:

Total gross receipts per audit	₱1,088,325.71
5% tax due thereon	54,416.28
Less: Amount paid	18,411.43
Balance	₱ 36,004.85
Add: 25% surcharge	9,001.21
Amount erroneously refunded.	4,820.04
TOTAL AMOUNT DUE	₱ 49,826.10

The 5% tax rate has been imposed,

> pursuant to Section 259 of the National Internal Revenue Code, as amended, and in line with the decision of the Supreme Court in the cases of Hoa Hin Co., Inc. vs. Collector of Internal Revenue, G.R. Nos. L-9616 and L-11783, it appearing that your charters are municipal franchises (granted under Act No. 667) which do not contain an exemption clause. Inasmuch as the aforesaid letters of the General Auditing Office show in detail the gross receipts you realized during the period under review, as well as the discrepancies and other miscellaneous items, it is believed needless to reproduce the same herein. The 25% surcharge has been added to the deficiency tax in accordance with the said Section 259 of the Tax Code.
>
> The amount of ₱4,320.04 which was erroneously refunded to you under Treasury Warrant No. B-0514415, refers to the franchise tax you claimed as overpayment for certain prior period.

On September 21, 1961, in a reply to respondent, petitioner contested the legality of the foregoing assessment, invoking, among other things, the defense of prescription.

On October 23, 1961, respondent wrote a letter to the Auditor General requesting for a recomputation of the tax liabilities of petitioner based on the prescriptive period provided in Section 331 of the Tax Code. In this letter, respondent said: ". . . That Office is in a better position to determine the gross receipts covered by the returns filed within the five (5) year period for the deficiency tax thereon."

In an indorsement to the Commissioner of Internal Revenue, dated December 28, 1961, the Auditor General submitted a revised computation of petitioner's franchise tax liabilities, this time covering only the period from July 1, 1956 to December 31, 1960, with the following notation:

> The returns of the utility for the 3rd quarter of 1956 should have been filed on or before October 20, 1956, which is within the five-year prescriptive period from August 11, 1961, the date of the assessment notice.

On the basis of the foregoing recomputation of the General Auditing Office, respondent, in a letter dated August 6, 1962, revised the previous assessment of August 11, 1961 and demanded from petitioner the payment of the total amount of ₱37,363.10, as deficiency franchise tax and surcharge from July 1, 1956 to December 31, 1960, inclusive of the amount of ₱4,820.04, representing franchise tax alleged to have been erroneously refunded to petitioner, computed as follows:

Gross receipts per audit. . . .	₱650,886.45
5% tax due thereon	32,544.32
Less: Amount paid	6,509.87
Balance.	₱ 26,034.45
Add: 25% surcharge	6,508.61
Tax erroneously refunded .	4,820.04
TOTAL AMOUNT DUE	₱ 37,363.10

Still dissatisfied with the revised assessment, petitioner's counsel, in a letter dated October 10, 1962, requested that the same be reconsidered, contending that: (1) respondent's right to assess the tax from July 1, 1956 to June 30, 1957 had already prescribed; (2) the right to recover the sum of ₱4,820.04, as alleged erroneously refunded franchise tax to petitioner for prior years, had also prescribed; and

(3) the deficiency assessment from July 1, 1957 to December 31, 1960 was contrary to the terms and conditions of petitioner's franchise and the law applicable.

In his reply of December 17, 1962, respondent denied said request for reconsideration thus prompting the latter to interpose his appeal to this Court on January 14, 1963.

On June 22, 1963, after issues were joined by respondent's answer, Republic Act No. 3829, a special franchise for petitioner, took effect, providing, under section 4 thereof, the following:

> SEC. 4. In consideration of the franchise and rights hereby granted, the grantee shall pay into the Treasury of the Philippines a franchise tax equal to two per centum of the gross earnings for electric current sold under this franchise. Provision of laws to the contrary notwithstanding, the franchise tax equal to two per centum of the gross earnings of the grantee granted by the Municipality of Santa Cruz, Province of Davao, shall be respected. Effective upon the date the original franchise was granted, no other taxes of every name and nature - municipal, provincial or national, upon its capital stock, franchises, right of way, earnings, and all other property owned or operated by the grantee under this concession or franchise shall be levied or assessed on the herein grantee or the corporation to which he is empowered to sell or assign this franchise, except the franchise tax of two per centum of the gross earnings mentioned in the said original franchises.

On February 7, 1964, an amended petition for review was filed by the petitioner alleging that said Republic Act No. 3829 exempted him from the payment of the 5% tax provided in Section 259 of the National Internal Revenue Code and imposed instead a franchise tax of 2% retroactive to the date of the original franchise. This amended petition was admitted in open Court on February 10, 1964 and, on February 20, 1964, an amended answer thereto was filed by respondent.

With respect to the first issue, that is, prescription in connection with the period from July 1, 1956 to June 30, 1957, it is not controverted that returns were filed by petitioner and they were neither false nor fraudulent. The prescriptive period is therefore 5 years counted from the filing of the return (Section 331, National Internal Revenue Code). The return for the months of July, August and September, the third quarter for 1956, by law should have been filed on October 20, 1956 and it is from this date that prescription started to run. From October 20, 1956 to August 6, 1962 when the revised and final assessment was issued 5 years, 9 months and 17 days elapsed. However, petitioner filed a request for reconsideration on September 21, 1961. The time that elapsed from this date to August 6, 1962 a period covering 10 months and 16 days, should be deducted from the total prescriptive period of 5 years, 9 months and 17 days (Comm. of Int. Rev. vs. Sison, 7 SCRA 884; Querol vs. Coll. of Int. Rev., 6 SCRA 304; Republic vs. Lopez, 7 SCRA 566; Tan Guan vs. Nable, 24 SCRA 93). The result is that the final assessment of August 6, 1962 was made in 4 years 11 months and 1 day, which is within the prescriptive period of 5 years.

In the second issue respondent tries to recover the sum of ₱4,820.04 which was allegedly refunded erroneously to petitioner as overpayment. Such a demand is in the nature of an assessment and the prescriptive period thereof is counted from the return of the tax involved therein (Ilagan Electric & Ice Plant, Inc. vs. Comm. of Int. Rev., CTA Case No. 1178, May 8, 1964, affirmed in G.R. No. L-23081, Sept. 30, 1969, 29 SCRA 634; Dagupan Electric Plant Co., Inc. vs. Comm. of Int. Rev., CTA Case No. 1175, Aug. 29, 1964, affirmed in G. R. No. L-23611, April 24, 1967, 19 SCRA 790, 796).

The record shows that this refund was made by Treasury Warrant No. B-0514,415 dated January 22, 1959. No evidence has been presented by petitioner as to the date when the return of the taxes subject of the refund was filed or should have been filed. Evidence on this point would allow the Court to determine if the right of the government to recover the sum in question had prescribed when the assessment of August 11, 1961 was issued. He who asserts prescription as a defense must prove same and in this respect petitioner failed.

We come now to the rate of franchise tax applicable to this case. Petitioner insists that it should be 1% as provided in his municipal franchise while respondent claims that the rate should be 5% as provided in Section 259 of the Tax Code as amended.

It appears that on October 1, 1946, Section 259 of the Tax Code was amended by Republic Act No. 39 raising the franchise tax to 5% and expressly making same applicable to "all existing and future franchise." A proviso of the section as amended is to the effect that franchise owners whose franchise provide for a different rate shall pay the higher rate, whichever may be higher, unless the provisions of the special franchise precludes the imposition of such higher rate. Petitioner's franchise is one of the mass of municipal franchises granted under Act 667 with lower rates stipulated. A number of such franchises were brought to Court on the very same issue now before us, to wit: the applicability of the higher rate of 5% provided by said Section 259 to such franchises. In these cases, Hoa Hin vs. David, 105 Phil. 783; Imus Electric vs. C.T.A. et al., 19 SCRA 612; Guagua Electric vs. Coll., 19 SCRA; Balanga Power Plant Co., Inc. vs. Comm. of Int. Rev., G.R. No. L-20499, June 30, 1965, the Supreme Court ruled that the franchise owners thereof are subject to the higher rate of 5% because the provisions of their franchises do not preclude the imposition of the higher rate of 5%. In the light of said ruling, needless to say, petitioner's franchise is subject to the 5% rate provided in Section 259 of the Tax Code right from the approval of their municipal franchise.

Upon the effectivity of Republic Act No. 3014 on June 19, 1960 which had prospective effect, the rate applicable to petitioner was 2% as provided therein; the rate of 2% provided in said act superseded Section 259 of the Tax Code as far as petitioner's franchise is concerned (Diaz Electric vs. Comm. of Int. Rev., C.T.A. Case No. 1628, September 30, 1968). However, because of the effectivity of Republic Act No. 3829 reiterating the 2% provided in Republic Act No. 3014 and providing further that such rate is retroactive as of the grant of the original municipal franchise, petitioner should pay this rate for the tax involved in the assessment now subject of controversy.

Respondent contends that the tax in question was "due and payable as early as August 6, 1962, prior to the enactment of Republic Act 3829" hence the provisions of the latter law is not applicable thereto. This question is no longer one of first impression to this Court. In the case of Lingayen Gulf Electric Power Co., Inc. vs. Commissioner of Internal Revenue, C.T.A. Cases Nos. 581 and 1302, it appeared that petitioner therein obtained municipal franchises in 1946 to operate an electric power plant to serve the municipalities of Lingayen and Binmaley providing a rate of 2%. Subsequently, the Commissioner of Internal Revenue assessed him at the rate of 5% as provided in Section 259 of the Tax Code and petitioner brought the question as to the rate applicable to this Court. While the case was pending in this Court, Republic Act No. 3843, which granted the petitioner therein a legislative franchise to operate an electric light, heat and power system in the same municipalities of Lingayen and Binmaley was approved providing a rate of 2% with a retroactive effect. When the Commissioner of Internal Revenue contested the retroactive effect of said rate this Court said the following:

> In the alternative, respondent Commissioner claims that Sec. 4 of Republic Act No. 3843, which fixes the franchise tax on petitioner's gross receipts at 2%, cannot have a retroactive effect. It is urged that this statutory provision is in the nature of a tax exemption, and tax exemptions operate prospectively, not retroactively; that taxes already assessed before the exempting law are collectible; and to give Sec. 4 of Republic Act No. 3843 a retroactive effect would create confusion and litigations.
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> Respondent's contention is of no moment. The question of whether a statute operates retrospectively, or prospectively only, is one of legislative intent (Hasset v. Welch, 303 US 303, 82 L ed 858; Shwab v. Doyle, 258 US 529, 66 L ed 747). Article 4 of our Civil Code states:
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> > "Art. 4. Law shall have no retroactive effect, unless the contrary is provided."
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> In view of this codal provision, there should be no question that Section 4 of Republic Act No. 3843 retroacts to the date when petitioner's original franchises were granted in 1946 for it is so expressly provided therein. However, it is a long accepted doctrine that the rule giving a statute a retroactive effect is subject to two exceptions, namely: (1) when the retroactivity of a penal statute will make it an

> *ex post facto* law (US vs. Diaz Conde, 42 Phil. 766; US vs. Gomez, 12 Phil. 279), and (2) when the retroactive effect of the statute will constitute an impairment of the obligation of contract (Asiatic Petroleum vs. Llanes, 49 Phil. 466). Republic Act No. 3843 does not come within these two exceptions.
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> As to the wisdom of Congress in giving retroactivity to Section 4 of Republic Act No. 3843, we are wanting in authority to pass upon the same (People vs. Cayat, 68 Phil. 12). Courts are not concerned with the wisdom, efficacy or morality of laws, their only function being to interpret them, and if not in disharmony with the Constitution, to apply them (People vs. Limenco, G.R. No. L-3090, January 9, 1951). (Underlining supplied)

Respondent further contends that to concede petitioner a rate less than 5% would trench on the rule of uniformity of taxation. With respect to franchises it is often held that the constitutional requirement of equality and uniformity does not apply to the taxation of franchises, where such taxes are not property taxes but are in the nature of privileges taxes (Cooley, Vol. 1, page 773, 4th Ed.). In this jurisdiction, a franchise tax is in the nature of a privilege tax. Indeed the very Section 259 of the Tax Code invoked by responient recognizes two rates of franchise taxes and surely respondent does not pretend that the very provision of law that he invokes is unconstitutional.

In fine, based upon the 2% franchise tax provided in Republic Act No. 3829, we find petitioner liable only for the sum of ₱8,134.82, as deficiency franchise tax from July 1, 1956 to December 31, 1960, inclusive of 25% surcharge and further find him liable for ₱4,820.04 as taxes erroneously refunded, computed as follows:

Gross receipts per audit. . . .	₱650,886.45
2% tax due thereon.	13,017.73
Less: Amount paid.	6,509.87
Balance.	6,507.86
Add: 25% surcharge.	1,626.96
Tax erroneously refunded	4,820.04
TOTAL AMOUNT DUE.	12,954.86

WHEREFORE, the decision appealed from is hereby modified and petitioner ordered to pay to respondent Commissioner of Internal Revenue the sum of ₱12,954.86, representing deficiency franchise tax and surcharge for the period from July 1, 1956 to December 31, 1960, and return of amount erroneously refunded. Without pronouncement as to costs.

SO ORDERED.

Quezon City, May 10, 1974.

RAMON L. AVANCEÑA
Associate Judge

WE CONCUR:

ROMAN M. UMALI
Presiding Judge

ESTANISLAO R. ALVAREZ
Associate Judge