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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
MANILA

February 9, 1960

CASINO ESPAÑOL DE MANILA,
Petitioner,

- versus -

C.T.A. CASE NO. 352

THE COLLECTOR OF INTERNAL
REVENUE,
Respondent.

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

D E C I S I O N

This is an appeal from the decision of the respondent Collector (now Commissioner) of Internal Revenue assessing against and demanding from the petitioner Casino Español de Manila the sum of ₱69,973.89 as fixed and percentage taxes, plus the amount of ₱300.00 as compromise penalty for its failure to secure the approval of the respondent before using its books of accounts, and the further sum of ₱5,000.00 for failure to pay the percentage tax on time, or in the total sum of ₱75,273.89.

Petitioner is a non-stock corporation, organized under the laws of the Philippines sometime in 1913, for the following purposes:

"SEGUNDO. Que los fines para los cuales se formo dicha Corporation son. Estrechar la union de todos los españoles aqui residentes, coadjuvar al desarrollo de sus intereses en estas Islas, proporcionar a los miembros de la Corporacion los recreos y entretenimientos propios de la buena sociedad y atender y auxiliar a estos en los medios y forma que los intereses de la Corporation lo permitan, siendo por lo tanto ajeno a ello todo lo que tenga tendencia politica y este en desacuerdo con las leyes del pais y las reglas del decoro, comprometiendose en su virtud los miembros a evitar la creacion de antagonismos y a eludir discusiones personales o que se relacionen con la política, manteniendo siempre constante el amor a su patria." (p. 1, Escritura Social del Casino Español de Manila, Exhibit A, p. 38 CTA rec.; see also Artículo 1.º Estatutos Enmendades del Casino Español de Manila, Exhibit B, p. 39 CTA rec.)

For its operation, petitioner depends upon funds derived from membership fees and dues and receipts from its bowling, bar and restaurant where it sells wines, liquors and food. Under its by-laws, the use of the petitioner's facilities is limited to its members and their guests (Artículos 18.0 y 59.0, Escritura Social del Casino Español de Manila, Exhibit A; see also Artículos 20.0, 57.0 y 59.0, Estatutos Enmendados del Casino Español de Manila, Exhibit B). The articles and by-laws of petitioner do not contain provisions for the accumulation of profits, much less for the distribution thereof. Petitioner never declared or distributed dividend (pp. 10 & 54, t.s.n.). The profits it realized were invested in the improvement of its facilities (pp. 112-113, t.s.n.).

Before the last war, petitioner was an owner of a parcel of land situated in the corner of Taft Avenue and San Luis Streets, Ermita, Manila, on which were erected buildings and other improvements. During said war all the buildings of petitioner were destroyed, and after the liberation (in 1945), the United States Army "commandeered and took possession of said parcel of land, for military purposes, without the knowledge of the CASINO (the herein petitioner)". The U. S. Army paid to petitioner a monthly compensation of ₱600.00 for the use of its parcel of land from August, 1945 to December, 1947. When the U. S. Army vacated the premises, the American Red Cross took over, and paid a similar monthly compensation from January, 1948 to June, 1948. (Exhibit E, p. 49 CTA rec.; see pp. 8-9, t.s.n.) The compensation for the use of petitioner's premises by the U. S. Army and the American Red Cross covering the periods from August, 1945 to June, 1948 is itemized as follows:

August to December,	1945	--------	₱ 3,000.00
	1946	--------	7,200.00
	1947	--------	7,200.00
January to June	1948	--------	3,600.00
	Total	....	₱21,000.00

(See Financial Statements on pp. 46, 44, and 42, BIR rec.)

In December, 1950, petitioner sold the front portion of the said parcel of land, and used the proceeds to build its new club house on the remaining portion of land. (Exh. E, ibid.)

After an investigation of the operations of petitioner, it was ascertained that petitioner did not pay percentage tax on the gross receipts it derived from its bar and restaurant during the period from January 1, 1946 to June 30, 1955, and real estate dealer's fixed tax for the years 1946 to 1948. Consequently, respondent, in his letter dated January 15, 1957, determined against the former a liability amounting to ₱69,973.89, as fixed and percentage taxes and 25% surcharge thereon, plus ₱300.00 in extrajudicial settlement of the penal liability arising from its failure to secure the prior approval of respondent before using its books of accounts, and the further sum of ₱5,000.00 for failure to pay the tax on time, or a total of ₱75,273.89 (Exhibits 1-A & G, p. 124 BIR rec.). This letter was received by petitioner on February 6, 1957 (par. 6 of Amended Petition for Review, p. 20 CTA rec.). From this assessment, petitioner appealed to this Court by filing therewith its petition for review on February 26, 1957, to which petition respondent filed his answer on March 28, 1957. On December 3, 1957, petitioner filed its amended petition for review to which respondent filed his amended answer on February 7, 1958.

The issues involved are as follows:

1. Whether or not the right of respondent to collect the taxes in question has prescribed;

2. Whether or not petitioner is liable for the payment of percentage tax and surcharge in connection with the operation of its bar and restaurant during the period from January 1, 1946 to June 30, 1955;

3. Whether or not petitioner is liable for the payment of real estate dealer's fixed tax in connection with the receipts arising from the use of its property by the U. S. Army and the American Red Cross; and

4. Whether or not petitioner is liable for the payment of the respective sums of ₱300.00 and ₱5,000.00 as compromise penalties.

Petitioner contends that the right of respondent to collect the taxes in question has already prescribed. We find this contention to be without merit. Section 332(c) of the Tax Code provides that a proceeding in court for the collection of any internal-revenue tax may be made within five (5) years after the assessment of the tax. The assessment at bar was made on January 15, 1957 and was received by petitioner on February 6, 1957. Reapondent's answer to the original petition for review, which is considered as the judicial action for collection of taxes (Collector of Internal Revenue v. Clement and Hooker, G.R. No. L-12194, January 24, 1959; Collector of Internal Revenue v. Solano, G.R. No. L-11475, July 31, 1958) was filed on March 26, 1957, exactly one (1) month and nine (9) days after the assessment was received by petitioner. Obviously, respondent's right to collect the taxes in question has not prescribed.

The law upon which respondent bases his determination of petitioner's liability for the fixed and percentage taxes in question is found in Sections 182, 183, 191, 193(q) and 194(s) of the Tax Code, the pertinent provisions of which follow:

> "SEC. 182. Fixed tax upon business. - Unless otherwise provided, every person engaging in a business on which the percentage tax is imposed shall pay in full a fixed annual tax of ten pesos for each calendar year or fraction thereof in which such person shall engage in said business. x x x" (As amended by Republic Act No. 42.) (Underscoring supplied.)

> "SEC. 183. Payment of percentage taxes.- (A) In general. - 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; and it shall be the duty of every person conducting a business on which a percentage tax is imposed under this Title, within twenty days after the end of each calendar quarter, to make a true and complete return of the amount of the gross sales, receipts, or earnings, or gross value of output actually removed from the factory or mill warehouse, during the preceding calendar quarter and pay the tax due thereon; x x x" (As amended by Republic Act No. 253) (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

"Keepers of restaurants, refreshment parlors and other eating places shall pay a tax of three *per centum*, and keepers of bars and cafes where wines or liquors are served, five *per centum*, of their gross receipts. x x x." (As amended by Republic Act No. 588.)

"SEC. 193. Amount of tax on business. - Fixed taxes on business shall be collected as follows, the amount stated being for the whole year, when not otherwise stated. x x x.

"(q) Stockbrokers, dealers in securities, real estate brokers, real estate dealers, commercial brokers, customs brokers, and immigration brokers, one hundred pesos." (As amended by Republic Act No. 42.) (Emphasis supplied.)

"SEC. 194. Words and phrases defined. - In applying the provisions of the preceding section, words and phrases shall be taken in the sense and extension indicated below: x x x.

"(s) x x x; 'real estate dealers' includes all persons who for their own account are engaged in the sale of lands, buildings, or interests therein or in leasing real estate." (As amended by Republic Act No. 42.) (Underscoring ours.)

As already observed elsewhere, these afore-cited provisions of law are embodied in "Chapter I - Taxes on Business and Occupation", "Title V - Privilege Taxes on Business and Occupation" of the Revenue Code. This is indicative of the legislative intention to impose the fixed and percentage taxes prescribed in these provisions only upon persons or entities engaged in those activities where business purpose is evident. (The Club Filipino, Inc. de Cebu vs. Collector, C.T.A. No. 15, July 11,1957; Manila Lodge No. 761 of the BPOE v. Blaquera, C.T.A. No. 140, July 31, 1956, affirmed in G.R. No. L-11176, promulgated on June 29, 1959; J. N. Sweeney, et al v. Collector, C.T.A. No. 179, Feb. 8, 1957, affirmed with modification in G.R. No. L-12178, promulgated August 21, 1959.)] To justify petitioner's liability for fixed and percentage taxes, the petitioner must be engaged in business for livelihood or profit. And it is now well-settled that the term "business" as understood in these provisions, is "restricted to activities or affairs where the profit is the purpose, or livelihood is the motive." (The Club Filipino Inc. de Cebu v. Collector, 1956.)

With these jurisprudential observations in mind, we shall now determine whether petitioner was engaged in the business of operating a bar and restaurant.

It is contended on behalf of respondent that petitioner was engaged in the business of operating a bar and restaurant for profit or gain. It is claimed that the intent to profit and gain from the operation of the bar and restaurant could be inferred from the large profits derived from its operation during the period from 1946 to 1955; and that these profits have enlarged or improved the facilities of petitioner.

We find respondent's contention untenable. While it is true that petitioner has realized profit during the years from 1946 to 1955 from the operation of its bar and restaurant, the realization of profit alone does not necessarily show that petitioner has engaged in business so as to be liable for fixed and percentage taxes (see Club

Filipino Inc. de Cebu v. Collector of Internal Revenue, *supra*). This profit was incidental to its purposes which are clearly not commercial. Besides, every responsible organization must be so run as to, at least, insure its existence, by operating within the limits of its own resources, especially its regular income. But, it should always strive to have a surplus (Jesus Sacred Heart College v. Collector of Internal Revenue, G.R. No. L-6897, May 24, 1954; Collector of Internal Revenue v. Sinco Educational Corp., G.R. No. L-9276, October 23, 1956).

The test of whether a corporation is organized for profit is whether it expects to pay dividends (Read v. Tidewater Coal Exch., 116 A. 868, 904, 13 Del. Ch. 195, cited in 34 Words & Phrases, Perm. Ed., p. 220). In the case at bar, petitioner is decidedly a non-stock corporation. Nowhere in its articles and by-laws, which, as afore-stated, contain no provision on the accumulation of profits and their distribution, can we find a clue that points to the conclusion that petitioner expects to pay dividends.

Moreover, the fact that petitioner never declared or distributed dividend, but invested its profits in the improvement of its facilities is a negation of the idea of profit.

Finally, petitioner was organized to tighten the union of all Spaniards residing here; to help develop their interests in these Islands; to afford to its members the proper recreations and entertainments of good society; and to attend to or help them through means and form that the interests of the corporation (petitioner) permit. These purposes are highly persuasive in the determination that petitioner was not engaged in business carried on for profit.

In view of the foregoing, we find that petitioner was not engaged in the business of bar-keeper and restauranteur and therefore, is not liable for the payment of percentage tax and surcharge in connection with the operation of its bar and restaurant during the period from January 1, 1946 to June 30, 1955.

We will now come to the third issue of whether or not petitioner is liable for the payment of real estate dealer's fixed tax in connection with the receipts arising from the use of its property by the U. S. Army and the American Red Cross.

It is contended by respondent that petitioner engaged in the business of leasing real estate. He claims that the transaction involving the use of petitioner's parcel of land by the U. S. Army and later by the American Red Cross, for which use a compensation was received, is a lease, and therefore, is subject to the payment of fixed tax under Sections 182, 193(q) (now 182-[3]-[s]), and 194(s) (as amended by Republic Act No. 42) of the Tax Code.

A "contract of lease" is defined as a "contract by which one of the parties delivers to the other some non-consumable thing, in order that the latter may use it during a certain period and return it to the former"; and "rent" is defined as the "compensation either in money, provisions, chattels, or labor, received by the owner of the soil from the occupant thereof", or "the return or compensation for the possession of some corporeal inheritance, and is a profit issuing out of lands or tenements, in return for their use". (Tolentino et al v. Chian, 50 Phil. 558, 575-576.) In the light of these jurisprudential definitions, the use of petitioner's parcel of land by the U. S. Army and the American Red Cross for which monetary compensation was received by petitioner was a lease. The fact that petitioner's parcel of land was "commandeered" for military use by the U. S. Army without the knowledge of petitioner, and then taken over by the American Red Cross, does not detract from the fact that this use was a lease. Similarly, the fact that there was no prior consent by petitioner to this use does not destroy its character as a lease, for there was a tacit or implied consent on the part of petitioner when, for the use of its parcel of land, it received the compensation paid for such use. (see Perez v. Pomar, 2 Phil. 682, cited in Padilla's Civil Code Annotated, Vol. III, 1956 Ed., p. 491.)

But to tax petitioner for its act of leasing the property, it must have been engaged in the business of real estate dealer. "'To engage in business' is uniformly construed as signifying to follow the employment or occupation which occupies the time, attention, and labor for the purpose of a livelihood or profit" (Imperial v. Collector of Internal Revenue, G.R. No. L-7924, September 30, 1955, citing Semple v. Schwartz, 109 S. W. 633, 636, in turn citing Seickler v. Guenther, 96 N.W. 895, 896). The expression "engage in business", does not have a meaning different from that of "doing business" which conveys the idea of business being done, not from time to time, but all the time (Imperial v. Collector, supra, citing Lewellyn v. Pittsburgh, B & L. E. R. Co., C. C. N. Pa. 222 F. 177, 185).

While the use in the years 1946-1948 of petitioner's parcel of land by the U. S. Army and later by the American Red Cross was a lease, there is no showing that this property was leased prior to and/or after said years. It must also be noted that the initial lease of the property by the U. S. Army was effected by means of commandeering. Petitioner did not offer to lease its property. And during these years, and even prior and subsequent thereto, petitioner was mainly occupied in the operation of its club. Petitioner's act of leasing this property was merely an isolated transaction. Under these circumstances, it cannot be said that petitioner was engaged in leasing real estate, and therefore, is not liable for the payment of the fixed tax prescribed in Sections 182, 193(q), and 194(s), as amended by Republic Act No. 42, of the Tax Code.

With respect to the sum of ₱300.00 which is sought to be collected from petitioner as compromise penalty for violation of the bookkeeping regulations, it does not appear that a compromise agreement has been entered into between the parties in accordance with Section 309 of the Revenue Code. Petitioner may not therefore be compelled to pay said amount. (Collector of Internal Revenue v. U.S.T., G.R. Nos. L-11274 & L-11280, November 28, 1958; Collector of Internal Revenue v. Bautista and Tan, G.R. Nos. L-12250 & L-12259, May 27, 1959.)

Finally, having previously ruled that petitioner is not liable for percentage taxes, it cannot therefore be liable for the amount of ₱5,000.00 as penalty for failure to pay said taxes on time.

WHEREFORE, the decision of the Collector (now Commissioner) of Internal Revenue appealed from is hereby reversed. Without pronouncement as to costs.

SO ORDERED.

Manila, February 9, 1960.

MARIANO NABLE
Presiding Judge

I CONCUR:

AUGUSTO M. LUCIANO
Associate Judge

I concur in the result.

ROMAN M. UMALI
Associate Judge