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ATLAS CONSOLIDATED MINING
& DEVELOPMENT CORPORATION,
Petitioner,

- versus - C.T.A. CASE NO. 3022

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

9/30/80

D E C I S I O N

In this suit for recovery of the percentage tax of 3% imposed on the sale of electric power alleged to be erroneously collected on the ground that it was paid after the law providing for its collection had already been repealed, the question is whether or not petitioner Atlas Consolidated Mining & Development Corporation, as the taxpayer who made the payments, is entitled to the refund although it passed on the tax to the purchaser.

Section 191 of the 1939 National Internal Revenue Code imposed, among others, a percentage tax equivalent to 3% of their gross receipts of "persons selling water, light, heat, or power, except those paying a franchise tax." Petitioner had been paying this tax on its sales of electric power to Atlas Fertilizer Corporation,and continued paying even after January 1, 1973 when Presidential Decree No. 69 deleted it from

Section 191 of the then National Internal Revenue Code. Respondent Commissioner of Internal Revenue having failed to take action on its claim for refund (tax credit) of its erroneous payments during the period July 20, 1977 through May, 1979 in the alleged sum of ₱257,397.76, petitioner commenced this proceeding before this Court.

The factual background of the case is not in controversy.

Petitioner is a corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines with principal offices at the A. Soriano Corporation Building at Makati, Metro Manila. It is engaged in the business of mining copper in Toledo City, Cebu. It appears that located near the mines site of petitioner is Atlas Fertilizer Corporation, a sister company of which petitioner is a substantial stockholder. Petitioner and Atlas Fertilizer Corporation are both managed by the same general managers, the Andres Soriano Corporation.

The records reveal that petitioner produces its own electric power, and by agreement with Atlas Fertilizer Corporation which does not generate its own power, it supplies the latter with some of its electricity at cost, without any margin of profit.

Billed as part of the cost, however, is the percentage tax of 3% on the sale of electric power which petitioner paid to the Bureau of Internal Revenue in accordance with Section 191 of the then in force National Internal Revenue Code.

On July 18, 1979 petitioner filed with respondent a claim for tax credit of the amount of ₱257,397.76 representing erroneous payments from July 20, 1977 to May, 1979 of the 3% percentage tax on gross receipts on its sales of electric energy to Atlas Fertilizer Corporation. It appears that "without benefit of legal advise", petitioner paid the 3% percentage tax imposed under Section 191 of the then National Internal Revenue Code even after its deletion from the said section by Presidential Decree No. 69 on January 1, 1973.

Meanwhile, respondent caused the investigation of the claim for tax credit of petitioner. In his 2nd Indorsement dated May 27, 1980, the internal revenue examiner assigned to this case reported that "There is no question that the taxpayer (petitioner) paid the 3% tax as established by the attached documentary evidences. It appears, however, that the 3% tax paid was passed on to their customer, the Atlas Fertilizer Corporation. This is evidenced by the attached Check Voucher No. 6291, dated October 17, 1977, which is noted strongly, where the phrase, "Note: These were charged to consumers", indicating that the 3% contractor's tax were (was) billed to their consumer(s)." (Exh. "1-A", p. 31, BIR records.)

Without waiting for the decision of respondent Commissioner of Internal Revenue on its claim for tax credit, petitioner commenced this suit for recovery of the 3% percentage tax erroneously paid by it pursuant to Section 292 of the present National Internal Revenue Code.

Is petitioner entitled to the refund (tax credit) of tax involved in this case?

Petitioner's contention is, in substance, that it is entitled to the refund (tax credit) since (1) it in fact made the alleged payments, (2) within two years from (previous to) the filing of the claim with the Bureau of Internal Revenue and with this Court, (3) when the law did not anymore impose the 3% percentage tax on the sale of electric power during the period covered by this case, and (4) petitioner was the legal taxpayer or the entity called upon by the law to pay the percentage tax in question. (Memorandum of petitioner, pp. 84-85, CTA records.) Respondent does not quarrel with these propositions of petitioner; and the evidence presented, both oral and documentary, as well as the records of the Bureau of Internal Revenue bearing on this proceeding, clearly and definitely show that these factual situations are all present and coincide in this case.

In brushing aside the stand of petitioner that, in the light of the foregoing considerations, it is entitled to its claim for tax credit of the percentage tax in question, respondent however argues that while the check vouchers submitted show that petitioner actually made the payments of 3% percentage tax, the same documents reveal that the said payments were charged to the consumer. And averring that since the money used in the payment of the tax came from the buyer (Atlas Fertilizer Corporation) not the seller (Atlas Consolidated Mining & Development Corporation), respondent asserts that petitioner is seeking a refund of a tax that had already been paid to it by the consumer. Having charged the amount paid as tax to Atlas Fertilizer Corporation, petitioner is devoid of any legal right to sue for recovery. Respondent would therefore unwrap the thesis that it is Atlas Fertilizer Corporation, the buyer, which is the legal taxpayer entitled to the refund on tax credit of the 3% percentage tax erroneously or illegally paid.

(Memorandum of respondent, pp. 99-100, CTA records.)

The controlling statute, as stated above, is Section 191 of the 1939 National Internal Revenue Code, the pertinent portion of which textually reads as follows:

> 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 persons selling water, light, heat, or power, except those paying a franchise tax; x x x x x shall pay a tax equivalent to three *per centum* of their gross receipts.

It is quite apparent from the terms of the law that the Government's right to collect the percentage tax of three *per centum* of the gross receipts is planted on the *sale* of water, light, heat or power. The statute uses the words "persons selling water, light, heat, or power." The percentage tax is imposed on the seller - person selling - and not on the purchaser, on the sale of water, light, heat or power. Neither is the tax imposed on the property sold - on the water, light, heat or power.

On this matter of who bears the burden of the sales tax, and entitled to the refund thereof in case it is erroneously or illegally collected, the Supreme Court, after an extensive research on this subject, said in Philippine Acetylene Co., Inc. vs. Commissioner of Internal Revenue & Court of Tax Appeals, L-19707, 20 SCRA 1056, that statutes of the type under consideration, which impose a tax on sales, have been described as "act(s) with schizophrenic symptoms", as they apparently have two faces - one that of a vendor tax, and the other, a vendee tax. Fortunately, for us, the provisions of the Code throw some light on the problem. The Code states that "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 quarterly 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 quarter, pay the tax due thereon." (Sec. 183(a), 1939 National Internal Revenue Code.) It may indeed be that the economic burden of the tax finally falls on the purchaser; when it does the tax becomes a part of the price which the purchaser must pay. It does not matter that an additional amount is billed as tax to the purchaser. The effect is still the same, namely, that the purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all and the amount added because of the tax is paid to get the goods and for nothing else. It follows that it is the <u>seller</u>, and not its <u>customer</u>, that may ask for a refund of whatever amounts it is entitled for the percentage or sales tax it erroneously or illegally paid. (Cebu Portland Cement Company vs. Collector of Internal Revenue, L-20563, October 29, 1968, 25 SCRA 789.)

In the afore-cited Cebu Portland Cement Company, this case involves the taxpayer's claim for refund of ₱458,241.45 sales tax paid from December 1, 1954 to March, 1955, and ₱427,552.95 *ad valorem* tax paid from April, 1955 to September 30, 1956 from the sale of APO Portland Cement produced by the taxpayer. Prior to the effectivity of Republic Act No. 1299 on June 16, 1955 (an Act amending further Section 246 of the then National Internal Revenue Code, as amended, by defining the words "minerals" and "mineral products"), the taxpayer had been paying the sales tax (known also as percentage tax) of APO portland cement produced by it, computed at 7% of the gross selling price inclusive of the cost of the bag containers of cement and the gypsum used in the manufacture of said product. After the approval of the amendment of the law the taxpayer stopped paying sales tax on its gross sales and instead paid the *ad valorem* tax on the selling price of the product after deducting therefrom the corresponding cost of the containers thereof.

It appears, however, that since 1952, the taxpayer had been protesting the imposition of the sales tax on its APO portland cement, and on January 16, 1953, it also protested the payment of ad valorem taxes. A written claim for refund of sales and ad valorem taxes paid by the taxpayer was filed two years later (September 1955) which was reiterated on July 26, 1956.

Without awaiting the ruling of the Collector (now Commissioner) of Internal Revenue on said claims for refund, the taxpayer, on January 24, 1957, filed with this Court a petition for review of the action of the Collector of Internal Revenue in refusing to entertain its claim for refund of the percentage tax on sales of its APO cement. It was alleged in the petition that the percentage taxes collected by the Collector (Commissioner) of Internal Revenue were refundable since under Republic Act No. 1299, producers of cement are exempt from the payment of said tax.

After hearing and consideration of the evidence submitted in connection therewith, this Court rendered judgment dismissing the petition for review, holding among others, that for so much of the sales taxes that were billed, charged to, and paid by its customers, the taxpayer is not the proper party to claim for refund. On appeal, the Supreme Court held that pursuant to the provisions of Section 186 (sales tax law applicable) of the then in force Tax Code and in consonance with the case of Philippine Acetylene Co., Inc. vs. Commissioner of Internal Revenue & Court of Tax Appeals, supra, it is the taxpayer, and not its customers that may ask for a refund of whatever amounts it is entitled for the percentage or sales tax it paid before the amendment of Section 246 of the same Code.

We find no cogent and valid reason to modify, much less depart from the conclusion reached in Philippine Acetylene Company and Cebu Portland Cement Company, as expressed in the above-stated ruling of the Supreme Court there, and of which this Court is bound to follow, and the same should resolve the identical problem now brought before us in this appeal. The ruling in Medina vs. City of Baguio, 91 Phil. 854, and other similar cases cited by respondent, can not be applied on the ground that the Medina case involved a tax on admission to theaters which is different from the sales tax. The tax on admission is a tax on the ticket sold, so that in effect, it is a levy upon the theater-goer who buys the same. On the other hand, the sales tax is by law imposed directly not on the thing sold, but on the act (sale) of the seller who is exclusively made liable for its timely payment. It is essentially a tax on the transaction and not on the articles sold. (Philippine Acetylene Co., Inc. vs. Commissioner of Internal Revenue & Court of Tax Appeals, supra; Cebu Portland Cement Company vs. Collector of Internal Revenue, supra; Philippine Manufacturing Company vs. Meer, 76 Phil. 436.)

We can see no significance, therefore, in the argument of respondent that since petitioner passed on the 3% percentage tax on its sales of electric power to Atlas Fertilizer Corporation, it must be Atlas Fertilizer Corporation that should request for the refund on tax credit of the tax under question. Well-settled is the rule that the sales tax is not a tax on the purchaser but on the sale of merchandise imposed on, and is due from, the seller. The phrase "passed the tax on" is inaccurate, as obviously the tax is laid and remains on the seller and on him alone. The purchaser does not really pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all. The price is the sum total paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else. It may indeed be that the incidence of the tax ultimately settles on the purchaser, but it is not for that reason alone that one may validly argue that it is a tax on the purchaser. (Philippine Acetylene Co., Inc. vs. Commissioner of Internal Revenue, <u>supra</u>.)

In view of this conclusion, we need not discuss the effect of the contention of respondent that "to allow the tax credit in favor of the petitioner would be going against the legal maxim 'No one shall enrich itself at the expense of another'." (Memorandum of respondent, p. 102, CTA records.) Nonetheless, it may be stated that the evidence presented sufficiently show that the tax credit under consideration would eventually be credited in favor of Atlas Fertilizer Corporation in accordance with long-followed practices between petitioner and its sister corporation, Atlas Fertilizer Corporation, and that the latter is aware of this practice and of this claim and expects that its account will be credited by petitioner in case the claim involved herein is granted. Be that as it may, the sales tax in question is a personal liability of petitioner, and as such, petitioner as taxpayer is entitled to the refund thereof. The question as to who shall pay any given tax and who shall be entitled to the refund thereof in case it is erroneously or illegally collected are determined by law, and the applicable law, as construed by the Supreme Court, makes it clear that petitioner Atlas Consolidated Mining & Development Corporation as the taxpayer that made the payments is the one entitled to the refund of the tax.

The problem of the exact amount of tax credit which petitioner is entitled comes in. Respondent in his memorandum states that a "careful computation of the amounts claimed for tax credit filed with the Bureau of Internal Revenue on July 18, 1979 (Exh. "J") and the Petition for Review filed with this Honorable Court on July 19, 1979 shows that the actual and correct amount is ₱229,609.05, and not ₱257,397.76 as appearing in both of the claims filed." (Memorandum of respondent, p. 102, CTA records.) The difference of ₱27,788.71 which represents the percentage tax paid for the fourth quarter of 1978 under Central Bank Official Receipt No. A-2103800 dated April 23, 1979 (Exh. "H", p. 62, CTA records) was not listed, together with its supporting documents, as part of the claim for tax credit filed with the Bureau of Internal Revenue and the petition for review filed with this Court, although the amount thereof was included in the aggregate sum of ₱257,397.76 being claimed by petitioner as refundable.

A "claim for refund" has been defined as a document filed within the statutory period in which the taxpayer has indicated with reasonable clarity the fact that he is demanding a return of overpaid taxes and the ground upon which he is making his demand. Furthermore, the ground which he advances must be one which actually supports his claim. (Julia A. Forhan, 45 BTA 799.)

As far as its claim for tax credit filed with the Bureau of Internal Revenue on July 18, 1979 (Exh. "J", supra) is concerned, petitioner indicated with reasonable clarity that it is demanding the return of erroneously paid "energy tax" in the sum of ₱257,397.76 which included the amount of ₱27,788.71 being questioned by respondent. The same is true with respect to the petition for review filed with this Court. Under paragraph 5 thereof, petitioner alleged that during the period July 20, 1977 through May, 1979, it had paid to respondent the total sum of ₱257,397.76; and in paragraph 4 of his answer, respondent admitted the payments mentioned thereof, "subject to the qualification that since said payments were made in checks, the encashment thereof has not as yet been verified by respondent." Likewise, under paragraph 8 of its petition for review, petitioner averred that it filed a claim for tax credit with respondent dated July 16, 1979 for all its erroneous payments from July 20, 1977 to May, 1979, in the aggregate sum of ₱257,397.76. Similarly, under paragraph 6 of his answer, respondent admitted that petitioner filed a claim for tax credit. And in its prayer in the petition for review, petitioner prayed that after trial, this Court render judgment in favor of petitioner ordering respondent to immediately grant the claim for tax credit in the total amount of ₱257,397.76. While no administrative action was taken by respondent on petitioner's claim for refund, petitioner, during the hearing of the case before this Court, was able to establish by competent evidence that it paid erroneously the amount of ₱27,788.71 to respondent and the same is included in the aggregate sum of ₱257,397.76 involved in this proceeding and its claim for tax credit filed with the Bureau of Internal Revenue.

It bears emphasis that the hearing before the Court of Tax Appeals partakes of a trial de novo and this Court is authorized to receive evidence, summon witnesses, and give both parties, the Government and the taxpayer, opportunity to present and argue their sides, so that the true and correct amount of the tax to be collected, or refunded, may be determined and decided. (See Collector of Internal Revenue vs. Batangas Transportation Company, et al., L-969[illegible], January 6, 1958, 102 Phil. 822.) Petitioner having filed a claim for refund (tax credit) with respondent in the amount of ₱257,397.76 and instituted court action with this Court for recovery of the said amount of ₱257,397.76, all within two years from dates of payments thereof; and during the hearing of this case before this Court, jurisdiction of which has never been disputed by respondent, petitioner established by competent evidence that it is entitled to the refund (tax credit) of the amount of ₱257,397.76, this Court must necessarily have the power to order respondent Commissioner of Internal Revenue to grant a tax credit in favor of petitioner Atlas Consolidated Mining & Development Corporation the amount of ₱257,397.76. To hold otherwise would be to incur in self-contradiction. In all cases which are within the jurisdiction of the Court of Tax Appeals, it must logically have the right to do whatever is necessary to decide the issues properly brought before it, including the power to determine and decide, based on the evidence presented and the records of the proceedings, the true and correct amount of tax refundable to the taxpayer and to order the Commissioner of

Internal Revenue to refund the same.

We are therefore of the opinion and so hold that the evidence presented more than sufficiently prove that petitioner erroneously paid to respondent during the period July 20, 1977 through May, 1979, the aggregate amount of ₱257,397.76 representing the 3% percentage tax on its sales of electric power to Atlas Fertilizer Corporation. Accordingly, the said amount of ₱257,397.76 is refundable to petitioner.

WHEREFORE, respondent Commissioner of Internal Revenue is hereby ordered to grant a tax credit in favor of petitioner Atlas Consolidated Mining & Development Corporation the amount of ₱257,397.76. Without pronouncement as to costs.

SO ORDERED.

Quezon City, Metro Manila, September 30, 1980.

AMANTE FILLER
Presiding Judge

WE CONCUR:

CONSTANTE C. ROAQUIN
Associate Judge

ALEX Z. REYES
Associate Judge