REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
MANILA

WONG & LEE,
Petitioners,

- versus -

C.T.A. CASE No. 55

THE COLLECTOR OF INTERNAL REVENUE,
Respondent.

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

Oct. 31, 1955

D E C I S I O N

This is an appeal from a decision of the respondent Collector of Internal Revenue assessing and demanding from the petitioners, Wong Lee Din and Juanito Lee Tim, doing business under the partnership name of Wong & Lee, a deficiency amusement tax of ₱3,170.03, inclusive of surcharges, itemized and computed by the respondent as follows:

Total receipts per investigation - - - - - - - -	₱41,217.00
Less: Total gross receipts per return - - - - -	23,102.50
Undeclared gross receipts -	₱18,114.50
10% tax due on ₱18,114.50 -	₱ 1,811.45
25% surcharge for late payment - - - - - - - -	452.86
50% surcharge for willful underdeclaration of gross receipts - - - -	905.72
AMOUNT STILL DUE AND COLLECTIBLE - - - - - -	₱ 3,170.03

The disputed assessment is based on the alleged undeclared gross receipts of the petitioners in the amount of ₱18,114.50 covering the period from February

13 to March 18, 1953, in connection with the Xavier Cugat Show held and rendered at the Riviera Night Club for 19 nights within the aforesaid period. The assessment and demand was made by the respondent under authority of section 260 of the National Internal Revenue Code, as amended by Republic Act No. 418, which imposes on the operators, proprietors and lessees of night clubs an amusement tax of 10% of the gross receipts; a surcharge of 25% for late payment and an additional surcharge of 50% for willfully submitting a false or fraudulent return.

Before going into the merits of this case, it would be worth mentioning that during the last stages of the trial of the case before this Court wherein only one issue was raised, i. e., the legality or illegality of the ₱3,170.03 deficiency assessment, petitioners' counsel filed a motion to amend their original petition for review so as to include by way of second cause of action, a claim for refund of the amount of ₱2,310.25 allegedly paid by the petitioners to respondent on the gross receipts declared by them during the same period involving the same business venture. To the formal "Motion to Amend" of petitioners' counsel filed before this Court on July 15, 1955, was attached the "Amended Petition for Review" with the request that the same be formally admitted. Respondent's counsel filed an opposition thereto alleging (1) that the new issue sought to be included completely changes the nature and theory of the original action, thereby causing substantial prejudice to the respondent and, (2) that the amended petition embodies a claim for refund of the amount of ₱2,310.25 over which this Court has no jurisdiction due to petitioners' failure to comply with the requirements imposed by section 306 of the National Internal Revenue Code.

This Court, in its resolution of July 26, 1955, denied the "Motion to Amend" filed by the petitioners on the following grounds: (1) that there is no allegation in the proposed amended petition for review sought to be admitted that a claim for refund or credit has been previously filed with the respondent Collector of Internal Revenue under section 306 of the National Internal Revenue Code (Wee Poco vs. Posadas 64 Phil. 640; Bermejo vs. Collector of Internal Revenue, G. R. No. L-3029, July 25, 1950) so as to confer upon this Court jurisdiction to hear and decide on the merits of this additional cause of action; (2) that to allow the petitioners to amend their petition for review at such advanced stage of the trial would unnecessarily delay the final determination of the principal issue subject of the original petition for review (section 2, rule 17, Rules of Court in the Philippines); and (3) that at any rate, the claim for refund of the amount of ₱2,310.25 could be made the subject matter of a separate and independent appeal by the petitioners before this Court. Moreover, even granting that a claim for refund was made with respect to this amount, a cursory reading of the pleadings will show that the contemplated court action involving ghe said amount is being filed beyond the 2 years prescriptive period provided for in section 306 of the National Internal Revenue Code (P. J. Kiener Co., Ltd. vs. Saturnino David, 49 O. G. p. 1852).

Petitioners' counsel never moved for a reconsideration of this Court's resolution of July 26, 1955 denying their "Motion to Amend" much less have they declared their intention to appeal said resolution to the Supreme Court. Thus, the trial proceeded to its final termination with respect to the one and only issue stated in the original "Petition for Review" which is the legality or illegality of the deficiency amusement tax assessment in the amount of ₱3,170.03 inclusive of surcharges. This decision is, therefore, limited to the appeal interposed by the petitioners questioning the legality and accuracy of the last mentioned assessment.

From the admitted portions of the pleadings and the documentary and testimonial evidence presented by both parties during the trial of this case, the following facts appear: The "Riviera" is a night club located at Dewey Boulevard, Pasay City, owned by Mariano Zamora and operated under lease during the period comprised between January, 1952 to December 31, 1953 by the petitioners herein, Wong Lee Din and Juanito Lee Tim, doing business under the firm name of Wong & Lee. Sometime in the early part of February 1953, by special agreement between the petitioners and one Ted Lewin, who promoted the coming of the Xavier Cugat Orchestra for a series of performances at the International Fair Auditorium, the said orchestra was engaged to play and hold floor shows at the Riviera Night Club after its regular matinee and evening performances at the Philippine International Fair. More particularly, the contract between the petitioners, as lessees and operators of the Riviera Night Club, and Ted Lewin, the promoter and booking agent of the Xavier Cugat Orchestra, was that the latter would perform at the said night club for 19 nights during the period from February 13 to March 8, 1953. The contract also provided that Ted Lewin would get all the cover charges collected from the patrons of the Riviera Night Club for those nights as his compensation for sponsoring the coming of said orchestra to this country and the petitioners would get during those series of performances the proceeds of the night club derived from food and drinks served within the club premises.

The petitioners declared in their amusement tax returns for the nights when the Xavier Cugat Orchestra played at the Riviera Night Club, gross receipts on cover charges the amount of ₱23,102.50 (Exhibits D, D-1-A, D-2 and D-3-A) for which they paid the corresponding amusement tax of 10% or ₱2,310.25. It will be noted in these returns as well as the corresponding official receipts, Exhibits D and D-2, that the amusement tax paid by petitioners for the months of Februay and

March 1953, amounts to ₱10,880.06. In this amount is included the amusement tax for other receipts of the petitioners such as food and drinks as well as the amusement tax for other nights during said period when the Xavier Cugat Orchestra played at Clark Field and Olongapo and not at the Riviera. Actually, for the nights when the said orchestra played at the Riviera, the petitioners declared a total gross receipt on cover charges the amount of ₱23,102.50 on which they paid 10% or ₱2,310.25.

On or about March 18, 1953, while B.I.R. Agents Suarez, Lontok and Jongko were examining, on orders of their superiors, the books of accounts and other important papers of Ted Lewin at the Bay View Hotel in connection with his different business ventures and promotions, the said agents came across various working sheets, chits, receipts and other papers, Exhibits 2 to 11, which in some way or another were connected with the performances rendered by the Xavier Cugat Orchestra at the Riviera Night Club of which Ted Lewin was one of the beneficiaries. The papers in question formed part of the bundle of records delivered voluntarily to the B.I.R. Agents by Carlos Magdaluyo, Accountant-Bookkeeper of Ted Lewin, during the course of said investigation at the Bay View Hotel. The investigating team brought along Exhibits 2 to 11 after issuing a receipt therefor, and after carefully examining and evaluating them arrived at the conclusion that the petitioners actually netted on the cover charges at the Riviera Night Club during the several nights of Cugat's performances the total sum of ₱41,217.00 and not ₱23,102.50 as declared by them in their returns. Consequently, the respondent assessed against the petitioners the amount of ₱3,170.03 as deficiency amusement tax, inclusive of surcharges, in accordance with section 260 of the National Internal Revenue Code, as amended by Republic Act No. 418.

Petitioners' appeal narrows down to two main questions:

1. Whether or not the chits, papers and other documents, Exhibit 2 to 11, taken by BIR Agents Suarez, Lontok and Jongko, from the office files of Ted Lewin upon which they based and computed the deficiency amusement tax liability of petitioners are admissible in evidence against the petitioners and whether or not these exhibits are sufficient to sustain the deficiency amusement tax assessment made by the respondent; and

2. Whether or not petitioners are exempt from paying said taxes under section 1 of Republic Act No. 722, which exempts the holding of musical programs from the payment of any national or municipal amusement tax on the receipts derived therefrom.

On the first question: Petitioners' counsel contends that it is highly unfair and most irregular to hold a taxpayer liable for deficiency tax based on the chits, working sheets and other papers taken or seized from another taxpayer. To prove their point, petitioners presented as their witness Carlos Magdaluyo, Accountant-Bookkeeper of Ted Lewin, who testified that the documents, Exhibits 2 to 11, taken by the B.I.R. Agents from the office files of his employer upon which the said agents based the deficiency tax liability of the petitioners, also included other business ventures and promotions of his employer such as the Ortiz, Dado Marino, Joe Louis prize fights, Roller Derby, Ice Follies and Harlem Globe Trotters and that the total amount of cover charges paid by the petitioners to Ted Lewin for the Xavier Cugat performance at the Riviera Night Club as per contract is ₱23,750.00 and not ₱41,217.00 as found by the B.I.R. Agents. On the question of credibility, we find testimony of B.I.R. Agent Reynaldo Suarez, who with two other agents, made a thorough examination and evaluation of the documents in question, more reliable and trustworthy than that of petitioners' witness, Carlos Magdaluyo. The petitioners have not shown any possible ulterior motive why B.I.R. Agent Suarez should distort the truth. There is in his favor the presumption of regularity in the performance of official duties which has not been disproved by petitioners. On the other hand, it is easy to understand why Carlos Magdaluyo testified in the manner he did in favor of petitioners. By admitting a greater sum than what the petitioners claim to have delivered to Ted Lewin as his share of the cover charges, the latter would undoubtedly be held liable for a bigger amount of income tax than that declared by him, if he has declared this income at all.

As correctly pointed out by respondent's counsel in his memorandum, the notations "Lee" "Wong" or "Wong and Lee", written on Exhibits 4-B, 5-A, 8-C, 9-A, 9-B, 10-A and 11-A refer to no other person or persons but the herein petitioners. The figures appearing on these exhibits could not have been in connection with other business ventures and/or promotions of Ted Lewin because none of his ventures or promotions were held at the Riviera Night Club except the Xavier Cugat Show. It will be noted in Exhibit 2-A that the entries therein are for the period from February 13 to March 8 which, which far from being just a mere coincidence, tally with the dates when the Xavier Cugat Orchestra performed at the Riviera Night Club. The respective amounts appearing after each date represent no doubt the total amount of cover charges received for that particular day by Ted Lewin from the petitioners in accordance with their contract. Obviously, the words and figures "at ₱5.00" appearing after each day on Exhibit 2-A refer to the admission price or cover charge charged by the petitioners for the Cugat show which they admitted to be actually ₱5.00 per ticket. This unit price appearing on Exhibit 2-A certainly could not refer to drinks and food served in the premises of the Riviera. Neither can it be said that the amounts appearing on said exhibit ranging from ₱70.00 to ₱5,020.00 include receipts for food and drinks served at the Riviera. As per contract, the receipts for food and drinks are for the petitioners and not Ted Lewin. The accuracy of the figures appearing on Exhibit 2-A, which total ₱41,217.00, becomes the more convincing if we are to note as we do note, that after each item there appears the initial of approval of Alberto K. Darosa, a trusted employee of

Ted Lewin.

With the admission of witness Magdaluyo that he does not keep a regular journal for his employer, these chits, ruled sheets and working sheets, Exhibits 2 to 11, are in our opinion the best source of an accurate and true record of the total amount of cover charges received by the petitioners from the Riviera Night Club during the Xavier Cugat Show which the petitioners in turn delivered to Ted Lewin in accordance with their contract.

Another clear and convincing proof to show that the various figures appearing in Exhibits 2 to 11, as summarized in Exhibit 2-A, represent the actual gross receipts of the petitioners on cover charge from February 13 to March 8, 1953, is the fact that the first entry for February 13, 1953, marked as Exhibit 2-B on Exhibit 2, for ₱3,340.00, also appears in the books of accounts of the Riviera Night Club for the same date.

We know of no rule in evidence, and for that matter petitioners' counsel have failed to cite any such rule, which excludes documentary evidence taken or seized from one taxpayer as evidence against another taxpayer more so if the two taxpayers have an interest in and are the beneficiaries of a common business venture. Respondent invokes for the admission of the questioned exhibits, section 15 of the National Internal Revenue Code which gives him the discretion to assess the proper tax on the "best evidence obtainable" when he believes that that return filed by the taxpayer is false, incomplete or erroneous. This discretionary power conferred upon the Collector of Internal Revenue is not absolute. When a case involving a disputed tax assessment is brought to this Court on appeal, the evidence adduced by the Government in support of said assessment must stand the same judicial scrutiny as in other civil cases. In People vs. Sy Juco 37 Off. Gaz. 508 the Supreme Court has held that the Bureau of Internal Revenue cannot forcibly seize and divulge the contents of letters, documents and other papers found in the possession of a lawyer belonging to his client as that would violate the required secrecy between lawyer and client. However, the exhibits presented by the respondent in the instant case in support of his deficiency amusement tax assessment are not barred by any rule of evidence. To our mind, they are not only admissible in evidence against the petitioners but are also of sufficient weight and reliable enough to sustain the questioned deficiency assessment based thereon.

On the second question: Petitioners maintain that their gross receipts derived from cover charges during the Xavier Cugat show rendered at the Riviera Night Club during the period from February 13 to March 8, 1953 are exempt from amusement tax under section 1 of Republic Act No. 722 which "exempts the holding of operas, concerts, recitals, dramas, painting and art exhibitions, flower shows, and literary or oratorical or musical programs from the payment of any national or municipal amusement tax." Petitioners seek cover under the words "musical programs" contending that the

Xavier Cugat show falls under such category.

We have carefully read the explanatory note to House Bill No. 2775, now Republic Act No. 722, as well as the sponsorship speeches on the floor of both houses of Congress when said bill was submitted for the consideration of, and approval by, both chambers (Congressional Record, House of Representatives, Vol. 3, No. 53, pp. 1181-1182; Congressional Record, 2nd Congress of the Republic, 3rd Session, Senate, Vol. III, No. 69, pp. 1189-1191). We find, as explained by Senator Pecson, that the main purposes for the tax exemption are "to bring about a flowering of our own culture, to stimulate the genius of our people, to make the talented among us contribute to the honor and glory of the country and to promote respect and admiration for Philippine culture." In our opinion, the exemption applies when the musical program, opera, concert, recital, drama or art exhibition has for its primary purpose the propagation and development of art and culture and the element of profit merely incidental. In the instant case, it cannot be said that the main purpose of the petitioners "Wong and Lee" in contracting the services of the Xavier Cugat Orchestra for a series of performances at the Riviera was to enhance and promote our artistic and cultural development. Judging by the gross receipts realized from said business venture which run to several thousands, one would inevitably conclude that the primary objective of the petitioners in such promotion was to popularize their night club and to bolster the sale of drinks and food in their establishment. Neither could it be said on the part of the patrons of the Riviera during those nights, that their main purpose in going there was to see the Cugat show and to enhance their cultural and artistic background. If such were their real purpose, they could have instead seen the show at the Philippines International Fair Auditorium at a lesser expense and with a better repertoire of South American dances and songs. We believe that the patrons of the Riviera on the nights in question went there not for cultural purposes but simply to dance to the tune of a world-renowned orchestra. In other words, they went to the Riviera to dine and dance and not for the sake of art.

Petitioners claim that the Xavier Cugat Orchestra was granted by the respondent an exemption from amusement tax when it played at the Philippines International Fair Auditorium, and that in fairness to them (Petitioners), they too should be accorded the same privilege.

We are not called upon to decide in this appeal whether the amusement tax exemption granted by the respondent to the Xavier Cugat Orchestra for the other performances is legal or not. Perhaps those performances were held and rendered under different circumstances which we are not in a position to state categorically for lack of proof in this regard. All we are called upon to decide in this appeal is whether or not petitioners are liable for the payment of the deficiency amusement tax of ₱3,170.03 demanded from them by the respondent. And as pointed out above, petitioners are liable for said amount under the provision of section 260 of the National Internal Revenue Code, as amended by Republic Act No. 418, which imposes on the operators, proprietors and lessees of night clubs an amusement tax of 10% on their gross receipts; a surcharge of 25% for late payment and an additional surcharge of 50% for willfully submitting a false or fraudulent return. The cover charges in question, of which there has been an underdeclaration of ₱18,114.50, form part of the gross receipts of petitioners realized from the Xavier Cugat performances held and rendered at the Riviera.

IN VIEW OF THE FOREGOING, the decision of the respondent Collector of Internal Revenue appealed from is affirmed and the petitioners Wong and Lee are hereby ordered to pay to the respondent the sum of ₱3,170.03 as deficiency amusement tax, inclusive of surcharges, with costs against petitioners.

SO ORDERED.

Manila, Philippines, October 31, 1955.

AUGUSTO M. LUCIANO
Associate Judge

We concur:

MARIANO NABLE
Presiding Judge

ROMAN M. UMALI
Associate Judge

- 130