REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

UNIVERSAL CEMENT CO., INC.,
Petitioner,

- versus - C.T.A. CASE NO. 2776

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

10/28/87

D E C I S I O N

This case is analogous to CTA Case No. 2075 and No. 2103, Cepoc Industries, Inc., vs. Commissioner of Internal Revenue, wherein this Court in its decisions dated October 7, 1987 and October 21, 1987 ordered petitioner therein Cepoc Industries, Inc., to pay the 7% sales tax on the sales of cement, the same to be computed on the basis of the gross selling price, less appropriate deductions corresponding to the costs of raw materials used in the manufacture of cement, conformably with Section 186 of the applicable National Internal Revenue Code, and without the imposition of 25% surcharge.

The essential facts are not in controversy. As alleged in the petition for review:

1. Petitioner is a corporation duly organized and existing under the laws of the Philippines, with business address at Danao City, Philippines;

2. In a letter dated February 12, 1968 and received by petitioner on March 22, 1968, respondent Commissioner of Internal Revenue assessed and demanded the payment of P1,334,444.08 as alleged deficiency sales tax on its sales of cement for the period from April, 1963 to March, 1965, inclusive;

3. On April 3, 1968, petitioner wrote respondent protesting against the deficiency sales tax assessment, and requesting for its cancellation and withdrawal;

4. In a letter dated January 26, 1971 and received by petitioner on February 16, 1971, respondent reiterated his demand for the payment of the alleged deficiency sales tax, in the following tenor: (p. 10, CTA record.)

> UNIVERSAL CEMENT COMPANY, INC.
> Danao City, C e b u
>
> Gentlemen:
>
> Please be informed that, upon investigation conducted by an examiner of this Office, it was ascertained that you failed to pay the correct sales tax as manufacturer of cement during the years 1963 to 1965,

inclusive, in violation of Sections 182, 183 and 186, penalized under Section 209, all of the Tax Code. There is, therefore, due from you the sum of ₱2,105,263.48 representing sales tax and surcharge, computed as follows:

1963

Taxable sales	₱7,832,072.81	
7% sales tax due thereof. .	₱ 548,245.10	
Add: 25% surcharge.	137,061.28	
Total deficiency tax & surcharge		₱685,306.38

1964

Taxable sales	₱8,318,123.56	
7% sales tax due thereof. .	₱ 582,268.65	
Add: 25% surcharge.	145,567.16	
Total deficiency tax & surcharge		₱727,835.81

1965

Taxable sales	₱7,909,946.18	
7% sales tax due thereof. .	₱ 553,696.23	
Add: 25% surcharge.	138,424.05	
Total deficiency tax & surcharge		₱692,120.29
GRAND TOTAL OF AMT. DUE & COLLECTIBLE.		₱ 2,105,262.48

It is hereby requested that you pay as provided for by law, the aforesaid amount of ₱2,105,262.48 to our Collection Agent thereat within 15 days upon receipt hereof by presenting to him the enclosed Business and Occupation Tax Receipt.

5. On July 9, 1971, respondent issued Warrant of Levy on Real Property, which warrant was served on petitioner on January 13, 1976;

Hence, this appeal filed on February 9, 1976.

The issues are: (a) whether petitioner's sales of cement are subject to sales tax, and (b) whether respondent's right to collect the disputed deficiency sales tax has already prescribed.

Upon agreement of the parties, hearing of this case was deferred to await the decision of the Supreme Court in similar cases involving identical issues which were then pending therein under G.R. Nos. L-35668, 35670, 35671, 35672, 35683 and 35677, entitled "Republic Cement Corporation, Filipinas Cement Corporation, Apo Cement Corporation, Bacnotan Consolidated Industries, Inc., Rizal Cement Company, Inc., Philippine Portland Cement Co., Inc., and Cepoc Industries, Inc. vs. Commissioner of Internal Revenue". (p. 44, CTA record.)

On August 10, 1983 the Supreme Court promulgated its decision in Commissioner of Internal Revenue vs. Republic Cement Corporation,Filipinas Cement Corporation, Apo Cement Corporation, Bacnotan Consolidated Industries, Inc., Rizal Cement Company, Inc., Philippine Portland Cement Co., Inc., and the Court of Tax Appeals, G.R. Nos. L-35668-72 & L-35683; and Comissioner of Internal Revenue vs. Cepoc Industries, Inc.

and the Court of Tax Appeals, L-35677, 124 SCRA 46, wherein the High Tribunal unequivocally ruled that cement is a "manufactured product" and its sale is not exempt from the sales tax imposed by Sections 186 & 188(c) of the then in force National Internal Revenue Code. As a consequence of this ruling, the Supreme Court ordered the private respondents therein to pay the sales tax. Buttressed by the law, precedent and reason, we find unnecessary to re-echo the rationale of the ruling of the Supreme Court that cement is subject to the sales tax.

On the basis of this Supreme Court ruling, respondent therefore submitted this case for decision during the hearing on July 13, 1987.

For purposes of computing the correct tax liability of petitioner, however, some qualifications as pointed out in the decision are in order. To quote:

> (1) The disputed assessments carry a 25% surcharge pursuant to Section 183 (a) of the Tax Code [now Sec. 193 (a) (3)] which prescribes the said surcharge for late tax payment.
>
> In Connell Bros. Co. (Phil.) vs. Collector of Internal Revenue (10 SCRA 469 at 470-471), the then Justice Makalintal, speaking for the Court, rejected

therein the imposition of 25% surcharge for late payment:

xxx xxx xxx

xxx xxx xxx

In the case at bar, the assessments are not undisputed or indisputable. The dispute as to the tax liability of private respondents for sales tax on the sale of cement arose not simply because of ordinary divergence of views in good faith vis-a-vis the interpretation of the law; the position of private respondents was founded upon the original stand of the Bureau of Internal Revenue itself that cement is a mineral product rather than a manufactured product and is therefore subject to ad valorem tax, not sales tax. As pointed out above, this stand was apparently given implied support in CEPOC vs. Collector, G.R. No. L-20563 (1968), 25 SCRA 789, penned by Justice Angeles. That the posture of private respondents is plausible - despite the subsequent BIR position that cement is a manufactured product subject to sales tax - is supported by the fact that the Court of Tax Appeals, the specialized body handling tax cases, sustained the private respondents in the decisions under review.

Under the circumstances, the 25% surcharge imposed in the disputed assessment must be deleted.

(a) The assessments in question seem to have computed the sales tax liability of private respondents on the basis of the total selling price of cement sold. If this was so, a re-computation is in order so as to deduct from the tax base the costs of raw materials used in the production of cement,

> such as gypsum, conformably with the provisions of Section 186 [now Sec. 199(a)] of the Tax Code as it stood during the tax period here involved:
>
> xxx xxx xxx
>
> Before closing, it may be noted in passing that in order to obviate any further controversy, cement qua cement has been expressly made subject to sales tax at the reduced rate of 5% on the implicit assumption that it is a manufactured product and therefore outside the purview of "mineral product" under Section 246 of the Tax Code. (See Presidential Decree No. 1358.)

On the issue of prescription of the government's right to collect the deficiency sales tax, petitioner alleges under paragraph 6 of its petition for review that the right of respondent to collect the disputed deficiency sales tax has prescribed considering that more than five (5) years have already elapsed from the time the assessment was made on February 12, 1968 up to the time he sought to enforce the collection thereof by the summary procedure of warrant of levy on real property which warrant was served on petitioner only on January 13, 1976.

We disagree.

As stated in the petition for review, the deficiency sales tax assessment of respondent in the amount of ₱1,334,444.08 was received by petitioner on March 22, 1968 (par. 2), and on April 3, 1968, petitioner protested the deficiency sales tax assessment (par. 3). In a letter dated January 26, 1976 (quoted above) which was received by petitioner on February 16, 1971 (par. 4, petition for review), respondent made another assessment for deficiency sales tax and surcharge in the amount of ₱2,105,262.48 for the years 1963 to 1965 covered in the original assessment. The warrant of levy on real property to enforce collection of the ₱2,105,262.48 sales tax assessment was served on petitioner on January 13, 1976 (pars. 5 and 6, petition for review).

Under Section 332(c) of the National Internal Revenue Code then applicable, where assessment was made, the tax may be collected within five (5) years from the date of assessment. (See also Collector of Internal Revenue vs. Pineda, L-14511, May 31, 1961, 2 SCRA 401; Codiñera vs. Blaquera, 102 Phil. 1165.) However, if the taxpayer protested the assessment and an investigation is made, on the basis of which the Commissioner made another assessment, as in this case, the five-year period for collection is to be counted from this last assessment. (Republic vs. Lopez, L-13739, April 30, 1963, 7 SCRA 566; Republic vs. Acebedo, L-20477, March 29, 1968, 22 SCRA 1356; Republic vs. Marsman, L-18956, April 27, 1972, 44 SCRA 148.)

The last assessment of ₱2,105,262.48 for deficiency sales tax of respondent was received by petitioner on February 16, 1971. The warrant of levy on real property to enforce collection thereof was served on petitioner on January 13, 1976, which is manifestly within the five-year period provided by law within which the tax may be collected.

In passing, it may be added that no evidence whatsoever was presented by petitioner to substantiate its defense of prescription, although the burden of proof is upon the party laying claim to it. (Bellozos vs. Court of Tax Appeals, L-16441, March 31, 1965, 13 SCRA 469; Querol vs. Collector of Internal Revenue, L-16705, October 20, 1962, 6 SCRA 304.)

WHEREFORE, the decision appealed from is affirmed; and it is hereby ordered that petitioner Universal

Cement Co., Inc., pay to respondent Commissioner of Internal Revenue the 7% sales tax on cement, subject of this case, the same to be computed on the basis of the gross selling price, less appropriate deductions corresponding to the costs of raw materials used in the manufacture of cement, conformably with Section 186 of the applicable National Internal Revenue Code, and without the imposition of 25% surcharge. No costs.

SO ORDERED.

Quezon City, Metro Manila, October 28, 1987.

AMANTE FILLER
Presiding Judge

WE CONCUR:

CONSTANTE C. ROAQUIN
Associate Judge

ALEX Z. REYES
Associate Judge