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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

CEPOC INDUSTRIES, INC.,
(Formerly Cebu Portland
Cement Company),
Petitioner,

- versus -

C.T.A. CASE NO. 2083

COMMISSIONER OF INTERNAL
REVENUE,
Respondent.

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6/20/89

# D E C I S I O N

This is a companion case of C.T.A. Cases Nos. 2075 and 2103, involving the same parties and similar issues decided by this Court on October 7, 1987 and October 21, 1987, respectively, ordering petitioner CEPOC Industries, Inc. to pay the respondent Commissioner of Internal Revenue 7% sales tax on cement, subject matter therein, 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 factual setting of this case is also similar to those in CTA Cases Nos. 2075 and 2103.

Petitioner is a government owned and controlled corporation, duly organized and existing under and by virtue of the laws of the Philippines, formerly engaged in the production of Apo Portland cement and other products.

During the period from January 1, 1957 to June 30, 1959, petitioner produced Apo Portland cement, more than 80% of which consisted of limestone and clay quarried by petitioner from its own mineral land located in the Philippines.

For the purpose of ad valorem tax, petitioner filed with the Bureau of Internal Revenue, during the period in question, quarterly returns on the gross sales of cement it produced, on the basis of which respondent assessed and collected only ad valorem tax as respondent was then of the opinion that petitioner's cement was not liable to the payment of sales tax by virtue of the provisions of Rep. Act No. 1299 which took effect on June 17, 1955; that said ad valorem tax was the subject of an action for refund docketed as C.T.A. Case No. 706 on October 23, 1959, wherein the decision of this Court adverse to petitioner was appealed to the Supreme Court, docketed as G.R. No. L-18649.

Respondent, after the promulgation on February 27, 1965 of the decision of the Supreme Court in G.R. No. L-18649 entitled "Cebu Portland Cement Company vs. Commissioner of Internal Revenue" wherein the Supreme Court sustained the contention of petitioner that the basis for the computation of the *ad valorem* tax is the costs of the raw materials quarried from its mines, subjected petitioner, as producer of cement, to the payment of 7% sales tax.

On January 31, 1968, petitioner received a letter from respondent dated January 16, 1968, assessing the petitioner the amount of P2,480,001.70 as deficiency sales tax and surcharge on the cement produced by petitioner from January 1, 1957 to June 30, 1959.

On February 1, 1968, petitioner filed with the respondent a letter protesting the said assessment on the grounds that the assessment had already prescribed and that cement is not subject to sales tax.

On March 9, 1970, petitioner received from the respondent a letter dated February 19, 1970, denying the said protest filed by the petitioner against the assessment in question.

On March 31, 1970, petitioner filed its petition for review with this Court and on May 15, 1970 respondent filed his answer.

The issues raised are: (1) whether petitioner's cement is subject to sales tax, and (2) whether the assessment issued by respondent has already prescribed.

It should be stated that upon the request of the parties, action on this case was held in abeyance to await the decision of the Supreme Court in similar cases involving similar issues which were then pending therein under G.R. Nos. L-35668, 35670, 35671, 35672, 35683 and 35677 entitled "Republic Cement Corporation vs. Commissioner of Internal Revenue; Filipinas Cement Corporation vs. Commissioner of Internal Revenue; Apo Cement Corporation vs. Commissioner of Internal Revenue; Bacnotan Consolidated Industries, Inc. vs. Commissioner of Internal Revenue; Philippine Portland Cement Co., Inc. vs. Commissioner of Internal Revenue; and Cepoc Industries, Inc. vs. Commissioner of Internal Revenue", respectively.

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 Commissioner of Internal Revenue vs. Cepoc Industries, Inc. and the Court of Tax Appeals, L-35677 (124 SCRA 46), holding explicitly that cement is a "manufactured product" and its sales is not exempt from sales tax imposed under Sections 186 and 188 (c) of the then in force National Internal Revenue Code. And as a consequence of said ruling, the cement companies (private respondents therein) were ordered by the Supreme Court 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.

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 assessment 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.
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> 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 respondent 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-20363 (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 recomputation 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 198 [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, the Supreme Court, in its resolution dated May 7, 1987 denying CEPOC's motion for reconsideration, one of the private respondents in said appealed cement cases, ruled:

> 3. Finally, the Motion for Reconsideration filed by private respondent CEPOC raises anew the issue of prescription of the government's right to make the subject assessment in the light of Sec. 331 of the Tax Code. Unlike the non-retroactivity issue, prescription has been ventilated by the movant even during the pendency of the case in the Court of Tax Appeals, and in its pleadings filed with this Court. Both the Court of Tax Appeals decision and the decision sought to be reconsidered are, however, silent on that point. We clarify.
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> Considering that the decision on the tax liability of private respondents, as in fact, the dispositive portion thereof ordered them to pay the 7% sales tax, the prescription issue with regard to the movant CEPOC merits clarification. Left, unresolved, it will only serve to nurture the lingering doubt which CEPOC continues to harbor insofar as its tax liability is concerned. Besides, the issue was squarely raised at the proper time and in the proper forum. We elect to discuss

the issue, but as already said, only as a clarification of the decision which needs no reconsideration on its merits.

In order to avail itself of the benefits of the five-year prescription period under Sec. 331 of the Tax Code, the taxpayer should have filed the required return for the tax involved, that is, a sales tax return. (Butuan Sawmill Inc. v. CTA et al., G.R. No. L-21516, April 29, 1966, 16 SCRA 277). Thus CEPOC should have filed sales tax returns of its gross sales for the subject periods. Both parties admit that returns were made for the ad valorem mining tax. CEPOC argues that said returns contain the information necessary for the assessment of the sales tax. The Commissioner does not consider such returns as compliance with the requirement for the filing of tax returns so as to start the running of the five-year prescriptive period.

We agree with the Commissioner. It has been held in Butuan Sawmill Inc. v. CTA, supra that the filing of an income tax return cannot be considered as substantial compliance with the requirement of filing sales tax returns, in the same way that an income tax return cannot be considered as a return for compensating tax for the purpose of computing the period of prescription under Sec. 331..(Citing Bisaya Land Transportation Co., Inc. v. Collector, G.R. Nos. L-12100 and L-11812, May 29, 1959). There being no sales tax returns filed by CEPOC , the statute of limitations in Sec. 331 did not begin to run against the government. The assessment made by the Commissioner in 1968 on CEPOC's cement sales during the period from July 1, 1959 to December 31, 1960 is not barred by the five-year prescriptive period. Absent a return, or when the return is false or fraudulent, the applicable period is ten (10) years from the discovery of the fraud, falsity or omission. The question in this case is: When was the CEPOC's omission to file the return deemed discovered by the government, so as to start the running of said period?

It may be recalled that prior to the interpretation made by the Court in the first CEPOC case in 1965 on the nature and taxability of cement, the Commissioner of Internal Revenue was of the opinion that sales tax was not due on cement. Consequently, said private respondent did not file the required sales tax returns on its gross sales of cement for the period from July 1, 1959 to December 31, 1960. However, it was only in 1968, and by reason of said interpretation, that the Commissioner changed his opinion and assessed sales tax against the private respondents, including the movant CEPOC.

The Commissioner contends that his duty to assess the sales tax in question arose only after the Court ruled in the first CEPOC case (G.R. No. L-18649, February 27, 1965) that cement was subject to the tax. Thus, according to him, the statute of limitations began to run only in 1967, when the Motion to Reconsider said decision was denied. The net effect of this argument is that the prescription period for the assessment of the sales tax was suspended during the time that the Commissioner held the opinion that cement was not liable to tax. For its part, CEPOC maintains that the statute of limitations cannot be suspended because of the Commissioner's erroneous interpretation of the Tax Code which is not among the grounds for suspension under Section 333. Following this line of argument, the omission of CEPOC would be deemed "discovered" by the government as early as 1960, after the filing of CEPOC's ad valorem returns.

> Whether We consider the discovery of CEPOC's omission to file a sales tax return to have taken place in 1960, immediately after the filing of its returns for ad valorem tax, or in 1967, when the Commissioner changed his erroneous ruling, We will arrive at the same result. Since the subject assessment was made in 1968, the same still falls within the ten-year prescriptive period either from 1960 or from 1967.

In the case at bar, if we consider that the discovery of the omission to file a sales tax return was from the time the ad valorem tax returns were filed starting from the year 1957 and not from 1967 when respondent Commissioner changed his erroneous ruling, which indeed under the circumstances of this case should be the correct interpretation, the right of respondent to assess the sales tax for 1957 has already prescribed, because the assessment was made in January 1968 which was beyond the 10-year prescriptive period. However, the period covered by the assessment from 1958 to June 30, 1959 still falls within the 10-year prescriptive period.

We cannot accede to the view of respondent that the 10-year period commenced to run only in 1967 when he changed his erroneous ruling as that would be giving him undue advantage and benefit from his own erroneous interpretation of the law. Surely, respondent could have already made the correct interpretation as early as 1957 that cement was subject to sales tax.

**WHEREFORE**, the decision appealed from is modified, and it is hereby ordered that petitioner CEPOC Industries, Inc. pay respondent Commissioner of Internal Revenue the 7% sales tax on cement for the period from January, 1958 to June 30, 1959, 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 then applicable National Internal Revenue Code, and without the 25% surcharge. No costs.

**SO ORDERED.**

Quezon City, Metro Manila, October 20, 1989.

Amante Filler

AMANTE FILLER
Presiding Judge

WE CONCUR:

CONSTANTE C. ROAQUIN
Associate Judge

ALEX Z. REYES
Associate Judge

C E R T I F I C A T I O N

I hereby certify that this decision was reached after due consultation among the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

AMANTE FILLER
Presiding Judge
Court of Tax Appeals