REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

PHILIPPINE PRESTRESSED CONCRETE COMPANY, INC.,
Petitioner,

- Versus -

C.T.A. CASE No. 1852

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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D E C I S I O N

Petitioner has appealed from the decision of respondent dated May 10, 1967, assessing against and demanding from the former payment of the deficiency manufacturer's sales tax of ₱35,766.79 imposed by Section 186 of the Tax Code, inclusive of the 25% surcharge, for the period from December, 1962 to December 31, 1963.

Petitioner, Philippine Prestressed Concrete Co., Inc., is a domestic corporation. Article II of its original articles of incorporation shows that it was formed in 1960 principally for engaging "in the production, manufacture and sale of concrete products and by-products of all kinds, classes and descriptions, especially along the lines of prestressed concrete;" and secondarily, "in the general construction and contracting business, to construct public works, railroads, bridges, buildings, port works, or any other works, to own, operate, manage and maintain plants, shops, machinery and equipment as may be necessary in undertaking general construction work." On November 27, 1972, petitioner amended its articles of incorporation, particularly Articles II and II(a) thereof which read as follows:

> SECOND.- That the purposes for which such corporation is formed are to engage as contractor in the construction, precasting and fabrication of concrete structural components and by-products of all kinds, classes and description, especially along the systems of pre-tensioning and post-tensioning of prestressed concrete; and secondarily:
>
> (a) To engage in the general construction and contracting business, to construct public works, railroads, bridges, buildings, port works, or any other works; to own, operate, manage and maintain plants, shops, machinery and equipment as may be necessary in undertaking general construction work; to buy, sell, deal, import or export construction materials and products as may be necessary in order to accomplish the foregoing purposes. (Exh. N-1, pp. 106-107 CTA rec.)

Petitioner started its business operation on December 15, 1962. On March 13, 1964, petitioner paid ₱25,330.50 to respondent as 3% contractor's tax on gross receipts of ₱844,349.98 and ₱6,482.57 as surcharges and penalties, covering the period from December, 1962 to January, 1964. Upon examination of its books of accounts for the same period, petitioner was advised by the revenue office at Pasig, Rizal, of the proposed adjustments to petitioner's tax liability in the total sum of ₱75,192.65. Petitioner protested the proposed assessment on the ground that it is engaged solely as a contractor and not as a contractor and manufacturer at the same time.

On February 22, 1967, respondent formally demanded from petitioner payment of ₱104,331.90 as deficiency percentage taxes and penalties as manufacturer and contractor for 1962 and 1963. The said assessment was modified and reduced later on by respondent to ₱35,766.79, computed as follows:

Gross Sales - December 1962 - December 31, 1963	₱1,008,460.45
Less: Deductible Raw Materials ..	287,581.09
Taxable Sales	₱ 720,879.36
7% Sales Tax Due Thereon	₱ 50,461.56
Add: 25% surcharge for late payment	12,615.39
Total Amount Due	₱ 63,076.95
Less: Sales Tax Already Paid	27,310.16
Amount Still Due & Collectible ..	₱ 35,766.79

The only issue to be resolved in this appeal is whether or not petitioner is a manufacturer or contractor of prestressed concrete products subject to the 7% sales tax or the 3% contractor's tax imposed by Sections 186 and 191 of the Tax Code, respectively.

Petitioner claims and insists that, under the facts obtaining in this case, it is a <u>contractor</u> engaged in the manufacture of prestressed component parts of buildings, bridges, specific projects, and other construction work upon special orders and, therefore, it is a contractor subject to the 3% tax prescribed by Section

191 of the Revenue Code, the relevant portion of which reads as follows:

> SEC. 191. Percentage tax on road, building, irrigation, artesian well, waterworks, and other construction work contractors, x x x, and others. - Road, building, irrigation, artesian well, waterworks, and other construction work contractors; x x x shall pay a tax equivalent to three per centum of their gross receipts. (Underscoring supplied.)

Respondent, however, maintains that petitioner is a manufacturer as defined under Section 194(x) of the Revenue Code as follows:

> (x) "Manufacturer" includes every person who by physical or chemical process alters the exterior texture or form or inner substance of any raw material or manufactured or partially manufactured product in such manner as to prepare it for a special use or uses to which it could not have been put in its original condition, or who by any such process alters the quality of any such raw material or manufactured or partially manufactured product so as to reduce it to marketable shape or prepare it for any of the uses of industry, or who by any such process combines any such raw material or manufactured or partially manufactured products with other materials or products of the same or of different kinds and in such manner that the finished product of such process of manufacture can be put to a special use or uses to which such raw material or manufactured or partially manufactured products in their original condition could not have been put, and who in addition alters such raw material or manufactured or partially manufactured products, or combines the same to produce such finished products for the purpose of their sale or distribution to others and not for his own use or consumption. (Underscoring supplied.)

As a manufacturer of prestressed concrete products, petitioner is subject to the 7% tax imposed by Section 186 of the same Code, which in part provides:

> SEC. 186.- Percentage tax on sales of other articles.- There shall be levied, assessed and collected once only on every original sale, barter, exchange, and similar transaction either for nominal or valuable considerations, intended to transfer ownership of, or title to, the articles not enumerated in sections one hundred and eighty-four and one hundred and eighty-five a tax equivalent to seven per centum of the gross selling price or gross value in money of the articles so sold, bartered, exchanged, or transferred, such tax to be paid by the manufacturer or producer: x x. (Underscoring supplied.)

The 3% contractor's tax imposed by Section 191 of the Revenue Code is essentially a tax on the sale of services, labor and materials of a contractor, while the 7% sales tax under Section 186 of the same Code, supra, is levied upon manufacturer, producer or importer on the original sale, barter, exchange, or transfer of title to the articles enumerated therein. (Engineering Equipment & Supply Co. v. Comm., CTA Case No. 681, Nov. 29, 1966; See Celestino Co & Co. v. Coll., BTA Case No. 195, Oct. 4, 1954, aff'd in G.R. No. L-8506, Aug. 31, 1956, 99 Phil. 841.)

Our Civil Code distinguishes a contract of sale from a contract for a piece of work in this wise:

> ART. 1467.- A contract for the delivery at a certain price of an article which the vendor in the ordinary

> course of his business manufactures or procures for the general market, whether the same is on hand at the time or not, is a contract of sale, but if the goods are to be manufactured specially for the customer and upon his special order, and not for the general market, it is a contract for a piece of work. (Underscoring supplied.)

The word "contractor" has come to be used with special reference to a person who, in the pursuit of an independent business, undertakes to do a specific piece of job or work for other persons using his own means and methods without submitting himself to control as to the petty details. The true test of a "contractor" would seem to be that he renders service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is to be accomplished. (Luzon Stevedoring Co. v. Trinidad, 43 Phil. 803.)

Mr. Jose Abad, petitioner's expert witness and project design engineer during the years in dispute, in explaining the nature of petitioner's activities, testified substantially as follows:

> First of all, we promote our sales of prestressed concrete through our sales engineers. They usually go out and visit personally the architects and consulting engineers of various projects in the country. They then try to explain to these consultants the concept of prestressed concrete; what it is and what benefit it can do for the construction projects.
>
> The engineers and architects referred to are the consultants of the owner of the proposed building, etc. They are the

people who would undertake or supervise the construction of the project for the owner.

In general, our sales engineers interview the said engineers and consultants and make them interested in the idea of prestressed concrete. When they are successful in selling the idea, the project engineer or the consultants would then offer the project to our sales engineers for study of the nature and scope of the work that we would like to render in a given project. These would involve sketches of whatever preliminary plans the consultants may have in mind. Our sales engineers, in turn, would bring them to our office for scrutiny and study of the Engineering Department.

Our Engineering Department would then think about the best way by which we can supply prestressed concrete products. And to put this down into more concrete terms, we prepare a presentation drawing which summarizes the technical aspects of our work and participation in the proposed completion of the prestressed concrete project to be undertaken by us.

The presentation drawings are submitted thereafter to the consultant or owner of the project together with the price proposal. In other words, at this stage a quotation or budgetary price is offered to the owner to find out whether he would be willing to accept the offer and sign a contract for the completion of the prestressed concrete project.

The consulting engineer or architect of the owner subsequently analyzes our proposal. He normally compares our proposal with other systems of construction. For instance, he compares it with the cast-in-place construction. This is common and usual. Sometimes, he compares it with steel-fabricated structural components. Normally, he would also consider the time element for the completion of the project. After evaluating all the factors involved in the project, the owner or his representative would then decide which type of construction would be most favorable to him. Normally, the cheapest concept is adopted. Sometimes, a slightly more expensive concept is selected to gain time in the completion of his project.

If the owner finally accepts our offer - pricewise, safetywise, and timewise - we would then sit down and negotiate the terms of payment which varies from project to project, and depending of course on the owner's capability or credit standing. The owner's consultant would normally propose minor alteration like the architectural motiff or presentation. Normally, we sit down with him, and make changes which are most economical into the project under consideration.

After we have agreed on the revision, we go back to our plan. This time, we make the final design analysis of the project. And together with that, we also make the fabrication drawing which will show all the technical details arrived at in the first mentioned engineering design analysis. This is very, very similar. It is even more detailed because it includes such details which are associated with the making of these structural components within the confines of our plan.

The fabrication drawing and final design are subsequently presented to the architect and consultant of the project we are dealing with. They would scrutinize our engineering design and fabrication drawing to find out whether they are in conformity with the generally accepted practice in engineering, local regulations, etc.

These plans and designs are passed back and forth until they become acceptable to the various clients. When the parties agree on the final plans, specifications and price, then they give us the go-signal to proceed with the manufacture of these components. (underlining supplied.

The parol evidence of petitioner further show that: (1) it does not make any prestressed structural products except upon previous orders of customers;[1] (2) if these orders are withdrawn by the customers, the prestressed concrete products can not be sold or used in another project unless the said project has exactly the same plan or design as the first one;[2] and (3) petitioner's prestressed concrete products can not be mass-produced, stock-piled and sold to the general public.[3]

Petitioner manufactured prestressed concrete products such as columns, piles, beams, flooring, etc., out of sand, gravel, cement and steel upon special and previous orders of customers but it is not engaged in the manufacture thereof for sale to the public in general. Prestressed concrete products made by petitioner were designed either by the customers and their engineering consultants or jointly with petitioner's engineers or by the latter alone. The plans and designs were prepared by technocrats for a singular and specific project tailored or designed to that par-

[1] pp. 33-35, t.s.n., hearing 3/30/70
[2] id.
[3] pp. 17-18, t.s.n., hearing 3/30/70; pp. 31-36, t.s.n., id.

ticular project alone. Consequently, the manufactured prestressed concrete products can not be mass-produced or stock-piled for sale to the general market unlike products of manufacturing concerns, such as sashes, windows and doors,[1] concrete pipes and hollow blocks,[2] or window-type air-conditioners,[3] inasmuch as petitioner's products were individually and specially engineered to satisfy the load, span, depth, support and architectural requirements, etc., specified by a particular customer. For instance, columns or beams of one building are not interchangeable with those of another; in fact, columns of the same building are not interchangeable.[4] Even the measurements of prestressed concrete products are different; they are not made of standard sizes available to all customers. For example, prestressed pile and concrete flooring have standard outer cross-sectional dimension but the length varies from project to project depending upon the number of storeys to be constructed. Likewise, the amount of prestressing varies to conform to the load specified by the architect or engineer and the requirements under the Building Code.[5] In short, petitioner's products are

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[1] Celestino Co & Co. v. Coll., 99 Phil. 841.
[2] Phil. Pipes & Merchandising Corp. v. Comm., CTA Case No. 1858, March 30, 1970.
[3] Engineering Equipment & Supply Co. v. Comm., CTA Case No. 681, Nov. 29, 1966.
[4] pp. 25-29, t.s.n., hearing 3/30/70
[5] pp. 35-41, t.s.n., id.

practically useless as far as other customers are concerned. They are not products which any builder or homeowner may purchase from hardware stores or in the open market because they would not have existed were it not for the special order of the party desiring to acquire the same.[1]

Respondent, however, considered petitioner as a manufacturer and seller of concrete products because the purposes for which it was created provide as follows:

> Second.- That the purposes for which such corporation is formed are to engage in the production, manufacture and sale of concrete products and by-products of all kinds, classes and descriptions, especially along the lines of prestressed concrete; and secondarily;
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> xx xx xx xx
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> (b) To own, operate, rent, lease, establish and operate factories, manufacturing and processing plants, buildings, and structures of all kinds and to own, lease or otherwise acquire such lands, properties and transportation facilities and equipments as may be necessary in connection with its business;
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> (c) To buy, import, purchase or othewise acquire raw materials, ingredients, and other products necessary in its manufacturing business. (Exh. 9-A, p. 119 CTA rec.; underscoring supplied.)

Respondent also concluded that petitioner is a

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[1] Groves v. Buck, 3 Maule & S. 178; Towers v. Soborne, I Strange, 500; Benjamin on Sales, 90, cited in Arañas Ann. & Jur. on NIRC, Vol. II, p. 432.

manufacturer as shown by the following circumstances: (1) it stated the nature of its business as manufacturer when it applied in 1962 for registration of its business name or style; (2) it secured privilege tax receipts from 1961 to January, 1964, as manufacturer (C-14); (3) it registered its books of accounts in 1961 under C-14; and (4) it stated its business as manufacturer when it secured its Residence Certificate Class "C" from 1961 to 1964.

Petitioner's original articles of incorporation show that it had principal and secondary purposes. Its secondary purposes, among others, were:

> (a) To engage in the general construction and contracting business, to construct public works, railroads, bridges, buildings, port works, or any other works, to own, operate, manage and maintain plants, shops, machinery and equipment as may be necessary in undertaking general construction works; x x x. (Exh. 9-A, *supra*, underscoring supplied.)

Petitioner was originally organized to carry on various lines of business allowed under our corporation law. One of its secondary purposes was to engage in "general construction and contracting business." As stated earlier, the actual nature of petitioner's business transactions, activities and operations was that of a contractor. Respondent insisted that petitioner is a manufacturer because one of its purposes was to engage in the manufacture and sale of concrete products;

it is registered as manufacturer; and it secured privilege tax receipts as such. The effect of said insistence is to disregard the reality of petitioner's actual activities and business operation and to lean more heavily on form rather than substance. Taxation concerns itself with the actual nature and type of the business activity of a taxpayer in imposing the taxes due. Thus, it was held:

> x x x. It is a common practice to have extensive objects and powers set forth in the charter, although there may be no present intention to engage in any of the corporate activities and purposes enumerated. It is because of this practice that, for the purposes of taxation, the nature of the business actually engaged in is of decisive importance. State v. Central Trust Co. 106 Md. 268, 274, 67 A. 267; Industrial Corp. v. State Tax Commission, 134 Md. 379, 382, 106 A. 852. (State Tax Commission v. Allied Mortg. Cos., 119 ALR 585, 587-588. Underscoring supplied.)

In sustaining the supremacy of substance over form involving tax matter, the Tax Court, with the blessing of the Supreme Court, held as follows:

> Pursuant to this article, the essential elements of a partnership are two, namely: (a) an agreement to contribute money, property or industry to a common fund; and (b) intent to divide the profits among the contracting parties. If these two elements concur it is immaterial that the parties termed their relationship as mere co-ownership for it is not what the parties call their agreement but the true nature thereof that controls the legal effects of their acts. x x x. (Fernandez v. Comm. of Int. Rev., CTA

Cases Nos. 935 & 1262, Dec. 23, 1970, petition for certiorari denied in G.R. Nos. L-33961 & L-33962, Aug. 26, 1971. Underscoring supplied.)

At any rate, in 1972 petitioner amended its articles of incorporation to conform to the true nature and main thrust of its business activities, thus -

> SECOND.- That the purposes for which such corporation is formed are to engage as contractor in the construction, pre-casting and fabrication of concrete structural components and by-products of all kinds, classes and description, especially along the systems of pre-tensioning and post-tensioning of prestressed concrete; and secondarily:
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> (a) To engage in the general construction and contracting business, to construct public works, railroads, bridges, buildings, port works, or any other works; to own, operate, manage and maintain plants, shops, machinery and equipment as may be necessary in undertaking general construction work; x x x. (Exh. N-1, pp. 106-107, CTA rec., underscoring supplied.)

Respondent, however, argues that the amendment would not change the status of petitioner as a manufacturer because it was made long after petitioner had been assessed for manufacturer's sales tax. We disagree. Firstly, under its original articles, petitioner is also authorized to engage in "general construction and contracting business;" and secondly, the amendment was justified in order to reflect the actual nature of petitioner's business. Consequently, an amendment to emphasize and pinpoint the principal purpose and activity of a corporation is neither tax avoidance nor detrimental to petitioner's pending tax assessment.

The fact that petitioner can be classified as a manufacturer under the definition in Section 194(x) of the Revenue Code, supra, does not deprive it of its status as a contractor. After all, a contractor is engaged in the sale of services, labor, and materials. In the language of Article 1467 of our Civil Code, supra, it clearly provides that "if the goods are to be manufactured specially for the customer and upon his special order, and not for the general market, it is a contract for a piece of work." However, if the prestressed concrete products and by-products manufactured by petitioner were sold or made available for sale to the general market without special order from customer, then petitioner is the manufacturer subject to the 7% sales tax.

In trying to overthrow petitioner's evidence, respondent relied on Revenue Examiner Narciso Masilao's report dated February 1, 1965 stating, in substance, as follows:

1. Petitioner had stocks of concrete products in its factory at Marikina, Rizal, which are uniform in appearance and composition as evidenced by photographs;

2. The said products are sold by petitioner

to the general public or to any person who wanted to buy them and pay the price therefor; and

3. Petitioner's plant covers more than 25 hectares of land and employs more than 200 workers. (p. 18, BIR rec.) It can stock its concrete products for it is mechanically equipped to do so.

The foregoing statements are mere conclusions of the revenue examiner bereft of any corroborative evidence. He was not even presented as a witness during the trial of the case. The said examiner reported that the concrete products of petitioner were mass-produced and habitually made for the general market, yet no evidence was cited or introduced to support the examiner's conclusion. It has not been shown that petitioner's products can be utilized for projects other than those for which they were specially and exclusively intended. Neither has it been shown that the U-beams and other concrete products photographed by respondent's examiner were salable for the general market considering their design and such criteria as spans, height, width, depth, sizes, spacing, shape and kind of reinforcement, concrete strength, allowable deflection, clearances and kind of finish. Respondent's examiner also failed to point or specify any particular person or entity who or which purchased any of the prestressed concrete products of petitioner without special order to justify the conclusion that petitioner's manufactured products were sold to the general public.

The distinction between a manufacturer and a contractor notwithstanding, respondent declared that petitioner is not a contractor within the purview of Section 191 of the Revenue Code, citing as authority the case of Celestino Co & Co. v. Collector of Internal Revenue, G.R. No. L-8506, August 31, 1956, wherein it was held that a construction work contractor's activity is limited to repair and alteration of buildings, structures, streets, highways, etc.

At the time material to this case, Sec. 191 of the Revenue Code was amended by Republic Act 1612, approved on August 24, 1956, which provided, among others, as follows:

> SEC. 191.- Percentage tax on road, building, irrigation, artesian well, waterworks, and other construction work contractors, x x and others. (Underscoring supplied.)

The phrase "and other independent contractors" was added at the end of Sec. 191 by Sec. 12 of Rep. Act No. 1612 and, therefore, there is no parity between the applicable statutory provisions in the Celestino Co case, supra, and the case at bar. Consequently, the Supreme Court ruling relied upon by respondent is not controlling.

In passing, it may be stated that subsequent legislation proves the validity of our stand because Republic Act No. 4643, which took effect on June 18, 1965, defines the term "contractor" and includes within its purview subcontractor and specialty contractor. The latter term has been defined as follows:

> (e) A "specialty contractor" is a person whose operations pertain to the performance of construction work requiring special skill and whose principal contracting business involves the use of specialized building trades or crafts. (See National Internal Revenue Code, p. 170, 1970 ed., underscoring supplied.)

Moreover, the phrase "other construction work contractor" found in Section 191 of the Revenue Code should not be given a strict and limited meaning confined to repair or alteration work. The term "construction", as distinguished from "improvements" and "repair", has a broader meaning. Thus -

> "Construction" is a broad term, authorizing the making of new streets; "improvements" permits new work upon street already constructed; and "repair" relates to the restoration of an existing condition. (Cobell v. City of Portland, 57 P. 2d. 1292, 1297; 153 Or. 528; cited in Words and Phrases, Permanent ed. Vol. 8-A, p. 498.)

WHEREFORE, the decision of respondent Commissioner of Internal Revenue appealed from is hereby reversed and petitioner is declared a contractor of prestressed concrete products subject to the contractor's tax imposed by Section 191 of the Revenue Code during the period covered by the assessment. Without pronouncement as to costs.

SO ORDERED.

Quezon City, November 23, 1973.

ESTANISLAO R. ALVAREZ
Associate Judge

WE CONCUR:

ROMAN M. UMALI
Presiding Judge

RAMON L. AVANCEÑA
Associate Judge