REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ELEVATOR SERVICE CO., INC.,
Petitioner,

- versus - C.T.A. CASE NO. 2488

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

4/1/82

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D E C I S I O N

The controversy in this case revolves on the validity of the deficiency income tax assessment issued by the Commissioner of Internal Revenue against petitioner, Elevator Service Co. Inc., for the taxable years 1961, 1962 and 1963, in the respective amounts of ₱136,157.28, ₱10,562.30 and ₱66,827.04, inclusive of surcharges and interests.

Petitioner, Elevator Service Co., Inc., is a domestic corporation organized and existing under the laws of the Philippines. It is registered with the Securities and Exchange Commission and one of the primary purposes of the corporation is to manufacture, sell, repair and erect elevators.

escalators and hoisting apparatus of all kinds and other machinery composed of metal or wood or both and the purchase, lease and sale of the same. (See Articles of Incorporation of Elevator Service Company, Inc., p. 99, BIR rec.)

On May 6, 1964, Macario U. Razon, an informer, wrote the Commissioner of Internal Revenue a letter alleging that petitioner Elevator Service Company, Inc. and Elcolift Corporation, which is owned and managed by Edgardo Limcaco, has not been reporting its true income for 1961 and 1962, despite its profits derived from its transaction with National Orthopedic Hospital and that in 1963, it failed to file its income tax return. This letter was endorsed to the Supervising Revenue Examiner, who referred the same for investigation to Examiner Orlando Roque.

Subsequently, in two indorsement letters both dated September 23, 1964, Examiner Roque reported that after verification of the tax census returns, it was found out that the income tax returns of petitioner were in order; that the taxpayer's contract with the National Orthopedic Hospital was not yet consumated; and that partial payments were made in 1964 only.

In view of these negative findings, the Chief, Investigation Division recommended that the case be filed for future reference.

On January 13, 1966, the investigation was revived and Examiner Roque made the findings that petitioner Elevator Service Company, Inc., Elcolift, and Mr. & Mrs. Limcaco, did not file their returns for 1964 and prior years. On April 4, 1966, Examiner Roque, assisted by Examiner Austria, were issued a Letter of Authority No. 20151 to investigate the case of petitioner anew. As a result of their investigation, Examiner Roque and his assistant, Examiner Austria, submitted a report stating that Mr. Limcaco would not produce the petitioner's books of account and that it was verified from a contract petitioner had with the National Orthopedic Hospital that payment were already released to petitioner by the Social Security System, and these released payments were charged against the loans from the National Orthopedic Hospital, which were in the total amount of ₱532,026.70, which covers the period from 1961 to 1964. (See Exh. "2", p. 110, BIR rec.) The said examiners, therefore, recommended the assessment of a deficiency income tax against petitioner for the years 1961, 1962 and 1963.

Acting on the above findings, the Commissioner of Internal Revenue, on September 29, 1967, recommended to the City Fiscal of Manila the criminal prosecution of Edgardo Limcaco, in his capacity as President of Elevator Service Co., Inc., on the following grounds:

> (1) Failure to file the corporate income tax returns of petitioner Elevator Service Co., Inc., for the years 1961, 1962 and 1963, and to pay the corresponding income tax thereon;
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> (2) Filing of false and fraudulent return by petitioner Elevator Service Co., Inc., for 1964;
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> (3) Failure of petitioner Elevator Service Co., Inc. to file percentage tax returns and pay the 3% contractor's tax on the gross receipts of Elevator Service Co., Inc.; and
>
> (4) Failure of petitioner Elevator Service Co., Inc. to keep books of accounts.

Also, the Commissioner of Internal Revenue filed a complaint against petitioner Elevator Service Co., Inc. with the City Fiscal of Manila, but on August 5, 1968, the complaint was dismissed on the ground that it was prematurely filed, and the City Fiscal instead suggested that the case be inquired into further in view of the submission by petitioner of its corporate income tax returns for 1961, 1962 and 1963 but in which they declared a loss in 1961 and 1963 and a taxable income in 1962, and the registered books of accounts; and that the failure to file percentage tax returns and to pay the contractors tax on petitioner's gross receipts was already the subject of inquiry by the Quezon City Fiscal's Office, which dismissed the case upon partial payment of percentage tax by petitioner.

Upon the dismissal of the criminal complaint by the City Fiscal of Manila, a re-investigation of the case against petitioner's deficiency tax liabilities was recommended.

On July 29, 1970, Examiner Austria reiterated its recommendation for the issuance of deficiency income and business taxes against petitioner. In a letter dated October 30, 1970 and sent to petitioner on November 6, 1970 (See Exh. F-2, p. 56, CTA rec., see also pp. 8 & 16, t.s.n., hearing of December 7, 1976), the Commissioner of Internal Revenue finally assessed against and demanded payment from petitioner deficiency income taxes for the taxable years 1961, 1962 and 1963, in the amounts of ₱136,157.28, ₱10,562.30 and ₱66,827.04, respectively, computed as follows:

<u>1961</u>

Net income per final investigation - -	₱306,000.00
Tax due thereon - - - -	81,046.00
ADD: 50% surcharge - - - -	40,523.00
½% mo. int. fr. 4-17-62 to 4-17-65 - - - -	14,588.00
TOTAL AMOUNT DUE & COLLECTIBLE - - - -	₱136,157.28

<u>1962</u>

Net income per final investigation - -	₱ 31,325.00
Tax due thereon - - - -	6,685.00
ADD: 50% surcharge - - - -	3,342.50
½% mo. int. fr. 4-17-63 to 4-17-66 - - - -	534.80
TOTAL AMOUNT DUE & COLLECTIBLE - - - -	₱ 10,562.30

<u>1963</u>

Net income per final investigation - -	₱164,187.58
Tax due thereon - - - -	39,778.00
ADD: 50% surcharge - - - -	19,889.00
½% mo. int. fr. 4-20-65 to 4-20-68 - - - -	7,160.00
TOTAL AMOUNT DUE & COLLECTIBLE - - - -	₱ 66,827.04

Petitioner, thru its Auditor, replied in a letter dated November 25, 1970, contesting the assessment and asserting that it did not owe the government any tax liability at all and requesting that the case against it be considered closed and terminated. Petitioner's protest on the assessment was predicated on the following grounds:

> (1) That the net income, as per final investigation by respondent, did not conform to that entered in the petitioner's income tax returns for the years 1961, 1962 and 1963;
>
> (2) That respondent failed to take into account the income tax payments made by the petitioner for the year 1962; and
>
> (3) That the assessment made by respondent for the years 1961, 1962 and 1963 should have been made within the period of five (5) years after the return was filed, in accordance with Section 51 (b), in relation to Section 331 of our Internal Revenue Code, and that, therefore, action for the collection of taxes for the said years 1961, 1962 and 1963 had already long prescribed.

In view of the protest of petitioner against the assessment, the Commissioner of Internal Revenue, thru the Revenue Operations Head, on December 19, 1972, sent another communication to petitioner reiterating the collection and payment of the questioned assessment, and enclosing therewith a Waiver of the Statute of Limitations and asking that it be signed by the President and/or General Manager of petitioner-corporation, in order that it may be given a chance, i.e.petitioner to avail itself of the tax amnesty granted under Presidential Decree No. 68. The records will show that petitioner neither replied to this letter nor chose to avail of the tax amnesty granted by Presidential Decree No. 68. Instead, it opted to institute an appeal with this Court.

The issues for determination are:

(1) Whether Court has jurisdiction over this case;

(2) Whether the assessment issued by respondent against petitioner for taxable years 1961, 1962 and 1963 have already prescribed; and

(3) If the same has not prescribed, whether the assessment is valid or not.

Insofar as the first issue is concerned, there is no question that the Court has jurisdiction to take cognizane of this case.

Respondent alleged that the failure of the taxpayer to avail of the benefits granted under Presidential Decree No. 68 made the assessment final, executory and demandable since according to him the tax liabilities involved became unpaid delinquent tax accounts and that the answer filed by respondent to the Petition For Review is equivalent to a complaint for collection of its tax liabilities under consideration.

On the other hand, petitioner contends that the Court has jurisdiction to take cognizance of this case because this involved a disputed assessment and the decision of the Commissioner of Internal Revenue has become final upon reiteration for the collection and payment of the questioned assessments as embodied in its letter dated December 19, 1972.

Petitioner's stand is well taken. Under Section 7 of Republic Act 1125, the Court of Tax Appeals exercises exclusive appellate jurisdiction to review by appeal decision of the Collector of Internal Revenue in cases involving disputed assessments, x x x arising under the National Internal Revenue Code or other law or part of law administered by the Bureau of Internal Revenue.

Respondent's letter of December 19, 1972 is tantamount to a denial of the protest of petitioner corporation on the assessment, inasmuch as it is denial of its protest and a reiteration of the demand made by the Commissioner of Internal Revenue on the protest of petitioner in its letter dated November 25, 1970. Respondent's second letter indicates his final stand on the request for reconsideration of the disputed assessment, which indeed has the effect of a final decision on the protested assessment. The refusal of petitioner to execute the waiver of the statute of limitation is of no consequence to the decision already made by the Commissioner of Internal Revenue to hold petitioner liable for the deficiency income tax assessments in question. Presidential Decree No. 68 merely gives the taxpayer an opportunity to settle its tax obligation outside of Court which is voluntary in nature and non-availment of the same does not deprive petitioner of its right to question the assessment in Court.

Consequently, from the receipt of the decision of December 19, 1972 to the filing of the petition for review on February 22, 1973, the latter was filed within the reglementary period of 30 days. Hence, the Court has jurisdiction over the appeal.

We will now proceed to discuss the issue of prescription. Petitioner contends that the right of respondent to assess and/or collect the deficiency income tax has prescribed since the assessments against petitioner for taxable years 1961, 1962 and 1963 were made only in November 6, 1970 which is beyond the five-year period provided by law. Pursuant to the provisions of Section 331 of the Old Tax Code, which limits the period of assessment and collection to five years after the return was made, petitioner strongly asserts that the assessment should have been validly done, at the latest, for the years 1961, 1962 and 1963, respectively, on the following dates: April 16, 1967, for return filed on April 16, 1962; April 15, 1968, for the return filed on April 15, 1963 and April 15, 1969, for the return filed on April 15, 1964.

Petitioner asserts too that the instant case does not fall under any of the exceptions to the five (5) year prescriptive period stated in Section 332 of the Old Tax Code, which provides that in case of the filing of a false or fraudulent return, the tax may be assessed within ten (10) years after discovery of the falsity, fraud or omission. Petitioner contends that respondent could not avail of these exceptions because there were income tax returns filed for the years in question and there was no clear, strong and convincing evidence of actual fraud committed by petitioner.

Respondent on the other hand, asserts that its right to assess has not yet prescribed because Section 332 of the Old Revenue Code (now Section 318) should apply since the petitioner has filed false or fraudulent returns and therefore respondent has a period of ten (10)years from June 27, 1966, (the date of discovery of the falsity or fraud) within which to assess its tax liabilities herein involved. It is alleged that from June 27, 1966, the original date of investigation, to October 30, 1970, the date the taxpayer was alleged to have been assessed, only four (4) years, four (4) months and three days have elapsed. In other words, only four years, four months and three days have elapsed from the date of discovery of the falsity or fraud. Respondent, allege that petitioner has committed fraud or falsity in its income tax returns filed for the taxable years in question by not declaring the releases made by the Social Security System to Elevator Service Company which were made in payment of an alleged contract entered into between the National Orthopedic Hospital and petitioner. (See pp. 19-24 t.s.n., March 15, 1977.)

Section 331 of the Old Tax Code indeed limits the period of respondent to assess and collect taxes to five years. The exception to this provision of law is provided in said Section 332 of the National Internal Revenue Code. In cases where the government takes exception to the five-year period within which to assess on the basis of a fraudulent or false return, the government, thru the respondent, has the duty to show fraud by means of clear and convincing evidence and not merely by a preponderance of evidence. (Yutivo Sons Hardware Company vs. Commissioner, G.R. L-13203, January 28, 1961). Fraud is never lightly presumed because it is a serious charge. (Commissioner of Internal Revenue vs. Ayala Securities Corporation and The Hon. Court of Tax Appeals, respondents, L-29485, 762 March 31, 1976, 70 SCRA 204.).

Upon a review of the records of this case, respondent has not proven clearly and convincingly that there was a fraudulent intent of petitioner to defraud the Government of its rightful revenue. The mere fact that petitioner had refused to produce its books of accounts and failed to produce its income tax returns, as claimed by respondent are to us circumstances which are inadequate to show the clear intent of petitioner to commit fraud. It is most important under the Code for respondent to show that petitioner had derived income during the taxable years in question which it willingly neglected to reflect in its income tax returns with the intent to deprive the government of the revenue due to it. This respondent was not able to do.

The claim that releases of payments made by the Social Security System to petitioner by virtue of the latter's contract with the National Orthopedic Hospital to install elevators in the latter's premises, in the following amounts, as shown by the Statement of Releases made by the Social Security System to the Elevator Service Co., charged against the National Orthopedic Hospital Loan (See Exh. "2" for resp., p. 119 BIR rec.), to wit:

Check No.	Date Issued	Amount
PBTC Check # 725108	October 10, 1961	₱306,000.00
PBTC Check # 797641	October 2, 1962	31,000.00
PBTC Check # 817994	March 18, 1963	153,000.00
PBTC Check # 852665	May 9, 1963	11,187.50
PBTC Check # 60243	April 17, 1964	1,117.20
PBTC Check # 60242	April 17, 1964	19,397.00
PBTC Check # 60241	April 17, 1964	10,000.00

which allegedly petitioner had failed to declare as incomes in its income tax returns for taxable years 1961, 1962 and 1963 is not correct.

It is to be noted that respondent failed to show by clear and convincing evidence that the above releases were income of petitioner. Respondent merely presumed without positively showing how and why, the above amounts of releases by the

Social Security System are considered incomes to petitioner.

Contrarily, it was shown clearly by petitioner that the amount of ₱306,000.00 were used for the direct purchase of elevator parts for installation in the National Orthopedic Hospital. (See Exhs. "P", "P-1", p. 102, CTA rec.) As to the amounts of ₱31,325.00, ₱153,000.00 and ₱11,187.50 which were released by the Social Security System, the same appears to have been taken up in petitioner's books of accounts, but respondent, however, insisted that these releases were not reflected in the books. (See Exhs. "I", "I-1", "J", "J-2", t.s.n., p. 13, Hearing of May 10, 1977.)

The Court is thus convinced that from the above circumstances, they do not clearly and convincingly indicate fraud. What the circumstances tend to show is a private scheme entered into between petitioner and National Orthopedic Hospital, whereby the latter furnishes the necessary financing for the purchase and importation of the said elevators and parts to be installed in its building. (See Exhs. "K-1", "L", "L-1", "L-3", "M", "M-1", "M-2", "M-3", "M-4", "N", "N-1", "N-2", "N-3", & "O", for pet., pp. 81-102, CTA rec.) That the releases of payments by the Social Security System were intended for the acquisition, purchase and importation of the elevators and parts owned by the National Orthopedic Hospital and not as payment to or income of petitioner Elevator Service Co., Inc.

In the case of Yutivo Sons Hardware vs. Commissioner, L-13203, January 28, 1961, the Supreme Court has ruled that where a man "honestly believes" that the method employed by him in computing his tax liability is correct, he does not incur any fraud, in which case, no fraud penalty attaches under Section 72 of the Tax Code, which in part reads:

> "Section 72. Surcharge for failure to render returns and for rendering false and fraudulent returns. x x x In case of wilfull neglect to file the return or list within the time prescribed by law, or in case of false or fraudulent return or list wilfully made, the Commissioner of Internal Revenue shall add to the tax, in case any payment has been made on the basis of such return before the discovery of the falsity or fraud, a surcharge of fifty per centum of the amount of such tax or deficiency tax x x x."

The foregoing consideration inevitably leads us to the conclusion that the law applicable in this case is Section 331 of the Tax Code, which provides:

> "Section 331. Period of limitation upon assessment and collection. - Except as provided in the succeeding section, internal-revenue taxes shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after expiration of such period. For the purposes of this section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day: Provided, that this limitation shall not apply to cases already investigated prior to the approval of this Code."

It is of record that petitioner indeed filed its income tax returns for 1961 on April 16, 1962; its income tax returns for 1962 on April 15, 1963; and its income tax returns for 1963, on April 15, 1964. In accordance with the above provisions of law, assessment against petitioner should have been validly made at the latest on the following dates: April 16, 1967, for returns filed on April 16, 1962; April 15, 1968, for the returns filed on April 15, 1963 and on April 15, 1969, for the returns filed on April 15, 1964. Since the assessment by respondent against petitioner was made only on November 6, 1970, the five-year period has clearly elapsed and respondent's right to assess has of course prescribed. Hence, the question of the validity of the assessment of respondent becomes moot and academic because of the foregoing discussion.

WHEREFORE, the decision of respondent Commissioner of Internal Revenue appealed from is hereby set aside. Respondent's income tax assessment of ₱136,157.28 for 1961, ₱10,562.30 for 1962, and ₱66,827.04 for 1963 is hereby cancelled and declared to be without legal force and effect. No pronouncement as to costs.

SO ORDERED.

Quezon City, April 1, 1982.

CONSTANTE C. ROAQUIN
Associate Judge

WE CONCUR:

AMANTE FILLER
Presiding Judge

ALEX Z. REYES
Associate Judge