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COURT OF TAX APPEALS
MANILA

December 8, 1961

VISAYAN CEBU TERMINAL
CO., INC.,
Petitioner,

- versus - C.T.A. CASE NO. 719

BUREAU OF INTERNAL REVENUE,
Respondent.

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DECISION

This is an appeal from the decision of the Commissioner of Internal Revenue ordering the Visayan Cebu Terminal Co., Inc. to pay the amount of ₱52,172.97 as percentage tax and 25% surcharge, plus compromise penalty. But, respondent, in his answer to the instant petition for review, has limited the relief prayed for only to the payment of the percentage tax, 25% surcharge and costs.

There is no controversy as to the facts.

Petitioner Visayan Cebu Terminal Co., Inc. is a domestic corporation (Par. 1, Petition for Review, CTA rec. p. 1) engaged in rendering arrastre service at the port of Cebu (Exh. 1, BIR rec. p. 2) on import cargoes, including import transit cargo (Exh. 1-A, BIR rec. p. 10). Since 1946 petitioner has been managing the arrastre operation in the port of Cebu pursuant to a management contract with the Bureau of Customs (BIR rec. p. 72). For purposes of this case, we quote pertinent provisions of said management contract (Exh. G, CTA rec. pp. 95-109; Exh. 4-C, BIR rec. pp. 47-61):

"x x x

"2. During the period while the agreement remains in force and effect, the CONTRACTOR shall be, and the BUREAU does hereby appoint the CONTRACTOR, sole manager of the Arrastre Service at the Port of Cebu, on import cargoes including import transit cargo, subject always, however, to the terms, conditions, restrictions, subjections, supervisions and provisions in this agreement contained, with the exclusive right or privilege of receiving, handling, caring for and delivering all imported merchandise upon, or passing over, the Philippine Government-owned wharves and piers in the Port of Cebu; as also, the recording or checking of all such merchandise which may be delivered to the Port of Cebu at shipside, and other incidental services, and with full power to fix the number and salaries of, and to appoint and dismiss, all officers, employees and laborers, temporary or permanent, which may be necessary, and to do all acts and things which said CONTRACTOR may consider conducive to the interest of the Arrastre Service.

"3. It is expressly understood and agreed that the receiving, handling and checking of shipside deliveries and other incidental services as aforesaid, shall be under the general and direct supervision of the BUREAU, and the CONTRACTOR shall at all times carry out such instructions or directions as may be given or ordered from time to time by the BUREAU or its duly authorized representatives in respect thereto, and shall at all times conform with and abide by all rules and regulations of the BUREAU now existing and those which may from time to time hereafter be made, adopted or promulgated by the BUREAU.

"x x x

"12. x x x the CONTRACTOR shall at his own expense handle all merchandise upon or over said piers, wharves and other designated places, and at his own expense perform all work undertaken by him hereunder diligently and in a skillful work-

> manlike and efficient manner; and the CONTRACTOR shall be solely responsible as an independent contractor for, and promptly pay to the steamship company, consignee, consignor, or other interested party or parties the invoice value of each package x x x.
>
> "19. x x x all charges made by the CONTRACTOR shall be strictly uniform and in accordance with the rates of charges herein specified; and that the CONTRACTOR shall not take or receive, directly or indirectly, any compensation for services other than as herein provided, x x x.
>
> "22. x x x all expenses of every nature and kind whatsoever incurred by the CONTRACTOR in receiving, handling, caring for and delivering merchandise under the terms and conditions hereof, and all liabilities to which he may be subject, shall be for the sole account of, and paid by, the CONTRACTOR.
>
> "23. x x x in consideration of the rights and privileges granted the CONTRACTOR for the management of the Arrastre Service, the BUREAU shall receive twenty-eight per centum (28%) of the total monthly gross income derived from whatever source in connection with the operation of the Arrastre Service, payable monthly x x x."

Previous to August 24, 1956, petitioner did not pay percentage tax as arrastre contractor because arrastre contracts were then not subject to said tax.

On April 20, 1959, subsequent to the amendment of Section 191 of the Tax Code by Republic Act No. 1612, the Commissioner of Internal Revenue determined against petitioner a liability for fixed and percentage taxes, surcharges and compromise penalty which, upon requests for reconsideration, was finally reduced to as follows:

to ₱52,172.97 as percentage tax and 25% surcharge, plus compromise penalty in the amount of ₱500.00.

Shortly thereafter, petitioner instituted the present appeal.

> We are asked to resolve whether or not the Visayan Cebu Terminal Co., Inc. is liable for the payment of the 3% percentage tax imposed in Section 191 of the Tax Code, as amended by Republic Act No. 1612;

and if so liable, whether or not

> the 28% of gross receipts paid to the Bureau of Customs should be excluded from petitioner's gross receipts in computing the 3% percentage tax.

Petitioner alleges that the Bureau of Customs has general supervision and regulation of, and control over the receiving, handling, custody and delivery of merchandise on the wharves and piers of ports of entry; that pursuant to an agreement, the Bureau appointed the petitioner as the sole Manager of the arrastre operation in the Port of Cebu on import cargo, subject to the general and direct supervision of the former; and that the participation of petitioner in arrastre operation is limited practically to manual work and implementation of the policy of the Bureau in the handling of imported cargo. Under these circumstances, it is argued that petitioner is not subject to the imposition of the 3% percentage tax provided for by Section

191 of the Tax Code.

Section 191 states:

> "SEC. 191. Percentage tax on road, building, irrigation, artesian well, waterworks, and other construction work contractors, proprietors or operators of dockyards, and others. Road, building, irrigation, artesian well, waterworks, and other construction work contractors; arrastre contractors; x x x, shall pay a tax equivalent to three per centum of their gross receipts."

x x x

There is no doubt that petitioner is engaged in arrastre service and the gross receipts, which were made the basis of the assessment in this case, were derived by petitioner from arrastre operations. But is petitioner an arrastre contractor as contemplated by Section 191? If so, he is subject to the percentage tax. The Tax Code contains no definition of arrastre contractor, but the Board of Tax Appeals has defined arrastre service as that service which covers the handling of cargoes at piers and wharves. (Simeon Sadaya vs. Collector of Internal Revenue, BTA Case No. 4, April 25, 1952; Cebu Arrastre Service vs. Collector of Internal Revenue, BTA Case No. 159, Nov. 11, 1953 affirmed in G.R. No. L-7444, May 30, 1956). Said definition to which we agree clearly covers the activities of petitioner of receiving, handling, caring for and delivering all imported merchandise upon, or passing over, the Philippine-owned wharves and piers in

pier --

the port of Cebu. Moreover, the Management Agreement between petitioner and the Bureau of Customs (Exh. G) denominates the former as "CONTRACTOR." Under the terms of said agreement, petitioner undertakes to manage no other than the arrastre service in the port of Cebu. And according to the testimony of its own witness, Mr. Manuel Cuenco, petitioner actually performed arrastre work. In these circumstances, we are compelled to the conclusion that petitioner is an arrastre contractor within the contemplation of Section 191 of the Tax Code.

However, petitioner suggests that inasmuch as it is engaged in overseas arrastre as Manager of the Bureau of Customs which is exempt from the payment of taxes, it should be distinguished from the arrastre contractor mentioned in Section 191 of the Tax Code. This suggestion is without merit. The codal section does not make a distinction between oversea arrastre and interisland arrastre. Ubi lex non distinguit nec nos distinguere debemos.

Having found petitioner to be within the ambit of Section 191 of the Tax Code, it follows that it is liable for the payment of the percentage tax provided therefor.

In the alternative, petitioner contends that since the 28% of gross receipts goes to the Bureau of Customs as its share, the same should not be included in computing the 3% percentage tax.

We agree to this contention. The total amount of cash received by petitioner as its earnings from the arrastre operation without including any amount of money that did not go to its funds as its property should be deemed its gross receipts, liable to the payment of percentage tax. Indeed, gross receipts should not include any money that has been especially earmarked for some other person (Commissioner vs. Manila Jockey Club, Inc., G.R. Nos. L-13890 & L-13887, June 30, 1960). And the government could not have intended to consider as gross receipt the 28% that went to one of its institutions, the Bureau of Customs, and thereby collect percentage tax on it from petitioner. To hold petitioner liable for the payment of percentage tax is unquestionably unjust and not contemplated by Section 191 of the Tax Code.

WHEREFORE, the decision appealed from is hereby modified in the sense that petitioner Visayan Cebu Terminal Co., Inc. is ordered to pay the Commissioner of Internal Revenue the sum of ₱41,416.38, as unpaid percentage tax and 25% surcharge. Without special pronouncement as to costs.

SO ORDERED.

Manila, December 8, 1961.

MARIANO NABLE
Presiding Judge

We concur:

AUGUSTO M. LUCIANO
Associate Judge

ROMAN M. UMALI
Associate Judge