REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
MANILA

PANAY ELECTRIC CO., INC.,
Plaintiff,

- versus -

ILOILO CIVIL CASE NO. 3087

COLLECTOR OF INTERNAL REVENUE,
Defendant.

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March 10/56

D E C I S I O N

Plaintiff herein, Panay Electric Co., Inc., is seeking to recover from defendant the sum of ₱135,872.67 as alleged overpayments of its franchise tax from January 19, 1947 to January 18, 1952.

Plaintiff is a corporation duly organized and existing under the laws of the Philippines with offices in the City of Iloilo. It operates under a franchise, Act No. 2983, as amended by Act No. 3665, of the Philippine Legislature, for a period of fifty years from the approval of said franchise on February 22, 1921. It has been granted the right to construct, maintain, and operate an electric light, heat and power system, for the purpose of generating and distributing electric light, heat and power for sale within the municipalities of Iloilo, La Paz, Jaro, Arevalo, Sta. Barbara and Pavia, Province of Iloilo. Under its franchise, it is subject to a 1-1/2% franchise tax on its gross earnings for the first twenty years and 2% for the remaining thirty years of the period of the franchise. Upon the effectivity of Republic Act No. 39 on October 1, 1946, which amended Section 259 of the National Internal Revenue Code, defendant required plaintiff to pay a franchise tax at the rate of 5% of its gross earnings, instead of 2%. From January 19, 1947 to January 18, 1952, plaintiff paid the 5% tax. On May 7, 1948 and June 7, 1948, counsel for the plaintiff wrote letters to the Collector of Internal Revenue protesting the imposition of the 5% tax on the ground that Section 7 of Republic Act No. 39, which amended Section 259 of the Tax Code, does not apply to the plaintiff. The Collector in his two letters, dated May 28, 1948 and July 28, 1948, ruled that the 5% franchise tax was applicable to plaintiff effective October 16, 1946.

On April 25, 1950, a field examiner of the Auditor General's Office submitted a report recommending that plaintiff be held liable for deficiency franchise tax in the amount of ₱2,069.26, exclusive of surcharges, covering the period from November 1, 1945 to December 31, 1949. On the strength of said recommendation, defendant sent a letter dated May 27, 1950 to plaintiff directing the latter to pay the said deficiency tax to the City Treasurer of Iloilo within ten days from receipt of said letter. The plaintiff paid the tax in June, 1950.

On March 25, 1952, the Supreme Court decided Philippine Railway Co. v. Collector of Internal Revenue, G.R. L-3859, wherein it was held that the rate of tax provided in Section 259 of the Revenue Code, as amended by Republic Act No. 39, is not applicable to holders of franchises which provide for specific rates of franchise tax. On the strength of the above decision, plaintiff, in a letter to the City Treasurer of Iloilo dated April 16, 1952, but received by said official on April 18, 1952, requested refund of the excess tax paid by it since October 1, 1946 up to the date of the letter in the amount of P135,872.67. The Collector, in reply, admitted that overpayments were made, but stated that action on the claim had to be deferred until after the audit of the books of the company by the General Auditing Office. On July 8, 1952, plaintiff wrote another letter to the Collector reiterating his claim for refund, and on July 22, 1952, the Collector answered in the same tenor as above, which we quote:

> "With reference to your letter dated July 8, 1952, I have the honor to inform you that your overpayment within the two-year period from April 18, 1950 to April 18, 1952 cannot be ascertained by this Office until after your books of accounts for said period have been audited by the General Auditing Office. Inasmuch as you have paid the 5% franchise tax since April 18, 1950 instead of 2% as provided for in section 8 of your franchise (Act No. 2983, as amended by Act No. 3665), and in the light of the decision of the Supreme Court in the case of 'Philippine Railway Co. vs. Collector of Internal Revenue', it is believed that you have an overpayment sufficient to cover your franchise tax for the second quarter of 1952. However, if upon audit of your books of account it is disclosed that no such overpayment is found, there shall be imposed the 25% surcharge on the tax due for said quarter.

> pursuant to section 259 of the Tax Code. Our records show that your claim for refund of overpayment was filed with the City Treasurer of that City only on April 18, 1952.
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> "In this connection, your attention is invited to Section 309 of the said Code which provides that the 'authority of the Collector of Internal Revenue to credit or refund taxes or penalties under this section can only be exercised if the claim for credit or refund is made in writing and filed with him within two years after payment of the tax or penalty.' Payment of tax <u>under protest</u> is not considered by this Office as a claim for refund of overpayment, if any."

Without waiting for the final decision of the Collector, plaintiff filed on August 20, 1952 a petition for review with the defunct Board of Tax Appeals. On October 18, 1952, the Board promulgated its decision reversing the decision of the Collector and ordering him to refund to the plaintiff the sum of ₱64,607.07 as alleged overpayment during the period 1950-1951 and ₱70,272.49 covering the period 1947-1950. On October 29, 1952, plaintiff filed a motion for reconsideration, and the Board, on December 29, 1952, modified its decision declaring the petitioner entitled to a tax credit of ₱64,607.07 subject to auditing regulations, but denied the refund of ₱70,272.49 corresponding to the period 1947-50. From this decision, plaintiff appealed to the Supreme Court. The Supreme Court in its resolution of March 30, 1954, which became final and executory on May 5, 1954, dismissed without prejudice the said appeal. On

May 15, 1954, plaintiff filed a complaint against defendant in the Court of First Instance of Iloilo seeking to recover the said sum of ₱135,872.67. Upon the organization of this Court, the case was remanded here for final disposition upon motion of plaintiff's counsel.

There is no dispute as to the rate of tax payable by plaintiff on its gross earnings, defendant having admitted that the former is liable to the franchise tax of 2% under its franchise, and not 5% as provided in Section 259 of the National Internal Revenue Code, as amended by Republic Act No. 39, in line with the decision of the Supreme Court in Philippine Railway Co. v. Collector of Internal Revenue, G.R. No. L-3859, March 25, 1952. The only issue is one of jurisdiction. Defendant contends that plaintiff failed to comply with the requirements of Section 306 of the Revenue Code relative to the filing of a written claim for refund and the institution of judicial proceedings for recovery of taxes erroneously or illegally collected within two years from the date of payment. On the other hand, plaintiff contends that Section 306 of the Revenue Code does not apply, its franchise tax liability not being an internal revenue tax.

On the question whether or not the tax payable by plaintiff under its franchise is an internal revenue tax, the former Board of Tax Appeals expressed the opinion that the same is an internal revenue tax.

> " x x x Petitioner draws a distinction between tax proper and franchise tax.
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> 'A tax is a forced charge, imposition or contribution; it operates in invitum, and is in no way dependent upon the will or contractual assent, express or implied, of the person taxed.' (51 Am. Jur. pp. 38-39.)
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> "Francise tax is 'in consideration of the granting of the franchise,' and it operates because a person taxed assents expressly or impliedly. It is, in one word, a contractual assent. As correctly maintained by the respondent, Section 18 of the Tax Code enumerates what are National Internal Revenue Taxes, and among others franchise taxes are clearly listed; Section 259, Tax on Corporate Franchises, deals with franchise taxes." (B.T.A. No. 85, Oct. 18, 1952.)

It is clear from a reading of Section 259 of the Revenue Code that the "franchise tax" provided therein refers not only to the tax imposed in said section but also to the "taxes, charges, and percentages" prescribed in the special charters under which holders of franchises operate. In fact, the collection of franchise taxes and the penalty for delinquency are governed by Section 259, in so far as the provisions thereof are not inconsistent with the special charters. And Section 18 of the Revenue Code, as pointed out by the former Board of Tax Appeals, clearly classifies franchise taxes as national internal revenue taxes. We might also add that Section 359 of the Revenue Code provides for the disposition of franchise taxes as other national internal revenue taxes. We have, therefore, no doubt in our minds that the franchise tax prescribed in Act No. 2983, as amended by Act No. 3665, under which plaintiff operates, is a national internal revenue tax, and the provisions of law governing refunds of national internal revenue taxes are applicable to refunds of the franchise tax here in question.

Moreover, if, as contended by plaintiff, the tax imposed by its charter is not an internal revenue tax but a contractual obligation, then this Court has no jurisdiction to entertain the case and the same should be dismissed. Claims of private parties against the Government arising from contract are under the exclusive jurisdiction of the Auditor General, whose decisions in such matters are appealable directly to the Supreme Court. (See Com. Act No. 327.) The position taken by the plaintiff in this case is, therefore, untenable. It has instituted the present action against the Collector of Internal Revenue under the National Internal Revenue Code and yet it claims that said Code is not applicable. It alleges that the general law on prescription of actions, and not the Revenue Code, applies, and yet it did not resort to the remedy prescribed by law for such cases.

Having arrived at the conclusion that the franchise tax provided in the charter of plaintiff is a national internal revenue tax, and, therefore, suits for recovery of such tax are governed by the

National Internal Revenue Code, we will now proceed to consider whether or not plaintiff has complied with the requisites prescribed by said Code in actions for recovery of internal revenue taxes.

The franchise tax sought to be recovered by plaintiff was paid on various dates from January 19, 1947 to January 18, 1952. The law applicable is Section 306 of the Revenue Code, which provides:

> "Sec. 306. Recovery of tax erroneously or illegally collected.-- No suit or proceeding shall be maintained in any court for the recovery of any national internal revenue tax hereafter alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Collector of Internal Revenue; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. In any case, no such suit or proceeding shall be begun after the expiration of two years from the date of payment of the tax or penalty."

Section 306 of the Revenue Code requires that before an action may be instituted in court for recovery of an internal revenue tax allegedly erroneously or illegally collected, the taxpayer must first file a written claim for refund thereof with the Collector of Internal Revenue within two years from the date of payment, and the judicial proceeding for recovery must be instituted within the same period, whether or not the Collector has rendered a decision on the claim of the taxpayer. (See Poco v. Posadas, 64 Phil. 640; Bermejo v. Collector, G.R.

No. L-3029, July 25, 1950; Kiener v. David, G.R. No. L-5163, April 22, 1953.) In this case, plaintiff filed its claim for refund with the City Treasurer of Iloilo (a deputy of the Collector of Internal Revenue, Sec. 6, National Internal Revenue Code) on April 18, 1952. (See Annex "E" of the Complaint.) Prior to that, plaintiff sent letters to the Collector of Internal Revenue, but those letters were not claims for refund but only protests against the ruling of the Collector to the effect that the rate of tax payable by plaintiff was 5% under Section 259 of the Revenue Code and not 2% under its charter. We agree with the findings and opinion of the former Board of Tax Appeals in regard to the import of said letters.

> "An examination of the first letter of the petitioner addressed to the respondent, dated May 7, 1948, shows that the petitioner, after an exposition of the law and the provisions of the franchise granted the petitioner, requested that the Provincial Revenue Agent be advised of the exemption of the petitioner from the payment of the 5% franchise tax under the Tax Code. The request was denied by the respondent on May 28, 1948. The second letter of the petitioner, dated June 7, 1948, took exception to the ruling of the respondent and requested that respondent's stand be reconsidered. Petitioner's counsel made a comparative exposition of the contents of the franchise given to the petitioner and that given to the Philippine Railway, in which the petitioner contends that the Supreme Court had decided that the franchise given to the latter partakes of the nature of a contract and, therefore, can not be modified, amended or repealed by Congress. The respondent, on July 28, 1948, reiterated his view holding the petitioner liable for payment of 5% franchise tax, as provided

> for by the amended Tax Code. In both letters of the petitioner aforementioned, we can not find any hint of the petitioner's desire for the refund of the amount paid in excess or a request for tax credit. The letters are mere arguments in support of petitioner's theory and a request for the reversal of the ruling of the respondent. Assuming that the respondent granted the request of the petitioner as stated in its two letters aforementioned, the most that the respondent could do is to advise his agent in Iloilo to discontinue collecting from the petitioner 5% franchise tax. Unless petitioner formally and categorically request for the refund of the excess tax paid, the respondent would not, on his own initiative refund same. x x x " (B.T.A. Case No. 85, Dec. 29, 1952.)

At any rate, even if we concede that the two previous letters of plaintiff dat ed May 7, 1948 and July 28, 1948 may be considered claims for refund, only the amounts erroneously paid within two years before August 20, 1952, the date when plaintiff filed a petition for review with the former Board of Tax Appeals (if the filing of the petition with said Board is to be considered as commencement of judicial proceedings under Section 306 of the Revenue Code), may be refunded, inasmuch as Section 306 requires that judicial action must be instituted within two years after payment. In other words, it is not enough that there be a written claim for refund within two years after payment of the tax; it is essential that in addition to the claim for refund the judic ial action must be instituted within the same period, otherwise the action for recovery would be barred.

When this case was under consideration by the Board of Tax Appeals, defendant alleged that the excess payments made by plaintiff in the aggregate amount of ₱70,272.49 prior to April 18, 1950 were not recoverable, and that only the sum of ₱64,607.07, representing overpayments made from April 19, 1950 to January 18, 1952, was refundable. In fact, defendant alleged that "steps have been taken by the respondent to credit to the petitioner the amount of ₱64,607.07 x x x as overpayment in the franchise tax of the latter during the years 1950 and 1951 in the light of the decision of the Supreme Court in the Philippine Railway case." (Pp. 2-3, Answer of Respondent in B.T.A. Case No. 85.) However, when the present case was instituted in the Court of First Instance of Iloilo on May 15, 1954, after the appeal from the decision of the Board of Tax Appeals was dismissed by the Supreme Court without prejudice, defendant claims that the right of action as regards the entire claim has already prescribed on the ground that the appeal by defendant to the Board of Tax Appeals did not stop the running of the period provided in Section 306 of the Revenue Code.

As already stated, this case was originally instituted in the former Board of Tax Appeals, created by Executive Order No. 401-A, series of 1951, on August 20, 1952. Section 20 of said Executive Order provided that "no judicial proceedings against the Government involving matters arising under the National Internal Revenue Code x x shall be maintained except as herein provided, until and unless an appeal has been previously filed with the Board of Tax Appeals and disposed of in accordance with the provisions hereof." The same section prescribed that decisions of the then Board of Tax Appeals were appealable directly to the Supreme Court. Since no action for recovery of internal revenue taxes erroneously or illegally paid could be instituted in court until an appeal was filed with the Board of Tax Appeals whose decisions were appealable directly to the Supreme Court, it necessarily follows that the institution of an action in said Board was intended to be the commencement of judicial proceedings within the meaning of Section 306 of the Revenue Code. Although these provisions of Executive Order No. 401-A were declared unconstitutional in University of Sto. Tomas v. Board of Tax Appeals, G.R. No. L-5701, June 23, 1953, yet plaintiff had a right to believe that said provisions were valid and binding before they were declared unconstitutional. As a matter of fact, even after the decision of the Supreme Court in the case of the University of Sto. Tomas, decisions of the Board of Tax Appeals continued to be appealed to the Supreme Court, both by the Government and by the taxpayers. The case of herein plaintiff was one of the cases appealed to the Supreme Court (G.R. No. L-6483).

We are of the opinion, under the foregoing circumstances, that the institution by plaintiff of an action in the former Board of Tax Appeals on August 20, 1952, constitutes commencement of judicial proceedings within the meaning of Section 306 of the Revenue Code, sufficient to suspend the running of the two-year period provided in said section, and that the said period continued to run again after May 5, 1954, when the decision of the Supreme Court dismissing without prejudice plaintiff's appeal in G.R. No. L-6488 became final and executory, to May 15, 1954, when the present complaint was filed in the Court of First Instance of Iloilo. Since there was an interval of 10 days from May 5, to May 15,1954, plaintiff may be considered, for purposes of determining the two-year period under Section 306 of the Revenue Code, to have commenced judicial action for recovery of its excess payments of the franchise tax on August 30, 1952. Accordingly, only the excess payments made by plaintiff within two years prior to August 30, 1952 may be refunded.

The records show that the excess payments of the franchise tax made by plaintiff, which are not denied by defendant, are as follows:

Date of Payment	Amount Paid at 5%	Tax Due at 2%	Overpayment 3%
1947			
Jan. 19	₱ 5,769.62	₱ 2,307.85	₱ 3,461.77
Apr. 21	6,272.83	2,509.13	3,763.70
Jul. 18	6,984.75	2,793.90	4,190.85
Oct. 20	6,703.20	2,681.28	4,021.93

1948			
Jan. 20	₱ 7,885.39	₱ 3,154.16	₱ 4,731.23
Apr. 19	8,398.21	3,359.28	5,038.93
Jul. 19	8,690.88	3,476.35	5,214.53
Oct. 18	9,969.82	3,987.93	5,981.89
1949			
Jan. 19	9,505.89	3,802.36	5,703.53
Apr. 20	10,763.81	4,305.52	6,458.29
Jul. 19	11,903.17	4,761.27	7,141.91
Oct. 19	12,447.08	4,978.83	7,468.25
1950			
Jan. 19	13,481.35	5,392.54	8,088.81
Apr. 19	11,217.26	4,486.90	6,730.36
Jul. 18	12,266.27	4,906.51	7,359.76
Oct. 18	13,317.55	5,327.02	7,990.53
1951			
Jan. 16	13,646.03	5,458.41	8,187.62
Apr. 18	13,662.10	5,464.84	8,197.26
Jul. 17	14,523.54	5,809.42	8,714.12
Oct. 17	14,227.60	5,691.04	8,536.56
1952			
Jan. 18	14,818.10	5,927.24	8,890.86
Total -	₱226,454.45	₱90,581.78	₱135,872.67

From the foregoing, it appears that only the excess payments made by plaintiff from October 18, 1950 to January 18, 1952 in the aggregate sum of ₱50,516.95 were made within two years prior to the institution of judicial proceedings for recovery thereof. The excess payments made prior to October 18, 1950 (from January 19, 1947 to July 18, 1950) in the sum of ₱85,355.72 can not now be recovered, the right of action of plaintiff in regard thereto having prescribed.

WHEREFORE, the decision of defendant denying the refund of excess payments of the franchise tax made by plaintiff is hereby modified, and he is hereby ordered to refund to plaintiff the sum of

₱50,516.95, with costs against the latter.

SO ORDERED.

Manila, Philippines, March 10, 1956.

ROMAN M. UMALI
Associate Judge

I CONCUR:

~~AUGUSTO M. LUCIANO~~
~~Associate Judge~~

Presiding Judge Mariano Nable
did not take part.