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MANILA ELECTRIC COMPANY,
Petitioner,

versus

CTA CASE NO. 1030

JOSE B. LINGAD, in his
capacity as Commissioner
of Internal Revenue,
Respondent.

Mar 15/72

x, - - - - - - - - - - - - x

D E C I S I O N

Petitioner seeks for the review of the decision of respondent Commissioner of Internal Revenue dated March 8, 1961 holding it liable for ₱62,641.89 and ₱2,371.23, as deficiency franchise tax and surcharge for the period from 1948 to 1951 and merchant's sales tax for the years 1948, 1949 and 1951, respectively, or the total sum of ₱65,013.12.

It appears that on August 3, 1954, petitioner filed a claim for refund of the sum of ₱305,309.47 as over-payment of franchise taxes of its municipal franchises from the first quarter of 1946 to the fourth quarter of 1953, inclusive. On April 13, 1955, respondent approved the claim for refund but only for the sum of ₱110,926.75. Respondent said that only overpayments made within two years before August 3, 1954 are refundable, the rest having prescribed pursuant to Section 309 of the National Internal Revenue Code. In the same letter of April 13, 1955, respondent gave notice to the petitioner that he applied ₱67,113.15 thereof to deficiency franchise tax from January 1, 1948 to to December 31, 1951, plus 25% surcharge for late payment in connection with petitioner's legislative franchise; and that he also applied ₱2,371.23 thereof to sales taxes and surcharges for the years 1948, 1949 and 1951 for sales of crushed rock produced in petitioner's Rizal Quarry. Respondent explained in connection with the crushed rocks that petitioner failed to declare for the purpose of the sales taxes prescribed in Section 186 of the Revenue Code its gross sales for said years. With respect to the franchise taxes, respondent explained that petitioner erred in computing its legislative franchise taxes on actual receipts and not on accrued earnings as held in Philippine Long Distance Telephone Co. v. Collector of Internal Revenue, 90 Phil. 674-681.

In a letter dated January 31, 1957 filed in the Bureau of Internal Revenue on February 5, 1957, petitioner claimed the refund of the ₱69,484.38 which respondent applied to its legislative franchise and sales taxes alleging, among other reasons, prescription. Receiving no resolution on this claim, petitioner appealed to this Court on April 10, 1957.

In a letter dated August 26, 1957, petitioner proposed the withdrawal of said appeal if respondent would grant a tax credit for the said amount. On October 24, 1957, respondent agreed to the aforesaid proposition. On November 21, 1957, the Court of Tax Appeals granted a joint motion of the parties to dismiss the appeal hereinabove mentioned. Thereafter, respondent made the agreed grant of tax credit in a letter dated November 29, 1957, that reads as follows:

> In reply to your letter dated November 9, 1957, I have the honor to inform you that your request for the issuance of a tax credit authority in favor of your client, the Manila Electric Company in the amount of ₱69,484.38, is hereby granted, it appearing that the Court of Tax Appeals has already granted the Motion to Withdraw your Petition for Review in CTA Case No. 365 as required in our letter of October 24, 1957.
>
> This letter will serve as authority for the City Treasurer of Manila to apply the aforesaid amount of ₱69,484.38 against any outstanding or future tax liability of the Manila Electric Company.

On March 29, 1960, petitioner received a letter dated March 23, 1960, that reads as follows:

> With reference to the pending cases of your client, Manila Electric Company, involving the amount of ₱67,113.15 as deficiency franchise tax and surcharge for the years 1948 to 1951 under its legislative franchise and the amount of ₱2,371.23 as sales tax and surcharge for the years 1948, 1949 and 1951, I have the honor to inform you that the said amounts are really due and collectible from it. Accordingly, this Office will enforce the collection of the said amounts either by distraint and levy or by judicial action or both simultaneously, unless the same are paid within five (5) days from your receipt hereof.

In a letter dated March 30, 1960, petitioner contested the legality of the foregoing assessment and requested that the same be cancelled and withdrawn alleging prescription among other reasons. Ignoring this letter respondent on April 12, 1960, filed with the Court of First Instance of Manila an action for collection of said deficiency taxes.

In a letter dated April 19, 1960, petitioner requested that the matter be held in abeyance inasmuch as the General Auditing Office was undertaking a re-audit or re-examination of its books for the period covering 1948 to 1957. In a subsequent letter dated June 3, 1960, received by respondent on June 6, 1960, petitioner submitted four (4) copies of a waiver of the statute of limitations as a condition for giving due course to the reinvestigation being conducted by the General Auditing Office and the withdrawal of the civil case for collection. The aforesaid waiver reads as follows:

> Manila Electric Company, in consideration of the approval of the Commissioner of Internal Revenue of its request for re-investigation and/or reconsideration of the pending internal revenue case involving the demand for the sums of ₱67,113.15 and ₱2,371.23 as deficiency franchise tax and sales tax, plus surcharges, allegedly due from the said Company for period embraced within the years 1948 to 1951 set forth in the letter of Deputy Collector of Internal Revenue Silverio Blaquera to Ross, Selph, Carrascoso & Janda dated April 13, 1955, hereby waives the running of the prescriptive period with respect to the collection of taxes provided for in Section 332(c) and other relevant provisions of the National Internal Revenue Code, and consents to the collection of the taxes which may be found due after reinvestigation and reconsideration at any time before or after the lapse of the period of limitations fixed by said Section 332(c) and other relevant provisions of the National Internal Revenue Code, but not after December 31, 1964.
>
> The intent and purpose of this waiver is to afford the Commissioner of Internal Revenue ample time to carefully consider the instant protest of the undersigned taxpayer against the aforesaid demand. <u>It is understood, however, that the undersigned taxpayer does not, by the execution of this waiver, admit in advance the correctness of the demand which may be made against it for the periods above mentioned; nor does it waive its claim that the period within which the Commissioner of Internal Revenue could have assessed the alleged deficiency franchise and sales taxes against the Company has already expired</u>, and its right to use any of the legal remedies afforded by law to secure a credit or refund on such tax that may be assessed and paid for the same period pursuant to Sections 306 and 309 of the National Internal Revenue Code. The period of

suspension agreed upon herein may be extended by subsequent agreement in writing made before the expiration of said period of extension. (Underscoring supplied.)

In a letter dated March 8, 1961, which was prepared after a re-examination report on petitioner's case was submitted by the General Auditing Office, respondent demanded from petitioner the payment of the amount of ₱62,641.89, instead of the sum of ₱67,113.15 previously determined for the period from 1948 to 1951, the details of which are as follows:

Legislative	₱ 45,017.90
Municipal	5,095.61
25% surcharge for late payment . . .	12,528.38
Total amount due. . .	₱ 62,641.89

In the same letter, respondent reiterated his demand for payment of the deficiency sales tax (of ₱2,371.23) for 1948, 1949 and 1951.

The main issues raised by the parties are:

1. Whether or not respondent's right to assess the alleged deficiency franchise tax and surcharge for the period from 1948 to 1951 has already prescribed;

2. Whether or not said deficiency franchise tax and surcharge has been determined in accordance with law;

3. Whether or not petitioner is liable for sales tax and surcharge on crushed rocks produced in the Rizal Quarry.

To our mind, the guidepost for the issue of prescription is the doctrine laid down in Guagua

Electric v. Collector of Internal Revenue, G.R. No. L-23611, April 24, 1967 and Commissioner of Internal Revenue v. Ilagan Electric & Ice Plant, G.R. No. L-23081, September 30, 1969, where the Supreme Court ruled that where the Commissioner seeks to recover an amount previously refunded to the taxpayer on the ground that the refund is erroneous, the demand made by the Commissioner against the taxpayer is in the nature of an assessment and the statute of limitation applicable is Section 331 of the National Internal Revenue Code; in such case the five-year prescriptive period is to be counted from the date the return was filed.

In the present case, payments were made for franchise taxes of the municipal franchises of the petitioner for the period covering the first quarter of 1946 to the fourth quarter of 1953. Thereafter, a claim for refund was filed by petitioner for the sum of P ₱305,309.47 representing overpayments in said municipal franchise taxes. Respondent approved the claim up to the amount of ₱110,926.75 alleging prescription as to the balance. Respondent, however, deducted ₱67,113.15 therefrom, applying this sum to the payment of the deficiency franchise taxes plus 25% surcharge allegedly incurred by petitioner in its legislative franchise, for the period from January 1, 1948 to December 31, 1951, thus prompting petitioner to file a claim for the refund of the said amount. This claim was approved although respondent, by agreement of the parties, granted petitioner a tax credit for the amount instead of making an outright refund. In the light of these facts, the letter of March 29, 1960, demanding payment of the same amount, and threatening collection by distraint and levy, is in effect an assessment made after the lapse of the five-year prescriptive period for assessment counted from the date of the returns, the last of which was in the month of January 1952. In this respect, we are applying the five-year period provided in Section 331 of the Revenue Code because respondent does not allege fraud. Indeed, since the Commissioner did not include fraud penalty in his assessment, he in effect admits that the returns were not fraudulent (Central Azucarrera de Tarlac v. Coll. 104, Phil. 563).

Respondent makes much of the waiver executed by petitioner contending that same waived the prescriptive period for assessment and collection. It should be noted that the waiver refers to the "running of the prescriptive period with respect to the collection of taxes provided for in Section 332(c) . . ." In this respect, it is well to note that while Section 332(b) speaks of a waiver of the period for assessment, Section 332(c) speaks of the period for collection and the waiver of said period. It is also well to note that Section 332(c) speaks of the waiver of the period for collection after an assessment made within the period of limitation for assessment. This is so because an assessment that is out of time may be evaded by the taxpayer on the ground of prescription, and it is then puerile to talk about waiver of collection when there is nothing to collect. What petitioner agreed to waive, in the light of Section 332(c), is the prescriptive period for collection if the assessment of March 29, 1960 is declared to be within the prescriptive period for assessment.

Indeed, the waiver itself expressly contains a reservation to the effect that petitioner does not waive its claim that the period within which the Commissioner of Internal Revenue could have assessed the alleged deficiency franchise and sales taxes against the company has already prescribed.

Having found that the right of respondent to make the assessment of March 29, 1960 had prescribed it becomes unnecessary to pass upon the other issue raised by the parties in connection with petitioner's legislative franchise.

We will now dwell on the disputed deficiency sales tax and surcharge of ₱2,371.23 assessed for 1948, 1949 and 1951.

We note that petitioner does not insist in his defense of prescription. Petitioner, however, proved that the deficiency sales and surcharge was actually imposed against the royalties received by petitioner from the Talim Quarry, Inc., pursuant to its contract with the latter and that it has never been engaged in the production and sale of crushed rocks for which it should pay the deficiency sales tax and surcharge imposed against it. The evidence disclose that petitioner is the owner of the Rizal Quarry. However, pursuant to an agreement it had with the Talim Quarry, Inc., the latter operated the said Rizal Quarry and paid to petitioner a royalty of ₱0.50, which was later reduced to ₱0.30, per cubic meter of crushed rock removed from the latter's property. The quarried crushed rocks were later on sold by the Talim Quarry, Inc. to its customers for which it paid sales tax thereon. Under Section 186 of the National Internal Revenue Code, the manufacturer or producer who first originally sold, bartered or exchanged the crushed rocks should pay the sales tax therefor. Not being the manufacturer or producer who first originally sold, bartered or exchanged the crushed rocks, petitioner is not therefore liable for deficiency sales tax and surcharge assessed against petitioner for the period from 1948, 1949 and 1951.

WHEREFORE, the decision of respondent dated March 8, 1961 appealed from is hereby reversed. Without pronouncement as to costs.

SO ORDERED.

Quezon City, March 15, 1972.

RAMON L. AVANCEÑA
Associate Judge

WE CONCUR:

ROMAN M. UMALI
Presiding Judge

ESTANISLAO R. ALVAREZ
Associate Judge