ORIGINAL

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SAN MIGUEL CORPORATION,
Petitioner,

- versus -

C.T.A. CASE NO. 4675

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
JAN 06 1995

x - x

D E C I S I O N

This is a petition for review to set aside and reverse the decision of respondent Commissioner of Internal Revenue dated November 12, 1991, denying petitioner's protest of an assessment of deficiency sales tax for the year 1987 in the amount of ₱7,637,117.37.

Petitioner is a domestic corporation engaged in the business, among others, of manufacturing and agricultural production. On April 19, 1991, petitioner received from respondent Commissioner an assessment notice demanding payment of ₱7,637,117.13 allegedly representing deficiency sales tax for the year 1987, computed as follows:

"Sales (Magnolia Products) per return		₱ 938,254,341.87
Add: Sales of Bottled Milk	₱ 25,982,328.25	
Sales of Tetra Milk	30,816,775.82	56,799,104.07
Total Sales		₱ 995,053,445.94
10% Sales Tax Due		99,505,344.60
Less: Tax Credits		49,773,278.46
Amount Due:		₱ 49,773,278.46
Less: Amount already paid		44,093,368.05
Balance		₱ 5,679,910.41
Add: 25% Surcharge		1,419,977,60
Interest		512,229.36
Compromise Penalty		25,000.00
Total Amount Due and Collectible		₱ 7,637,117.37"

On April 24, 1991, petitioner protested the assessment, contending that its sales of bottled and tetra-packed fresh milk was not subject to any sales tax and that, alternatively, even if it was indeed liable for said deficiency sales tax, the government's right to assess the same had already prescribed since the disputed assessment was issued more than three years from the date petitioner filed its final quarterly sales tax return covering the fourth quarter of 1987.

On October 10, 1991, respondent Commissioner denied petitioner's protest, ruling that its right to assess the alleged deficiency sales tax had not yet prescribed since the same was based on petitioner's fraudulent failure to include said deficiency sales tax in its income tax return for the year 1987. Accordingly, respondent held, the applicable prescriptive period for the deficiency assessment is ten years from the discovery of the alleged fraud.

Hence, this petition which raises two issues, namely: (1) whether or not respondent Commissioner's right to issue the disputed assessment has prescribed; and (2) in the negative, whether or not petitioner is liable for deficiency sales tax for the year 1987.

Anent the first issue, petitioner contends that the disputed assessment is barred by prescription. It points out that the final quarterly sales tax return covering the fourth quarter of 1987 was filed on January 20, 1988, whereas the disputed assessment was issued only on April 15, 1991 or three (3) years, two (2) months and twenty five (25) days later.

Respondent Commissioner does not dispute the contention that the assessment in question was issued after the lapse of more than three (3) years from the time petitioner filed its final quarterly sales tax return for the year 1987. Respondent contends, however, that the three-year prescriptive period under Section 203 of the National Internal Revenue Code (NIRC) is not applicable because petitioner fraudulently omitted from its final quarterly sales tax return for 1987 its sales of bottled and tetra-packed milk totalling ₱56,799,104.07, thereby making said return a false return. Thus, argues respondent, the applicable provision is Section 223 of the NIRC which provides a prescriptive period of ten (10) years from the discovery of the alleged fraudulent or false return.

The Court finds respondent Commissioner's contention unmeritorious. There is no evidence on record that petitioner's failure to reflect its sales of bottled and tetra-packed milk in its final quarterly sales tax return for 1987 was fraudulent or intentional. On the contrary, it clearly appears from the record that petitioner acted in an honest belief that the sales in question was not subject to any sales tax pursuant to the last paragraph of Section 163 of the Tax Code (as renumbered) which provides that:

> "For purposes of sub-paragraphs (a) and (b) above, processed as applied to the food products mentioned therein means that such products have undergone the process of curing, canning, bottling or other manufacturing process. It does not include those which have merely undergone simple process of preservation such as freezing, refrigeration, drying, salting or smoking."

Further belying respondent's claim that petitioner fraudulently omitted to include its sales of bottled and tetra-packed milk in its final quarterly sales tax return for 1987 is the indorsement dated May 31, 1988 (Exhibit "B"), issued by Pablo R. Angeles, Jr., officer-in-charge of the Manufacturing Division of the Bureau of Internal Revenue. In said indorsement, Angeles recommended the disapproval of the proposed deficiency assessment, pointing out that petitioner was correct in contending that its sales of bottled and tetra-packed milk was not subject to sales tax, at least until February 5, 1988 when the BIR issued a ruling that such sales were subject to Value Added Tax (VAT).

As aptly pointed out by petitioner, respondent Commissioner's contention that it (petitioner) was guilty of fraud seems to be a last-ditch effort to avoid the effects of the three-year limitation provided under Section 203 of the Tax Code. A cursory examination of the disputed assessment readily shows that respondent merely assessed petitioner the 25% surcharge due on ordinary deficiency assessments, and not the 50% surcharge which would have otherwise been due had petitioner's returns been indeed fraudulent. This, to the mind of the Court is a clear indication that, at the outset, respondent Commissioner was not convinced that petitioner's returns were fraudulent. It was only when petitioner raised the issue of prescription that respondent belatedly claimed the existence of fraud.

It is, of course, axiomatic that fraud is never presumed, but must be proven as a fact. In the case at bar, respondent Commissioner has failed to discharge its burden of showing that petitioner's sales tax returns for the year 1987 were indeed fraudulent. On the contrary, respondent's failure to assess petitioner the 50% penalty charges for fraudulent returns is a tacit admission that the latter's returns were not fraudulent (Central Azucarera de Tarlac v. Collector of Internal Revenue, 104 SCRA 653). But even more revealing of the paucity of respondent's contention is its categorical admission in its memorandum that petitioner's sales tax returns were, indeed, not fraudulent (Memorandum for Respondent, page 8).

Respondent also contends in the alternative, that petitioner's omission of its sales of bottled and tetra-packed milk from its sales tax returns rendered said returns "false" within the meaning of Section 223 of the Tax Code. In support of this, reliance is placed on the ruling in the case of Aznar vs. Court of

Tax Appeals (58 SCRA 519), wherein it was held that the term "false return" merely implied a deviation from the truth, irrespective of whether such omission is intentional or not. Thus, respondent argues, since petitioner's sales tax returns did not disclose the "truth" regarding its sales of bottled and tetra-packed milk to outlets other than the Armed Forces of the Philippines Commissary and Exchange Service (AFPCES) and the US Military Installations (USMI), such omission rendered said returns "false" within the contemplation of Section 223 of the Tax Code.

We find respondent's reliance on Aznar misplaced. There is nothing in the said case which establishes a hard and fast rule that every "deviation" from the truth necessarily brings a particular return under the coverage of Section 223 of the Tax Code. As pointed out by the petitioner, it is only where the falsity or "deviation" would place the government at a disadvantage so as to prevent the assessment and collection of the correct amount of taxes that the ordinary prescriptive period provided under Section 331 (now Section 203) of the Tax Code should not be applied.

In the case at bar, however, the records show that from the very beginning, petitioner had opened its books to the agents of respondent Commissioner for inspection. It also furnished respondent copies of all pertinent documents which would enable the latter to determine with reasonable dispatch the correct amount of petitioner's tax liability. Despite petitioner's transparency and cooperation, however, it still took respondent Commissioner more than three years to come up with the disputed assessment. Thus, it cannot be said that the reasons for petitioner's omission of its sales of bottled and tetra-packed milk were concealed from respondent, thereby placing the latter at a "disadvantage" in its tax collection efforts. There is therefore no room for application of the ruling in the Aznar case.

In sum, it is clear that the applicable prescriptive period is three (3) years as provided under Section 203 of the Tax Code, and not ten (10) years as provided under Section 223 of the same Code. Accordingly, respondent's disputed assessment is now barred by prescription.

But even assuming, arguendo, that the disputed assessment is not yet barred by prescription, the fact is that the sales in question were, at the time they were made, not subject to sales tax. In this regard, respondent's contention that the said sales are subject to tax pursuant to the last paragraph of Section 163 of the Tax Code, as amended by Executive Order No. 36, is clearly untenable.

On January 1, 1973, Presidential Decree No. 69 was promulgated, amending certain sections of the Tax Code. One of the affected sections was Section 186-B, which was amended to read as follows:

> "**SEC. 186-B.** Percentage tax on sales of processed meat, milk, fruits and vegetables, fish and other sea foods, wheat, flour and feeds. There shall be levied, assessed and collected once only on every original sale, barter, exchange, and similar transaction either for nominal or valuable consideration, intended to transfer ownership of, or title to, the articles enumerated herein below, a tax equivalent to five 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.
>
> (a) Processed meat, milk, fruits and vegetables;
>
> x x x x x x x x x
>
> For purposes of this section, processed meat, milk, fruits and vegetables, fish and other sea foods include such food products which have undergone the process of curing, canning, bottling, or similar processes, but exclude such food products which have undergone only simple preserving processes such as freezing, drying, salting or smoking."

Interpreting the aforesaid provision, the Bureau of Internal Revenue issued an opinion dated March 20, 1973 addressed to petitioner, to the effect that pasturized milk is exempt from the sales tax provided under Section 186-B of the Tax Code. Thus:

> "Processed milk means and includes also all food products manufactured out of milk, as principal raw material, such as butter, cheese, ice cream, etc.
>
> Pasteurized milk is still milk, whether in its original state or not, and, therefore, remains exempt from sales tax under new section 186-B, even if canned or bottled, regardless of whether or not the pasteurizing or canning or bottling thereof is done by the producer, pursuant to Section 188(b) of the Tax Code, as amended also by Presidential Decree No. 69."

Subsequently, Section 186-B was amended and renumbered as Section 201 by Presidential Decree No. 1358, which was promulgated on July 1, 1978. The amendment consisted in additions to the list of goods subject to the sales tax provided under the old Section 186-B. However, the last paragraph of the old section was retained *in toto*. Thus:

> "**SEC. 201.** Percentage tax on sales of essential articles. There shall be levied, assessed and collected once only on every original sale, barter, exchange, and similar transaction either for nominal or valuable consideration, intended to

> transfer ownership of, or title to, the articles enumerated herein below, a tax equivalent to five (5%) 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.
>
> (a) Locally processed meat, milk, fish and other sea foods;
>
> x x x x x x x x x
>
> For purposes of this section, processed meat, milk, fruits and vegetables, fish and other sea foods include such food products which have undergone the process of curing, canning, bottling, or similar processes, but exclude such food products which have undergone only simple preserving processes such as freezing, drying, salting or smoking."

On August 1, 1986, Section 201 was again renumbered as Section 163 and amended by Executive Order No. 36 to read as follows:

> "**SEC. 163.** Percentage tax on original sales of articles. There shall be levied, assessed and collected once only on every original sale, barter, exchange, and similar transaction either for nominal or valuable consideration, intended to transfer ownership of, or title to, the articles enumerated herein below, a tax based on 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, producer or importer.
>
> x x x x x x x x x

> (2) Ten per cent (10%), on the following essential articles:
>
> (a) Processed meat, fruits, vegetables, fish and other sea foods and other processed food products for human consumption.
>
> (b) Processed milk, creamers dairy products, butter and its substitutes like margarine.
>
> x x x x x x x x x
>
> For purposes of subparagraphs (a) and (b) above, processed as applied to the food products mentioned therein means that such products have undergone the process of curing, canning, bottling, or similar processes. It does not include those which have merely undergone simple process of preservation such as freezing, refrigeration, drying, salting or smoking."

As may be seen from the foregoing, the last paragraph of Section 163 of the Tax Code has remained substantially the same despite the numerous amendments to the original Section 186-B as introduced by Presidential Decree No. 69. And all throughout its legislative history, the administrative interpretation given to the said provision has remained the same, i.e., that pasteurized milk whether bottled or in tetra packs, is exempt from sales tax. It was only on February 5, 1988 that the respondent Commissioner categorically ruled that fresh milk in bottles, cans or tetra packs is subject to Value-Added Tax (VAT) pursuant to Executive Order No. 273. In any event, such ruling cannot be given retroactive effect without violating Section 246 of the Tax Code.

In view of the foregoing, it is quite obvious that respondent Commissioner's contention that Section 163 of the Tax Code is inconsistent with the interpretation given by the Bureau of Internal Revenue to Section 186-B of the old Tax Code is untenable. We see no inconsistency, either in language or intent, between the two provisions. The fact that section 163, is substantially similar to Section 186-B of the old Code is a clear indication of the legislative intent to preserve the administrative interpretation given by the Bureau of Internal Revenue itself to Section 186-B.

Besides, if the opinion dated March 20, 1973 were indeed inconsistent with Section 163 of the Tax Code, respondent Commissioner could have very easily issued an amendatory ruling or opinion in order to clarify matters once and for all. The fact that no such amendatory opinion or ruling was issued until February 5, 1988 clearly shows that respondent Commissioner was in full agreement with the existing interpretation given to the said provision.

WHEREFORE, in view of the foregoing, the petition is hereby GRANTED. The decision of the

Commissioner of Internal Revenue, dated November 12, 1991, denying petitioner's protest is hereby REVERSED and SET ASIDE.

SO ORDERED.

MANUEL K. GRUBA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

RAMON O. DE VEYRA
Associate Judge

CERTIFICATION

I hereby certify that this decision reached after due consultation among the members of the Court of Tax Appeals in accordance with Section 13 Article VIII of the **Constitution.**

ERNESTO D. ACOSTA
Presiding Judge
Court of Tax Appeals