

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SPECIAL FIRST DIVISION

UNION CEMENT HOLDINGS
CORPORATION (formerly UNION
CEMENT CORPORATION),
Petitioner,

CTA CASE NO. 6799

- versus -

Members:

ACOSTA, Chairperson
BAUTISTA, and
CASANOVA, JJ.

COMMISSIONER OF INTERNAL
REVENUE,
Respondent.

Promulgated:

JUL 12 2010; 3:50 pm

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DECISION

BAUTISTA, J:

The present case involves a Petition for Review and a Supplemental Petition, both seeking the cancellation and withdrawal of the assessments issued against petitioner for deficiency income tax, value-added tax (VAT), documentary stamp tax (DST), and for increments for late filing and payment of withholding tax, in the total amount of P33,820,056.30, covering taxable year 1999.

Petitioner Union Cement Holdings Corporation (formerly Union Cement Corporation) is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal office located at Phinma Plaza, 39 Plaza Drive, Rockwell Center, Makati City. It is a duly

registered taxpayer with the Bureau of Internal Revenue (BIR), as shown by its Certificate of Registration dated September 3, 1998, and was issued Taxpayer Identification No. 201-136-574-000.¹

Respondent Commissioner of Internal Revenue is the official authorized under Section 4 of the National Internal Revenue Code (NIRC) of 1997 to assess and collect internal revenue taxes, as well as to decide disputed assessments, subject to the exclusive appellate jurisdiction of this Court. He holds office at the 5th Floor, BIR National Office Building, BIR Road, Diliman, Quezon City.

On February 19, 2003, petitioner received from respondent a Formal Assessment Notice² and four Assessment Notices, with attached "Details of Discrepancies", assessing petitioner for alleged deficiency income tax (IT-31634-99-03-257), value-added tax (VT-31634-99-03-257), documentary stamp tax (DS-31634-99-03-257), and for late filing and payment of withholding tax (WE-31634-99-03-257), covering taxable year 1999. The alleged deficiency taxes and penalties are computed as follows:

Income Tax	
Net Income per Return	P 87,326,234.00
Add: Net Operating Loss Carry-Over (NOLCO)	19,412,645.00
Adjusted Taxable Income	106,738,879.00
Tax due thereon (33%)	35,223,830.07
Less: Tax Due per Return	28,817,657.00
Tax Still Due	6,406,173.07
Add: Interest 04-16-00 to 03-12-03	3,717,942.66
TOTAL AMOUNT DUE	P 10,124,115.73
Value-added Tax	
Interest Income on Advances to Affiliate	P111,143,624.00
Less: Accrued Interest Receivable, end	2,746,146.00
Gross Receipt	108,397,478.00
Add: Other Income	172,518.00
Total Vatable Income	108,569,996.00
Basic Deficiency VAT [Output Tax (1/11)]	9,869,999.64
Add: 50% Surcharge	4,934,999.82
Interest 01-26-00 to 3-12-03	6,162,215.54
TOTAL AMOUNT DUE	P 20,967,215.00

¹ Par. 1, Admission of Facts, Joint Stipulation of Facts and Issues (JSFI), docket, p. 147

² Exhibit "A"

Documentary Stamp Tax		
Due from Affiliates	(964,345,163.00)/200xP0.30	P 1,446,517.80
Total DST Due		1,446,517.80
Less: Tax Paid		0.00
DST still due		1,446,517.80
Add: 25% Surcharge	P 361,629.45	
Interest 01-11-00 to 03-12-03	916,920.57	1,278,550.02
TOTAL AMOUNT DUE		P 2,725,067.82
1999 Increment on the Late Filing and Payment of February Withholding Tax		
Basic Tax		P 7,909.15
Add: Applicable increments		
25% surcharge	P 1,977.29	
Interest 03-10-99 to 03-25-99	65.00	2,042.29
Total Amount Due		P 9,951.44
Less: Payment 03-25-99		7,909.15
Amount still due		2,042.29
Add: Interest 03-26-99 to 03-12-03		1,615.46
TOTAL AMOUNT DUE		P 3,657.75
TOTAL DEFICIENCY TAXES		P 33,820,056.30

The deficiency income tax assessment in the amount of P10,124,115.73 (inclusive of interest) was due to respondent's disallowance of petitioner's Net Operating Loss Carry-Over (NOLCO) in the amount of P19,412,645.00. Such amount arose from expense deductions related to petitioner's stock transactions amounting to P35,645,398.24 during taxable year 1998. Respondent disallowed the NOLCO deduction for the following reasons:³

- "a. The deduction of NOLCO is allegedly in violation of Statements of Financial Accounting Standard No. 18. Respondent claims that since Petitioner has not claimed the amount of Ph35,645,389.24 and as expense, but as a deduction to its Additional Paid-In Capital, for financial accounting purposes, it cannot claim the same as a deductible expense for tax purpose. Respondent maintains that if the financial accounting standard does not allow the expenses to be deducted from gross income, it must also be disallowed as a deduction for tax purposes; and
- b. The expenses allegedly failed to comply with the requisites of deductibility under Section 34 of the Tax Code of 1997 (the 'Tax Code') that it must be ordinary and necessary and must be paid or incurred in carrying on a trade or business."

³ Par. 5, Admission of Facts, JSFI, docket, p. 149

Respondent also assessed petitioner for deficiency VAT in the amount of P20,967,215.00, inclusive of fifty percent (50%) surcharge, on the ground that petitioner is allegedly engaged in the business of regular lending or advancing money; thus, should be considered a lending investor subject to VAT under Section 108(A) of the NIRC of 1997.⁴

Respondent explained the basis of the deficiency DST in the Details of Discrepancies, as follows:

"Verification disclosed that there were loan agreements termed as Due From Affiliate in the financial statement not subjected to documentary stamp tax pursuant to BIR Ruling No. 108-99 dated July 15, 1999. The foregoing, provides that this office is of the opinion as it hereby holds that inter-office memo covering the advances granted to affiliate company or inter-office evidencing lending/borrowings is in the nature of promissory note subject to Documentary Stamp Tax under Section 180 of the Tax Code of 1997."⁵

On March 20, 2003, petitioner, through its counsel, filed a protest letter⁶ requesting withdrawal and cancellation of the said assessments.

Revenue District Office (RDO) No. 47 forwarded the protest letter of petitioner to the Legal Division of Revenue Region No. 8 for resolution of the legal issues raised by petitioner's counsel/accountant.⁷

Respondent did not render a decision on petitioner's protest within the allowed one hundred eighty (180)-day period from the date of filing of the protest; thus, prompting petitioner to file the instant Petition for Review on October 15, 2003.

⁴ Exhibit "A", Details of Discrepancies

⁵ Docket, p. 250

⁶ Exhibits "B" and "B-1"

⁷ Par. 16, Admission of Facts, JSFI, docket, p. 153

In his Answer filed on January 14, 2004, respondent raised the following

Affirmative and Special Defenses⁸:

- "4. Contrary to the allegation that the protest letter of the petitioner was not acted by respondent, the District Officer of Revenue District Office No. 47 forwarded the case on May 22, 2003 to the Legal Division of Revenue Region No. 8 for resolution of the legal issues raised by its counsel/accountant and the same was under study and pending resolution before the said office when the petitioner filed the petition for review;
5. The assessments have become final pursuant to Section 228 of the National Internal Revenue Code of 1997 (NIRC) because petitioner failed to submit within sixty (60) days from the filing of its protest, all relevant documents as stated in its protest letter dated March 19, 2003;
5. Since the assessments have already become final by operation of law it is our humble submission that this Honorable Court has not acquired jurisdiction over the case/petition;
6. The Net Operating Loss Carry-Over (NOLCO) in the amount of P19,412,645.00 was disallowed as it violates Paragraph 5 of the Financial Accounting Standard No. 18 which states that all expenses related to issuance of shares of stock must be debited to the Additional Paid-In Capital (APIC) but was however treated by petitioner as an outright expense and subsequently deducted from the taxable income as reflected in the reconciliation of its auditor of net income per book and net income per tax return of petitioner's 1998 income tax return;
7. The validity of the claim for net operating loss carry-over may be determined through the following procedures: a) By securing copies of income tax returns and the applicable audited financial statements for the three (3) consecutive taxable years immediately preceding the year of the claim; b) By verifying audit reports, if any, covering taxable years with net operating loss to ascertain correctness of amount claimed after audit, among others. (Sec. 11.3, Revenue Audit Memorandum Order No. 1-00, March 17, 2000.), which procedure was followed by the revenue officers in

⁸ Docket, pp. 86-89

this case thus completely overturning petitioner's claim that they have no authority to examine its 1998 returns.

8. American jurisprudence or authorities may have great influence in our tax system but is not necessarily binding in this jurisdiction specially the cited opinion of Mertens which is totally inapplicable in this particular case;
9. Let it also be stressed for clarification that the amended Articles of Incorporation of the petitioner was adopted only on November 24, 1999 by a majority vote of its Board of Directors or less than the total number of days that comprise the last quarter of 1999, and was approved by the Securities and Exchange Commission only on January 3, 2000, which only goes to tell that in the year 1999 it was not yet authorized to perform the functions of a holding company and therefore the expenses relating to the purchase, acquisition, issuance or sale of shares of stocks are not ordinary and necessary expenses of the petitioner hence should not be allowed as deductions from income;
10. Petitioner is a lending investor subject to the Value-Added tax under Section 108 (A) of the NIRC;
11. The activity of lending money or advancing money, as petitioner terms it, to its affiliates, friends and others with interest, done several times in a single year, falls squarely within the definition of lending investors which includes all persons who make a practice of lending money for themselves or others at interest. (1972 BIR Ruling cited in page 966, The National Internal Revenue Code of the Philippines Annotated, 1996 17th and Revised Edition);
12. The Unnumbered BIR ruling dated March 31, 1997 cited by the petitioner in its petition is not on four squares with the instant case for the reason that (1) petitioner is clearly earning profits, a whopping amount of P111,143,624.00, from its lending or 'advancing' money activities which is clearly carried on with a view to profit, this fact is not present in the case of Aboitiz (2) the facts taken into consideration by the Appellate Division in arriving at its favorable decision in the Aboitiz case are absent in the instant case (3) petitioner extends financial advances or loans not exclusively to its affiliates but also to others like, United Pulp and Paper Company and to friends while Aboitiz exclusively extends financial assistance to its affiliates;

13. Besides, the ruling in the Aboitiz case was arrived at after a conference-hearing and investigation conducted where testimonies of witnesses were presented and evidence were adduced by the taxpayer, which is not so in the instant case;
14. Even granting, for the sake of argument, that petitioner is not a lending investor, the said interest income is still subject to VAT as an incidental income of a VAT registered person under Section 105 of the NIRC, as implemented by Section 4.99-1 of Revenue Regulations No. 7-95, stating that income from incidental transaction of VAT registered taxpayer is also subject to VAT;
15. The petitioner executed twice a Waiver of the Defense of Prescription, which does not only suspend the running of the prescriptive period to assess, but has already been held and considered as a relinquishment of its right to invoke the prescriptive period in Section 222 of the NIRC;
16. Moreover, it is provided in Section 222 of the NIRC that in case of false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed at any time within ten (10) years after the discovery of the falsify, fraud or omission;
17. It is crystal clear that petitioner did not file the VAT returns for the gross interest income it derived from its lending activities;
18. The allegation therefore that petitioner has informed the respondent of its change in address has become moot;
19. The inter-office memos evidencing lending or borrowing of money may not be considered a promissory note but nonetheless still subject to the documentary stamp tax under Section 180 of the NIRC classified under 'orders for the payment of any sum of money otherwise than at sight or on demand';
20. The Voluntary Assessment and Abatement Program (VAAP) availed of by the petitioner with respect to the documentary stamp tax is still subject to review and approval by the respondent and besides, it will only provide relief from the penalty and interest to the respondent, not to mention the fact that the VAAP law imposes certain conditions for valid availment;

21. The imposition of the 25% penalty (surcharge) on the deficiency documentary stamp tax is based on Section 248 (A) (1) of the NIRC and Revenue Regulations No. 12-99, paragraph 4.1, for failure on the part of the petitioner to file its return and pay the documentary stamp tax as required under the provisions of the NIRC and rules and regulations on the date prescribed;
22. The penalty equivalent to 50% impose on the deficiency value-added tax is based on Section 248 (B) of the NIRC due to willful neglect on the part of the petitioner to file its VAT return within the time prescribed by the NIRC or by rules and regulations not to mention that the amount P111,143,624.00 is a substantial underdeclaration of its taxable income;"

In the Answer, respondent likewise raised a "COUNTER-CLAIM", demanding an immediate payment of the amount of P5,492.29 as deficiency withholding tax, together with penalty due under Section 248(A)(3), and interest due under Section 249(B), both of the NIRC of 1997.⁹

During trial, petitioner presented its evidence and rested its case; while respondent was declared to have waived his right to present evidence for failure of his counsel to attend Court hearings for presentation of evidence, despite notice.¹⁰

On June 18, 2007, the Court required both parties to submit their respective Memorandum.

On August 28, 2007, before the filing of its Memorandum, petitioner moved to defer the submission of its Memorandum and asked for a Leave of Court to present additional evidence. Respondent made no objection to petitioner's motion. The Court granted the same in open court on September 14, 2007.

⁹ Docket, p. 90

¹⁰ Docket, pp. 422 and 424

After petitioner's presentation of its additional evidence, it filed its Formal Offer of Additional Evidence on December 3, 2007. The additional pieces of evidence were admitted on January 22, 2008.

On March 4, 2008, this case was submitted for decision, taking into consideration the Memorandum filed by petitioner on December 18, 2007, sans respondent's Memorandum.¹¹

On March 24, 2008, petitioner filed a Manifestation and Motion¹², stating that it has availed of tax amnesty under Republic Act (R.A.) No. 9480 with the Bureau of Internal Revenue. Petitioner thereafter submitted pertinent documents¹³ to prove its availment of the tax amnesty via its Compliance and Formal Offer of Evidence¹⁴ on June 13, 2008. The Court admitted the same in a Resolution dated July 31, 2008.

On August 26, 2008, petitioner filed its Supplemental Petition¹⁵, manifesting its availment of tax amnesty under R.A. No. 9480 and stating further that the issues pertaining to its deficiency income tax, VAT, and DST assessments are now considered moot. Petitioner prayed for the confirmation of its immunities and privileges under R.A. No. 9480 and the withdrawal and cancellation of the remaining assessments against it for 1999, including interest and surcharges.

No supplemental Answer was filed by respondent. Consequently, his Answer filed on February 2, 2004 was considered as his Supplemental Answer.¹⁶

¹¹ Docket, p. 880

¹² Docket, pp. 881-885

¹³ Exhibits "XX", "YY", "ZZ", "AAA", and "BBB"

¹⁴ Docket, pp. 914-917

¹⁵ Docket, pp. 929-943

¹⁶ Docket, p. 954

During the January 9, 2009 hearing, petitioner manifested that it paid the increment for late filing of withholding tax subject of this case. In lieu of a pre-trial, this Court allowed petitioner to present a witness to identify the documents proving its allegation of payment of the increments. Petitioner presented Ms. Hazel Quennie B. Saez as its witness. Thereafter, petitioner filed its Supplemental Formal Offer of Evidence on April 17, 2009, submitting documents¹⁷ to prove its alleged payment of the increments for late filing and of its withholding tax for February plus interest. This Court admitted the same in a Resolution dated May 25, 2009.

This case was submitted for decision on July 13, 2009, taking into consideration petitioner's Memorandum filed on July 7, 2009, without respondent's Memorandum.¹⁸

Initially, the parties submitted the following issues¹⁹ for this Court's resolution:

- "1. Whether or not the deficiency income tax assessment arising from the disallowance of Petitioner's NOLCO incurred in 1998 is proper.
 - 1.1 Whether or not the revenue examiners who conducted the audit investigation on Petitioner exceeded their authority under LOA 1999-00031634 when they delved into, and investigated Petitioner's internal tax liabilities for taxable year 1998.
 - 1.2 Assuming that the revenue examiners may investigate Petitioner's tax liabilities in 1998, whether or not the expenses incurred by Petitioner in connection with its stock

¹⁷ Exhibits "CCC", "DDD", and "DDD-1"

¹⁸ Docket, p. 1029

¹⁹ Statement of the Issues, JSFI, docket, pp. 153-155

transactions in 1998, can be regarded as ordinary and necessary business expenses for tax purposes.

2. Whether or not the Petitioner is liable for deficiency VAT in the amount of P20,967,215.00.
 - 2.1 Whether or not Petitioner, by granting advances to its affiliates and one non-affiliate, may be considered a 'lending investor' subject to VAT under Section 108 (A) of the Tax Code on interest income payments it received.
 - 2.2 Whether or not the right of Respondent to assess and collect VAT from Petitioner already prescribed pursuant to Section 203 of the Tax Code.
 - 2.2.1 Whether or not Respondent was informed of Petitioner's change of business address.
3. Whether or not Petitioner is liable for any deficiency DST in the total amount of P2,725,067.82 on the loans or advances it granted to its affiliates.
 - 3.1 Whether or not the loans or advances granted by Petitioner to its affiliates, not evidenced by loan agreements or promissory notes, are subject to DST under Section 180 of the Tax Code.
 - 3.2 Whether or not Petitioner actually availed of the Voluntary Assessment and Abatement Program (VAAP) relative to its deficiency DST on loans or advances granted to its affiliates.
4. Whether or not Petitioner is liable for a fifty percent (50%) surcharge on its alleged deficiency VAT and twenty-five percent (25%) surcharge on its alleged deficiency DST.
5. Whether or not the subject assessments have become final."

However, by virtue of petitioner's availment of the tax amnesty under R.A. No. 9480, the remaining issue for this Court's resolution is as follows:

"Whether or not petitioner is liable for the increment on late filing and payment of the withholding tax for February 1999 in the amount of P3,657.75."

The assessment for increment on the late filing and payment of the withholding tax for February 1999 is detailed as follows:

1999 Increment on the Late Filing and Payment of February Withholding Tax		
Basic Tax	P	7,909.15
Add: Applicable increments		
25% surcharge	P 1,977.29	
Interest 03-10-99 to 03-25-99	65.00	2,042.29
Total Amount Due	P	9,951.44
Less: Payment 03-25-99		7,909.15
Amount still due		2,042.29
Add: Interest 03-26-99 to 03-12-03		1,615.46
TOTAL AMOUNT DUE	P	3,657.75

From the foregoing, petitioner paid its basic withholding tax for 1999, amounting to P7,909.15 on March 25, 1999; leaving an unpaid interest of P2,042.29. Respondent added a corresponding interest, amounting to P1,615.46, accrued from petitioner's date of payment (on March 25, 1999) to March 12, 2003.

Petitioner likewise paid a total of P5,899.95, corresponding to the aforementioned 1999 increments, through respondent's Electronic Filing and Payment System²⁰ on September 1, 2008.

This fact was confirmed during the hearing held on March 5, 2009. The pertinent parts of the Transcript of Stenographic Notes²¹ are quoted for ready reference:

²⁰ Exhibits "CCC", "DDD", and "DDD-1"

²¹ TSN, March 5, 2009 hearing, pages 15-20

“ATTY. IBAZETA:

Q. Now, what is your basis on saying that petitioner paid these increments of withholding tax?

MS. SAEZ:

A. We have electronically filed through the E-system the increments.

ATTY. IBAZETA:

Q. Who paid for the withholding tax?

MS. SAEZ:

A. I did the filing.

ATTY. IBAZETA:

Q. Okay, now, if the electronic forms were shown to you, will you be able to identify them?

MS. SAEZ:

A. Yes.

ATTY. IBAZETA:

Q. I am showing to you two (2) documents, the first is a Payment Form BIR Form 0605 dated September 2, 2008 and a BIR EFPS Confirmation page dated September 1, 2008. What relation do these documents have to the electronic forms you mentioned?

MS. SAEZ:

A. This is the payment form I filed to pay the increments. This is the BIR confirmation as a proof that we have really paid the BIR.

ATTY. IBAZETA:

We would like to mark this, your Honors, as Exhibit 'CCC' and Exhibit 'CCC-1' for the petitioner.

JUSTICE BAUTISTA:

All right, mark them.
(Executive Clerk so marks)

ATTY. IBAZETA:

May we manifest, your Honors, that Exhibit 'CCC' is a certified true copy as certified by the Assistant Revenue District Officer 49, your Honors.

JUSTICE BAUTISTA:

Next time, Atty. Ibazeta, have your documents pre-mark by the Commissioner.

ATTY. IBAZETA:

Yes, your Honors.

ATTY. IBAZETA:

Q.

Now, Ms. Witness, base on Exhibit 'CCC' and Exhibit 'CCC-1', can you tell us what is your basis for saying that these shows the payments of the increments for the late filing?

MS. SAEZ:

A.

As mentioned earlier, there's an increment of two thousand forty two pesos and 29/100 (Php2,042.29) and the interest extended up to September 1, 2008, so a total of five thousand and eight hundred ninety nine pesos (Php5,899.00).

ATTY. IBAZETA:

Q.

What do you mean extended up to September 1, 2008?

MS. SAEZ:

A.

The interest should be paid from the date of the, so, the interest pertains to the interest from March 26, 1999 to September 1, 2008 when we filed the payment and we pay."

Since it is settled that petitioner paid the assailed increments for taxable year 1999, the effect of its payment is that its obligation is extinguished pursuant to Article 1231 of the Civil Code of the Philippines; hence, petitioner is no longer liable under Assessment No. WE-31634-99-03-257, representing its 1999 withholding tax increments.

Anent Assessment Nos. IT-31634-99-03-257 for income tax, VT-31634-99-03-257 for VAT, and DS-31634-99-03-257 for DST, inasmuch as petitioner is a qualified tax amnesty applicant under R.A. No. 9480 and has satisfied the requirements for the availment of tax amnesty, petitioner is now entitled to the immunities and privileges provided under Section 6(a) of R.A. No. 9480²². This Court's finding can be corroborated by the case of **Philippine Banking Corporation (now Global Business Bank, Inc.) vs. Commissioner of Internal Revenue**²³, where the Supreme Court declared thus:

"Records show that Metrobank, a qualified tax amnesty applicant, has duly complied with the requirements enumerated in RA 9480, as implemented by DO 29-07 and RMC 19-2008. Considering that the completion of these requirements shall be deemed full compliance with the tax amnesty program, the law mandates that the taxpayer shall thereafter be immune from the payment of taxes, and additions thereto, as well as the appurtenant civil, criminal or administrative penalties under the NIRC of 1997, as amended, arising from the failure to pay any and all internal revenue taxes for taxable year 2005 and prior years."

As a consequence, the foregoing deficiency income tax, VAT, and DST assessments are cancelled and withdrawn.

WHEREFORE, the instant Petition for Review and Supplemental Petition are hereby **GRANTED**. Accordingly, Assessment Notice Nos. WE-31634-99-03-257, IT-31634-99-03-257 for income tax, VT-31634-99-03-257 for VAT, and DS-31634-99-03-257 for DST are hereby **CANCELLED** and **SET ASIDE** due to

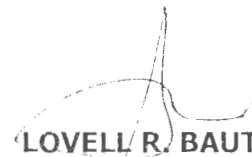
²² SECTION 6. *Immunities and Privileges*. — Those who availed themselves of the tax amnesty under Section 5 hereof, and have fully complied with all its conditions shall be entitled to the following immunities and privileges:

(a) The taxpayer shall be immune from the payment of taxes, as well as additions thereto, and the appurtenant civil, criminal or administrative penalties under the National Internal Revenue Code of 1997, as amended, arising from the failure to pay any and all internal revenue taxes for taxable year 2005 and prior years.

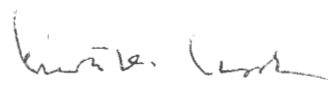
²³ G.R. No. 170574, January 30, 2009

petitioner's payment of its increments and availment of tax amnesty under R.A.
No. 9480.

SO ORDERED.


LOVELL R. BAUTISTA
Associate Justice

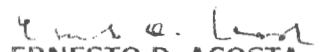
WE CONCUR:


ERNESTO D. ACOSTA
Presiding Justice


CAESAR A. CASANOVA
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, it is hereby
certified that the conclusions in the above Decision were reached in consultation
before the case was assigned to the writer of the opinion of the Court's Division.


ERNESTO D. ACOSTA
Presiding Justice
Chairperson, First Division