REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ARROW FORWARDING CORPORATION,
Petitioner,

- versus - C.T.A. CASE NO. 3442

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

x - - - - - - - - - - - - - - x

4/8/87

D E C I S I O N

This is an appeal from the decision of the respondent Commissioner of Internal Revenue assessing against and demanding from petitioner deficiency percentage tax plus surcharge and interest for the year 1975 in the total amount of ₱38,726.34.

In April 1980, petitioner received from Deputy Commissioner of Internal Revenue Ruben Ancheta, a letter dated April 16, 1980 (Exh. K, p. 95, BIR rec.) assessing against and demanding from it the payment of the amount of ₱38,726.34 as deficiency percentage tax, inclusive of surcharge and interest, for 1975. Said assessment dated April 16, 1980, is quoted hereunder in full:

April 16, 1980

Arrow Forwarding Corporation
Benguet Bldg., Pasong Tamo Ext.
Makati, Metro Manila

Gentlemen:

Please be informed that per investigation conducted by a revenue examiner of this Office for business tax purposes covering the year 1975, it was ascertained that you failed to pay the correct amount of percentage tax due on your gross receipts as forwarders pursuant to section 183(a) and 191, penalized under section 209, all of the Tax Code (now sections 193(a), 205 and 221, respectively, Tax Code of 1977, as amended). There is, therefore, due from you the amount of ₱38,726.34 as computed below, subject to adjustment of interest up to the actual date of payment.

Gross receipts	₱1,937,154.00
3% tax due thereon	₱ 58,114.62
Less: Amount paid (2%)	38,765.00
Deficiency percentage tax	₱ 19,349.62
25% surcharge for late payment.	4,837.41
	₱ 24,187.03
14% int. fr.1-21-76 to 5-16-80.	14,539.31
Total amount due	₱ 38,726.34

It is requested that you pay the aforesaid amount of ₱38,726.34 to the Receivable Accounts Division, this Bureau, BIR National Office Building, Revenue Road, Diliman, this city, on or before May 16, 1980.

Should you desire to settle extrajudicially the violation mentioned above, you may pay the amount of ₱300.00 as compromise penalty, likewise to the same collecting Division and within the same period.

Very truly yours,

RUBEN B. ANCHETA
Deputy Commissioner

Petitioner, thru its President, protested the aforesaid assessment in a letter dated May 3, 1980 (Exh. L, p. 97, BIR rec.) and which was filed on May 8, 1980.

On March 18, 1982, petitioner received the respondent's final decision, through its Deputy Commissioner Tomas Toledo, dated February 8, 1982 (Exh. M, p. 117, BIR rec.) on the disputed assessment, denying the former's protest and holding that it is a forwarder subject to 3% contractor's tax, which decision, is herewith quoted hereinbelow:

February 8, 1982

Arrow Forwarding Corporation
Benguet Bldg., Pasong Tamo
Extension
Makati, Metro Manila

Attn.: Mr. M. E. Gatera
President

Gentlemen:

With reference to your letter dated May 3, 1980 protesting our assessment issued against you for ₱38,726.34 representing deficiency percentage tax on your gross receipts in 1975 as forwarders, including surcharge and interest, under Letter of Demand No. IT-80-0098, dated April 16, 1980, I regret to inform you that after a thorough and careful review of the facts of the case, and the law and jurisprudence applicable thereto, this Office finds no plausible reason to favorably consider your protest.

You contend that your Company is operating as a common carrier, duly registered with the appropriate agencies of the Government, and that you have faithfully paid your business tax pursuant to Section 207 of the Tax Code. Our investigating officers however, found that you are a forwarder subject to the 3% contractor's tax and not to the 2% common carrier's tax, it appearing that you are contracting for the transportation and hauling of freight and passengers to any place in the Philippines. Our decision on your protest was based on the documentary evidence in the docket of the case and the report of our investigating officers inasmuch as you failed to appear at our scheduled hearing on May 21, 1981. It is believed that the records available, together with the said report is sufficient for this Office to render a judicious decision on your protest.

In view of all the foregoing, you are requested to pay the aforementioned amount of ₱38,726.34, representing deficiency percentage tax on your gross receipts as forwarder in 1975, inclusive of surcharge and interest to our Collection Agent at Makati, Metro Manila, within fifteen (15) days from receipt hereof, in order that this case may be closed and terminated. This constitutes our final decision on the matter.

Very truly yours,

TOMAS C. TOLEDO
Deputy Commissioner

On April 12, 1982, petitioner appealed to this Court.

The only issue to be resolved in this case is whether or not petitioner is a forwarder subject to the 3% contractor's tax assessed against it by respondent Commissioner of Internal Revenue in the amount of ₱38,726.34, under Section 191(13) (now Section 205(13), or as a carrier subject to 2% carrier's tax under Section 192 (now Section 207), both of the Tax Code.

Petitioner vigorously asserts that it is a carrier and not a forwarder as defined and understood in the law and as shown by the testimonial and documentary evidence presented by it. On the other hand, as shown in respondent Commissioner of Internal Revenue's "Special and Affirmative Defenses" in his Answer, he contends and insists that petitioner is a forwarder as indicated in its firm name "Arrow Forwarding Company", and as such, is taxable as a contractor, pursuant to Section 191(13) of the Tax Code, which provides as follows:

> SEC. 191. Contractors, proprietors or operators of dockyards, and others.- A contractor's tax of three per cent of gross receipts is hereby imposed on the following:
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> xxx xxx xxx
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> xxx xxx xxx
>
> (13) Proprietors or operators of arrastre and stevedoring, warehousing, or forwarding establishments; (Underlining ours.)
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> xxx xxx xxx

and that, as such, his assessment is in accordance with the law and regulations; and the tax assessment levied against petitioner is presumed correct and valid, and that it is incumbent upon petitioner to prove the contrary.

During the hearing petitioner submitted, in defense against assessment for 3% percentage (forwarder's) tax, both documentary and testimonial evidence. In the latter, the evidence consists of the testimonies of Nicanor Villanueva, Assistant Vice-President of petitioner, and Felix Gabuyo, Manager of petitioner's Brokerage Division, who both testified that the business of petitioner is trucking and brokerage; that it was granted certificates of public convenience by the Board of Transportation to operate a trucking firm; that its franchise covers the routes Manila to any part in Luzon, Valenzuela to any part of Luzon, and San Fernando, La Union to any part in Luzon; and that petitioner owns trucks in the conduct of its business.

On the other hand, respondent Commissioner of Internal Revenue did not present any witness or countervailing evidence and decided to submit his case before us based upon the records of the case.

It is true that an assessment of the Commissioner of Internal Revenue is presumptively correct. (Benipayo vs. Coll., 4 SCRA 182.) However, since the Commissioner's determination of a tax liability is not evidence, it disappears when countervailing evidence of petitioner is produced against it. (Hemphills School, Inc. v. Comm., 137 F 2d 961, cited in Pars. 7.3-7.9, Vol. 2, Fed. Tax Practice; see also Par. 8.6, ibid, p. 201.) Hence, when petitioner Arrow Forwarding Corporation presented its two witnesses, Vice-President Nicanor Villanueva and Manager Felix Gabuyo, whose testimonies not only were corroborative but also were uncontroverted, and for lack of evidence presented by respondent Commissioner of Internal Revenue with which to controvert said evidence and sustain his assessment, the evidence thus presented undisputedly proves that petitioner is a common carrier and not a forwarding establishment. Their testimonies were overwhelmingly supported by convincing documentary evidence showing that petitioner, in the conduct of its operational activity, is that of a common carrier. Petitioner possessed franchises issued by the Board of Transportation and their lines or routes of operation is within the island of Luzon and used its own transportation facilities in the transport of cargoes. (pp. 21-22, tsn, March 7, 1983). It was testified to that petitioner, in its engagement of business, transports cargoes, merchandise, goods and equipment by using its own facilities in the transport and delivery thereof to its clients; that it obtained a Certificate of Public Convenience on April 10, 1973 (Exh. B) wherein it was authorized to operate trucks and transport freight and merchandise from Valenzuela, Bulacan to any point of Luzon; a Certificate of Public Convenience dated May 16, 1973 (Exh. C), granting it equal authority to operate freight trucks for the City of Manila to any point in Luzon; a Certiticate of Authority (Exh. D) to change the motor of its Ford truck authorized in its franchise; that petitioner operates trucks for hire duly registered with the Land Transportation Commission (Exhs. E, F, G, H and J); and that in transporting freight or cargo to the points in the Philippines aforesaid granted to it under certificates of public convinience, it generally uses its own trucks, equipment and facilities.

Under the above stated facts, we are certainly of the opinion and so hold that petitioner is a common carrier as such defined and understood by the whole body of laws and jurisprudence and not a forwarder or a forwarding establishment as considered by respondent. From its Articles of Incorporation (Exh. A), in its first paragraph, Second Article (Exh. A-1), duly registered with the Securities and Exchange Commission (SEC), petitioner's primary purpose is its engagement "xxx in the business of handling and transporting passengers, freight goods, wares, produce, merchandise and other property by means of trucks, buses, trailers, vans and other forms of motor vehicle or conveyance as a carrier xxx and to acquire, own operate, lease and dispose of like business." (Underscoring ours.)

Per the testimony of Nicanor G. Villanueva, Assistant Vice-President of petitioner, who handles the overall operations of the movements of transportation, administrative support, and one who provides material and logistic operation, on the question propounded to him as to what is his employer's (petitioner's) principal business, he said that: "A. Our company is engaged in business of transporting cargos, merchandise, goods and equipment using our facilities in the transfer and delivery of cargos to destination of our clients." (p. 4, tsn, March 7, 1983.) He testified that the "Company is a common carrier", and has a Certificate of Public Convenience from the Board of Transportation and is authorized as a common carrier (p. 7, tsn, ibid.); and that he presented all the certificates of public conveniences used by petitioner (see pp. 7-9, tsn, ibid.) and that the latter was registered with the Bureau of Land Transportation and paid the registration fees thereon (p. 10-16, tsn, ibid.); that in transporting freight or cargoes to any point in the Philippines, in areas where certificates of public convenience were issued, petitioner used its own equipment and facilities. (p. 20, tsn, ibid.)

Felix Gabuyo, Manager of the Brokerage Division of petitioner, and in control and supervision of the daily activities of said division , corroborating the testimony of Nicanor G. Villanueva, Assistant Vice-President, stated in open court that: "A. The line of business of our (petitioner) corporation is trucking and brokerage." (p. 4, tsn, July 1, 1983) and affirmed that petitioner were granted franchises or certificates of public convenience to operate a trucking firm (p. 4, tsn, ibid.); and that the areas covered are: Manila to any point of Luzon; Valenzuela to any point of Luzon; San Fernando, La Union to any point of Luzon (p. 4, tsn, ibid.); and it was the line of business in which petitioner was engaged in 1975; and that it owns trucks in conducting its business as a trucker. (p. 5, tsn, ibid.)

Petitioner was granted on April 10, 1973, a certificate of public convenience to operate a TH truck service for the transportation of freight in the Municipality of Valenzuela, Bulacan to any place in Luzon with the use of 3 units granted by the Board of Transportation (Exh. B, p. 37, CTA rec.); and that petitioner was granted this certificate subject to the conditions among others that:

"4. In operating the TH service under the provisional permit herein granted, applicant shall charge the following schedule of rates;

> ₱0.03 per 100 kilos per kilometer or fraction thereof with a minimum charge of ₱0.25.

"5. Applicant shall also take all the necessary means and precautions to furnish the public with satisfactory, safe and adequate service; shall paint the schedule of rates on the windshield of the truck herein authorized or on a signboard hung in a conspicuous place inside the truck; shall issue freight stub receipts in duplicate to be printed in accordance with the model form prescribed by this Board for the issuance of freightage collected; and shall observe and comply and shall be responsible for the observance and compliance by its agents, employees and representatives with all the rules and regulations of the Board of Transportation relative to "TH" service."

Again, petitioner was given a certificate of public convenience to operate TH Freight truck service in the City of Manila to any part in Luzon subject to the same conditions as to the rates of freight and the use of freight stub receipts (Exh. C, pp. 41, 43-44, CTA rec.).

Considering the aforementioned circumstances and the fact that it received gross receipts from out of its operations in trucking and brokerage in 1975, these meets the definitions and characteristics of a common carrier to which it is actually engaged in. It has met the definition of the common carrier, i.e., "a person, corporation, firm or association engaged in the business of carrying or transporting passengers or goods or both, by land, water, or air, for compensation, offering them services to the public" (Art. 1732, Civil Code of the Philippines). Its essential characteristics are that it is a (1) regular business of carrying passengers or property for all persons or for the general public who may choose to employ them; and (2) for remunerative purposes (U.S. vs. Quinajon, 31 Phil. 196; Words and Phrases, Vol. 8, p. 15; Bouvier's Law Dictionary, Vol. I, 3rd Edition, pp. 553-554); (3) that it is responsible for loss and damage except acts of God (Webster Third New Int'l Dictionary, Unabridged, Vol. I, p. 458); and (4) finally, it is a quasi public agency enjoying a franchise to serve the public. (Lucastin R. Co. vs. Kelly, 28 A 2d, 619, 620, 20 N.J. Misc. 477; Words and Phrases, Vol. 8, p. 16; Underscoring ours; see also Webster's Third New Int'l Dictionary, Unabridged, op. cit.)

On the other hand, it cannot be a forwarder since a "Forwarder - as defined by Bouvier x x x is a person who receives and forwards goods, taking on himself the expense of transportation for which he receives a compensation from the owners, but who has no concern in the vessels or wagons by which they are transported, and no interest in the freight. Schloss v. Wood, 17P. 910, 911, 11 Colo. 287." (Words and Phrases, Vol. 17, p. 447.) A "forwarding merchant" or "forwarder" is one who ships or sends forward goods for others to their destination by the instrumentality of third persons without himself incurring the liability of a carrier to deliver them, and neither includes a consignor shipping goods nor a carrier engaged in transporting them. In re Emerson Marlon & Co., 199 F 95, 98, 117 C.C.A. 635." (Ibid.) "x x x The liability of forwarders is likewise that of warehouseman and common agents, and is governed by the general rule applicable to other bailees for hire, not subject to extraordinary liabilities. They are responsible for ordinary care, skill, and diligence - that is, such care and diligence as prudent men in similar circumstances usually exercise in the management of their own business. Hooper v. Wells, Fargo & Co., 27 Cal. 11, 26, 85 Am. Dec. 211" (Ibid.) Finally, a forwarder is "a. an agent who performs services (as clearing of customs, receiving, assembling, or delivering) designed to assure and facilitate the passage of goods of his principal to their destination-called also freight forwarder." (Webster's Third New International Dictionary, Unabridged, Vol. I, p. 896.)

As petitioner had shown by overwhelming evidence that it does not only receives and facilitates the forwarding of the goods to its client for a fee, but is operating as a common carrier which carries cargo for all persons or the general public, which line of business is covered by franchises or certificates of public convenience to operate trucks for hire, and subject to a government imposed restrictive rates of freight schedules, it is definitely not, therefore, a forwarder for which it can be held liable for 3% contractor's tax as a forwarding merchant under the provision of paragraph 13, Section 191 (now 205) of the Tax Code. Consequently, we are of the opinion and so hold that petitioner is a common carrier subject to the 2% common carrier's tax based on their monthly gross receipts under the provision of Section 192 (now Section 207) of the Tax Code, which provides as follows:

> SEC. 192. Percentage tax on carriers and keepers of garages.- Keepers of garages, cars for rent or hire driven by the lessee, transportation contractors, persons who transport passengers or freight for hire, and common carriers by land, air, or water, except owners of bancas, and owners of animal-drawn two-wheeled vehicles, shall pay a tax equivalent to two per centum of their monthly gross receipts.
>
> xxx xxx xxx

WHEREFORE, the decision of the Commissioner of Internal Revenue appealed from is hereby set aside.

No pronouncement as to costs.

SO ORDERED.

Quezon City, Metro Manila, April 8, 1987.

CONSTANTE C. ROAQUIN
Associate Judge

I CONCUR:

AMANTE FILLER
Presiding Judge

Dissents in separate opinion

ALEX Z. REYES
Associate Judge

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DISSENTING OPINION

I take exception to the majority's decision portraying the petitioner corporation in the best possible light as a "common carrier" subject to the reduced rate of contractor's tax of 2% prescribed under Section 192 now Sec. 207 of the Tax Code apparently because -

> The purpose for which the corporation is formed is to engage in the business of hauling and transporting passengers, freight, goods, wares, produce, merchandise and other property by means of trucks, buses, trailers, vans, and other forms of motor vehicle or conveyance as a common carrier or otherwise in any point or part of the Philippines, and to acquire, own, operate, lease and dispose of like business. (Articles of Incorporation).

It is by no means clear whether a corporation can no longer be considered in the category of other contractors for tax purposes even if its Articles of

Incorporation is coupled with other corporate purposes, to wit:

> To carry on the business of customs brokerage and in connection therewith to apply for, build, own or otherwise acquire and operate a bonded warehouse or warehouses, to take charge of and perform on behalf and for account of its clients the duties of bonding, receiving, landing, hauling, paying freights and other charges, duties and taxes due on goods, articles, wares, merchandise or other cargoes and to do all such other acts inherently and commonly carried on or undertaken by customs brokers in customs clearing. (Articles of Incorporation as amended, November 13, 1973).
>
> To carry on the business of receiving, loading, unloading, delivering, weighing, warehousing, gauging, measuring, and copering goods, wares, and merchandise destined for or unladen from steam vessels, ships and every other kind of watercraft and to perform in connection therewith services ordinarily performed by receiving, delivery, stevedores, tally and dock clerks, weighers, coopers, and to issue or take receipts for such goods, wares, and merchandise as principal, agent or otherwise, and in general to do any and all acts that may be necessary, convenient, or appurtenant to any one of the above-mentioned objects.

The nature of the above-described undertaking appears more than sufficient to show that petitioner corporation can readily slip into that warm cubby-hole of Section 191 (13) now Sec. 205 (13) of the Tax Code which reads -

> Sec. 205. Contractors, proprietors or operators of dockyards, and others. - A contractor's tax of three per centum of the gross receipts is hereby imposed on the following:
>
> xxx xxx xxx
>
> (13) Proprietors or operators of arrastre and stevedoring, warehousing or forwarding establishments.
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> (Underscoring supplied)

The tendentious question of being operated as a common carrier and registered as such does not detract from the fact that by design and purpose petitioner corporation is likewise a forwarding establishment as its business name so indicates. Moreover, both services, i.e., common carrier and forwarder, may be combined and performed by the same corporation and the varied rates of taxation as provided by law should be imposed and collected. Different strokes have to be applied on the transactions so to speak.

I sustain the respondent's deficiency assessment against petitioner.

ALEX Z. REYES
Associate Judge