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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
MANILA

July 20, 1962

CEBU PORTLAND CEMENT COMPANY,
Petitioner,

- versus - C.T.A. CASE NO. 345

THE COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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DECISION

This is an action for refund of the sum of ₱458,241.45 representing alleged overpayment of sales tax from November 1954 to September 30, 1955, and of the amount of ₱427,552.95 representing alleged overpayment of *ad valorem* tax; and alternatively the sum of either ₱590,649.92 or ₱854,619.89 which ever is correct depending on the correct basis of computing the *ad valorem* tax, or the amount of ₱59,410.66.

Petitioner, is a government owned and controlled corporation engaged in the manufacture and sale of "Portland" cement, composed of limestone rock and other minerals which, except the gypsum, were taken from petitioner's mineral land (Petitioner's Memorandum, p. 1). Prior to the effectivity of Republic Act No. 1299 on June 16, 1955, it had been paying the sales tax on the gross sale of its cement, together with the *ad valorem* tax on said minerals. After June 15, 1955, and pursuant to the provisions of Republic Act No. 1299, which placed cement under the category of "Mineral products", petitioner ceased to pay its sales tax on its gross sales of cement, and instead paid the ad valorem tax on the selling price of the product after deducting therefrom the corresponding cost of the containers thereof. (T.s.n. p. 58.)

On the basis of the cost of the raw materials used, the expenses incurred by petitioner in producing the cement from November 1, 1954 to September 30, 1956 amounted to ₱2,078,300.82 (Exhibits C, C-1, C-1-A, C-2, C-2-A, C-3, C-3-A, C-4, C-4-A, C-5, C-5-A, C-6, C-6-A, C-7, C-7-A, C-8, and C-8-A, pp. 17-97, t.s.n.). Based on the bin cost i.e., excluding the value of the bag containers, the cost of producing cement from November 1, 1954 to September, 1956, was ₱19,676,298.59. (Exhibits D, D-1, D-1-A, D-1-B, D-1-C, D-1-D, D-2, D-2-A, D-2-B, D-3, D-3-A, D-3-B, D-4, D-4-A, D-4-B, D-5, D-5-A, D-5-B, D-6, D-6-A, D-6-B, D-7, D-7-A and D-7-B, pp. 47-48, t.s.n.). The total cost of the cement bag containers for the said period was ₱2,173,175.07. (Exhibit I.) And the cost of the gypsum used during the same period was ₱859,952.64 (Exhibits D, H, and I, pp. 155, 168, and 169, CTA rec.).

Based on the gross selling price, i.e., inclusive of the cost of the bag containers and gypsum used, the sale of cement during the period from November 1, 1954 to September 30, 1956 aggregated ₱39,040,704.49 (Exhibit I).

Petitioner paid the 7% sales tax for the period from November 1, 1954 to March 1955, and the ad valorem tax of 1-1/2% for April, 1955 to September 30, 1956. And the corresponding sales taxes and ad valorem taxes paid during the said periods, totalled ₱458,241.45 (Exhibits A and A-1, pp. 130-131, CTA rec.) and ₱427,552.95 (Exhibits A-2 to A-14, and B, pp. 132-145, CTA rec.), respectively.

The sales tax was computed on the gross selling price, that is, inclusive of the cost of the bag containers; while the ad valorem tax was based on the gross selling price less cost of containers (pp. 16-17, 58, t.s.n.).

Petitioner made payments of the ad valorem tax through its Naga Plant in the sum of ₱8,043.05 (Exhibits A-8, A-9, A-10 and B, pp. 138-140, 145, CTA rec.) and thru its Bacnotan Plant in the sum of ₱5,421.35 (Exhibit A-11, A-12, A-13, A-14, and B, pp. 141-145, CTA rec.; pp. 49-51, t.s.n.).

Since 1952, petitioner had been protesting the imposition of the sales tax on its APO Portland Cement, and on January 16, 1953, it also protested the payment of the ad valorem tax (pp. 92-93 t.s.n.; Exhibit F, p. 106 BIR rec.). A written claim for refund of sales and ad valorem taxes paid by respondent was filed two days later (Exhibits E and E-1, pp. 137-143 BIR rec.), which claim was reiterated on July 26, 1956 (Exhibit G,

p. 20, CTA rec.). Without receiving respondent's decision on said claims for refund, petitioner filed the present petition before this Court on January 25, 1957.

On August 27, 1959, that is more than 2-1/2 years after the claims for refund were filed, and while this case is already pending before this Court, respondent denied the same.

The issues raised by the parties are as follows:

(1) Whether before the effectivity of Republic Act No. 1299 on June 16, 1955, the APC Portland Cement was a manufactured product subject to the sales tax, or a mineral product subject to the ad valorem tax;

(2) If a manufactured product, whether the cost of the bag containers and the gypsum used should be deducted from the gross selling price on which the sales tax was based;

(3) If a mineral product, whether the ad valorem tax should be computed on the basis of the: (a) gross selling price; (b) cost of the raw materials extracted by petitioner from its mineral lands and used in producing the cement; or (c) the "bin cost" of said cement;

(4) Whether the sales tax in question is refundable to the petitioner considering that a portion thereof was billed, charged to, and paid by its customers;

(5) Whether the right to recover the sales tax in question has already prescribed;

(6) Whether the ad valorem taxes allegedly paid for the period from April 1, 1955 to September 30, 1956 is recoverable; and

(7) Whether the ad valorem taxes paid by petitioner in its Naga and Bacnotan Plants in the amounts of ₱8,932.05 and ₱5,421.35, respectively, constitute double payment.

The determination of whether APO Portland Cement was a mineral product or a manufactured product before the amendment of Section 246 of the Tax Code by Republic Act No. 1299 turn upon the proper interpretation of said Act.

Before said amendment, Section 246 of the National Internal Revenue Code provides:

> "Sec. 246. Definition of the term 'gross output'.- The term 'gross output' shall be interpreted as the actual market value of minerals or mineral products, or of bullion from each mine or mineral lands operated as a separate entity without any deduction for mining, milling, refining, transporting, handling, marketing, or any other expenses: Provided, however, that if the minerals or mineral products are sold or consigned abroad by the lessee or owner of the mine under C.I.F. terms, the actual cost of ocean freight and insurance shall be deducted. The output of any group of contiguous mining claims shall not be subdivided. All the royalties or ad valorem taxes herein provided shall accrue to the National Treasury."

As amended by Republic Act No. 1299, said section 246 now provides:

> "Sec. 246. <u>Definitions of the terms 'gross output', 'minerals' and 'mineral products'; Disposition of royalties and ad valorem taxes.</u>- The term 'gross output' shall be interpreted as the actual market value of minerals or mineral products, or of bullion from each mine or mineral lands operated as a separate entity without any deduction from mining, milling, refining, transporting, handling, marketing, or any other expenses: <u>Provided, however,</u> that if the minerals or mineral products are sold or consigned abroad by the lessee or owner of the mine under C.I.F. terms, the actual cost of ocean freight and insurance shall be deducted. The output of any group of contiguous mining claims shall not be subdivided. <u>The word 'minerals' shall mean all in organic substances found in nature whether in solid, liquid, gaseous, or any intermediate state. The term 'mineral products' shall mean things produced by the lessee, concessionaire or owner of mineral lands, at least eighty per cent of which things must be minerals extracted by such lessee, concessionaire, or owner of mineral lands. Five per centum of the royalties and ad valorem taxes herein provided shall accrue to the municipality where the mines are situated, and ninety-five per centum to the National Treasury.</u>" (Amendment underlined.)

The purpose of the amendatory provision is to give an explicit definition of the word "minerals" and "mineral products" as used in the said section in order to avoid confusion in the collection of taxes. It was not intended to increase or deminish the collectible revenue (see II Congressional Record H.R. No. 50, p. 1573).

Petitioner contends that inasmuch as "respondent admits that APO Portland Cement is now a 'mineral product' as defined by Rep. Act No. 1299 x x x it cannot therefore deny that said cement was a 'mineral product' even before the enactment of said law because such was the signification of said term as used in Secs. 188 (c) and 246 of the National Internal Revenue Code then already in force long before the passage of Rep. Act No. 1299." This argument is untenable. If that were so, there would have been no necessity for Congress to pass the law. Precisely, the sponsor of the House Bill No. 3751 which finally became Republic Act No. 1299 admitted that the purpose of the amendment was to define the words "minerals" and "mineral products" as Republic Act No. 884 amending Section 246 of Com. Act No. 466 only defines the terms "gross output". The amendment is not therefore only declaratory in nature as petitioner contends, but substantial, because it materially effects the amount of revenue collectible by the government.

Moreover, from abundant literature, both scientific and mercantile, it appears that APO Portland Cement is generally accepted as a manufactured product and not a mineral product. That our Congress, in passing Republic Act No. 1299, has deemed it best to give it a meaning different from that which is universally accepted, does not justify the conclusion that prior to the approval of Republic Act No. 1299 it already meant a 'mineral product.'

The following definitions indicate the correct and generally accepted meaning of the words "Portland Cement" prior to the effectivity of said Republic Act No. 1299.

"The term 'Portland Cement' is a definition and, understood in the trade generally means a manufactured article resulting from a certain process." (P. 44, Vol. 33, Permanent Edition, Words, and Phrases.)

"The manufacture of cement.- The manufacture of Portland Cement from quarrying the rock to filling the sacks in which the cement is shipped is thoroughly mechanized process. Heavy and complicated machinery is necessary in the operation of the plant; x x x The method by which the rock is converted into the cement divides itself into two processes, the wet and dry. The wet process is employed where the raw materials are soft, such as chalk or clay. Water is used in the crushing and grinding operation to bring about an intimate mixture of the materials. The pulverized material called 'slurry' is pumped into storage tanks from which it passes to the kilns.

"In the dry process, the rock passes through crushers and ball mills until a flour-like finess is reached, so fine in fact that 85% of the resulting powder will pass through 200-mesh sieve.

"Each of these processes consists essentially of four steps, viz., (1) pulverizing the raw materials (2) burning to clinker (3) pulverizing the resulting clinker (4) sacking the product for shipment. A high temperature is required to properly clinker the materials, from 2800 to 3000°F. (Mineral in Modern Industry, by Walter H. Voskuil, p. 317. Copy of reference available at the Library of the House of Representatives, Congress of the Philippines; see also pp. 83-82, BIR rec.)."

"Portland cement does not consist of ground stone to which adhesive chemical has been added. <u>It is an industrial product obtained</u> by finely pulverizing clinker produced by burning to semi-fusion an intimate artificial mixture of finely ground calcareous and argillaceous materials." (Inorganic and Physical Chemistry, Institute of Science & Technology; see Free Press issue of Sept. 6, 1952, Issue No. 36, Vol. XLIII; see also p. 85, BIR rec.).

Furthermore, it is expressly admitted that "petitioner is a government owned and controlled corporation engaged in the quarrying of limestone rock, which, through scientific and mechanical process, it converts into a product commonly known as "APO Cement". (Page 1, Petitioner's Memorandum.) The conclusion, therefore, is that prior to the approval of Republic Act No. 1299 on June 16, 1955, the "APO Portland Cement", which petitioner produces, was a manufactured product subject to sales tax. The effectivity of the said law being made upon its approval, consequently, said APO Portland Cement, shall be treated and taxed accordingly as mineral product only from June 16, 1955, when the same was approved. Republic Act No. 1299 cannot be given retroactive effect for lack of specific provision on the matter. The generally accepted rule of construction is that laws are presumed to be prospective and not retrospective in operation unless its terms show the manifest contrary legislative intention (Sec. 117 pp. 385-388, Black Handbook on the Construction and Interpretation).

Petitioner also contends that the explanatory note of House Bill No. 3251 further supports their view. A careful analysis of said explanatory note belies this contention.

On the second issue, petitioner contends that, assuming the APO Portland Cement to be a manufactured product prior to the effectivity of Republic Act No. 1299, respondent, in imposing the sales tax, should have first deducted from the gross selling price the cost of the bag containers and gypsum used. On this contention, respondent asserts that petitioner has not alleged, much less has proved, that the bags and gypsum have already been subjected to the 7% sales tax.

The pleadings and evidences of record do not indicate that sales taxes have been laid on the bags and gypsum in question. No evidence having been presented showing that said taxes have been laid thereon, the cost of said materials cannot be deducted from the gross selling price of cement pursuant to the provision of Section 186 of the Tax Code which states:

> "Sec. 186. Percentage tax on sales of other articles.- x x x Provided, That where the articles subject to tax under this section are manufactured out of materials likewise subject to tax under this section and section one hundred eighty nine, the total cost of such materials, as duly established, shall be deductible from the gross selling price or gross value in money of such manufactured articles."

But, even assuming arguendo that the sales taxes in question were erroneously collected, as petitioner contends nevertheless, so much of said sales taxes that were billed, charged to, and paid for by its customers (Exhibits 2, 3-A to 3-E inclusive, pp. 170-177 CTA rec.) are not refundable to him because he is not the proper party. The rightful party to claim for refund is the party damaged by the alleged wrong payment of the tax (Philippine Manufacturing Co. vs. Meer, G.R. No. L-48483, March 29, 1946; Pedro F. Mendoza vs. City of Baguio, CA-G.R. No. 17547-R, June 23, 1959).

Again, assuming arguendo that there was overpayment of tax, either because of wrong computation of the sales tax or of the ad valorem tax, or that there was double payment of the same tax, petitioner's right to claim for refund is already barred by prescription in accordance with the provisions of Sections 306 and 309 of the Tax Code, which read:

> "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."

> "SEC. 309. Authority of Collector to make compromises and to refund taxes.- The Collector of Internal Revenue may compromise any civil or other case arising under this Code or other law or part of law administered by the Bureau of Internal Revenue, may credit or refund taxes erroneously or illegally received, or penalties imposed without authority, and may remit before payment any tax that appears to be unjustly assessed or excessive.

x x x x

"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 the payment of the tax or penalty."

It is well settled that the two requirements above stated, namely, (1) the filing of a written claim for refund with the Commissioner of Internal Revenue within 2 years from the date of payment; and (2) the institution of a suit or proceeding in court within 2 years from the date of such payment, are mandatory and substantive, and failure to comply with said conditions is fatal to recovery. (Johnston Lumber Co., Inc. vs. Court of Tax Appeals, G. R. No. L-9292, April 23, 1957.)

It must be noted at the outset that the amended petition for review dated October 23, 1959, which initiated the action for refund, was filed on October 24, 1959 (pp. 73-93 CTA rec.). This date is very significant because in order that the claim for refund be not adversely affected by the 2-year prescriptive period provided for in Section 306 of the Tax Code, the payment of the tax sought to be recovered must have been effected not earlier than October 24, 1957, that is, counting 2 years backwards from October 24, 1959, when the suit in court claiming refund of such tax was filed. In other words, in order that the recovery of the tax should be beyond the orbit of prescription, its payment should have been made not prior to October 24, 1957.

A careful examination of the statement of payments made for sales taxes and ad valorem taxes from November 1954 to September 1956 (see Exhibit B, p. 145,m CTA rec.) shows that, as regards the Manila Office, the latest payment was effected, under Check No. 30236 dated October 17, 1956 (Exhibit A-7, p. 137, CTA rec.), in the sum of ₱45,416.96; as regards the Naga Plant, the latest payment was effected on July 19, 1955, under O.R. No. 696251, for ₱2,826.89 (Exhibit A-10, p. 140, CTA rec.), and as regards the Bacnotan Plant, the latest payment was effected on July 20, 1955, under O.R. No. 1872453, for ₱1,068.79 (Exhibit A-14, p. 144 CTA rec.).

Inasmuch as the payments were made prior to October 24, 1957, it follows that the claim for refund is already barred by prescription.

Petitioner contends that a written claim for refund was made in his letters dated September 28, 1955, and July 26, 1955, respectively (Exhibits E & G, pp. 137-

143 BIR rec.). Assuming that said letters are valid claims for refund of the amounts in question, still the action will not prosper because, as heretofore stated, the suit or proceeding in court claiming refund was made beyond the 2-year prescriptive period.

Petitioner likewise argues that respondent has waived the right to the defense of prescription. This claim is not supported by the evidence. On the contrary, the defense of prescription was expressly pleaded by respondent in his amended answer dated February 26, 1960 (pp. 123-136 CTA rec.).

IN VIEW OF THE FOREGOING CONCLUSION, it becomes unnecessary to dispose of the issues relative to the bases for computing the sales and ad valorem taxes.

Premises considered, the Court holds:

1. That the "APO Portland Cement" was a manufactured product and not a mineral product prior to the effectivity of Republic Act No. 1299 on June 16, 1955, and therefore, petitioner was not exempt from payment of the sales taxes on said product;

2. That petitioner is not entitled to deduction from the gross selling price of the cost of raw materials (bag containers and gypsum) used in the absence of evidence that they were previously subjected to the 7% tax imposed by Sections 186 and 190 of the Tax Code;

3. That for so much of the sales taxes that were billed, charged to, and paid for by its customers, the petitioner is not the proper party to claim for refund; and

4. That the right to claim for refund of taxes alleged to be erroneously paid thru wrong computation, double payment, or otherwise is already barred by prescription.

Petition for review is hereby dismissed, with costs against petitioner.

SO ORDERED.

Manila, July 20, 1962.

MARIANO NABLE
Presiding Judge

I Concur:

JESUS Y. PEREZ
Acting Judge

I concur on the ground that the claim has already prescribed:

(Sgd.) JOSE N. LEUTERIO
Acting Judge