REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
MANILA

SOTERO ESCARILLA,
Petitioner,

- versus -

C.T.A.
CASE NO. 115

COLLECTOR OF INTERNAL REVENUE,
Respondent.

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

Aug. 29, 1956

D E C I S I O N

This is an appeal from a decision of the respondent Collector of Internal Revenue, dated March 21, 1955, (Exhibit 10, p. 200, BIR rec.) denying petitioner's claim for refund of the sum of ₱29,556.03 from the amount of ₱53,510.02 paid for and in his behalf by the Standard-Vacuum Oil Company to the Bureau of Internal Revenue by way of specific and compensating taxes on lubricating oil, greases, and other oils purchased on June 29, 1948 by the petitioner from the Surplus Property Commission at Samar Naval Base, Guiuan, Samar.

From the partial stipulation of facts hereinafter to be referred to as STIFACTS for short (pp. 37-44 C.T.A. rec.) and the additional evidence adduced by the parties on those matters not covered by the stipulation, the following pertinent facts appear to be uncontroverted.

On June 29, 1948, the petitioner Sotero Escarilla, a former officer in the Armed Forces of the Philippines, purchased for his personal account from the Surplus Property Commission at the price of ₱26,500.00, the entire contents of a Fuel Dump Area at Samar Naval Base, Guiuan, Samar, more specifically described in Surplus Property Commission Invoice No. 8236 (Exhibit A, petitioner; Exhibit 1, respondent, p. 100 BIR rec.) as follows:

> "x x x entire contents of the Fuel Dump Area, consisting of 3,055 (more or less) drums of Lubricating oil; Gear oil; Tar and Torpedo oil, located at NDS, Samar Naval Base, Guiuan, Samar."

After acquiring the lot, the petitioner paid the amount of ₱1,325.00 as compensating tax.

On October 13, 1948, Provincial Revenue Agent Daniel G. Jimenez of Leyte wrote a letter to the respondent recommending an assessment of deficiency specific tax in the amount of ₱28,225.00 on the 3,055 drums or 611,000 liters of lubricating oil acquired by petitioner from the Surplus Property Commission based on the figures appearing on SPC Invoice No. 8236 and the report of Agents Roman Carzon and Pablo Amascual. However, to forestall possible errors and tax evasion, further investigation on the matter was conducted by Assistant Agent Pablo Amascual with the help of Storekeeper Victor Naderazo. These two proceeded to ascertain personally the acquisition by checking the contents of the Fuel Dump Area located at the Naval Base at Guiuan, Samar, including those at Canpongo Wharf and Calicuan where the stock in question was then located, for the purpose of determining the actual quantity of oil obtained by petitioner from the Surplus Property Commission mentioned in SPC Invoice No. 8236. This was the only instance when the petitioner bought merchandise and articles from the Surplus Property Commission.

On October 18, 1948, after a thorough examination of the records in the office of the Surplus Property Commission at Guiuan, Samar, more particularly the tally-out sheets certifying to the removal of the oil in question by petitioner from the area with all the details as to quantity and quality, Internal Revenue Agent Roman Garzon and Assistant Agent Pablo Amascual submitted their report, Exhibit 4, to the Provincial Revenue Agent of Leyte together with their working sheets, Exhibits 5-A to 5-I (pp. 94-99 BIR rec.; pp. 52-55 C.T.A. rec.). In their report dated October 18, 1948 to Provincial Revenue Agent Daniel G. Jimenez, the two investigating agents recommended the assessment and collection from the petitioner the amount of ₱54,210.02 as deficiency specific and compensating taxes on the lubricating and other oils and greases obtained by him from the Surplus Property Commission covered by SPC Invoice No. 8236.

Here is an itemized list of what the petitioner acquired by purchase from the Surplus Property Commission on June 29, 1948, as appearing in the working sheets, Exhibits 5-A, 5-H and 5-I, of Agent Pablo Amascual.

<u>Lubricating oils</u>:

4,957	Drums	(53 gal.)
267	Drums	(10 gal.)
5,370	Cans	(5 gal.)
33,480	Tins	(4 oz.)

Bearing grease and other greases:

1,258 Cans	(25 lbs.)
4,166 Cans	(10 lbs.)
249 Cans	(5 lbs.)

3-in-1 Oil:

2,160 Tins	(4 oz.)

Petrolatum:

120 Cans	(10 lbs.)
84 Cans	(5 lbs.)

Provincial Revenue Agent Jimenez approved the findings of his subordinates and on October 19, 1948, recommended to the Collector of Internal Revenue that the petitioner be made to pay ₱54,210.02 instead of ₱28,225.00 as previously recommended by him (Exhibit 5, p. 10, BIR rec.).

On October 23, 1948, the respondent Collector of Internal Revenue approved the findings and recommendation of Provincial Revenue Agent Jimenez by sending to the petitioner a letter, Exhibit 3 (p. 11, BIR rec.), demanding from him the amount of ₱54,210.02 as deficiency specific and compensating taxes itemized as follows:

Number of liters of lubricating oil - - - - - - - - - -	1,109.882
Rate of Specific Tax per liter - - - - - - - - - - - -	x .05
Total Specific Tax due - - - -	₱55,494.10
Compensating Tax at 5% on assessed value of greases and other oils of ₱818.48- -	40.92
	₱55,535.02
LESS: Amount paid as compensating tax - - - - - - - -	1,325.00
BALANCE STILL DUE AND COLLECTIBLE - - - - - - - - -	₱54,210.02

In order to insure the collection of the taxes demanded and to avoid possible pilferages and removal without authority, the respondent, on December 7, 1948, placed under constructive distraint the properties in question located at Canpongo wharf and Calicon, Samar (Exhibit G, p. 20, BIR rec.). The petitioner signed a receipt for the articles placed under constructive distraint promising, among other things, not to remove any of the merchandise in question without previous authority from the Collector of Internal Revenue (Exhibit G, p. 20, BIR rec.). It appears, however, that notwithstanding his written promise as contained in the seizure receipt, Exhibit G, the petitioner sometime in the early part of 1951 removed without previously paying the taxes due thereon, 70 drums of 200 liters each containing lubricating oil forming part of the articles seized under constructive distraint. After the discovery of the anomaly, the petitioner on March 7, 1951, executed BIR Delinquency Form No. 33.01 (Exhibit H, p. 44 BIR rec.) wherein he admitted having violated by such removal the provisions of section 142-b of the National Internal Revenue Code and of having incurred a specific tax liability in the amount of ₱700.00 and a compromise fee of ₱10.00. The petitioner voluntarily paid the tax in question under O.R. Nos. 11207008 and 11207202, dated March 7 and 6, 1951, respectively. Thus, after crediting petitioner with this payment of ₱700.00 there still remained a balance of ₱53,510.02 from the original demand of ₱54,210.02.

On May 11, 1954, the Standard Vacuum Oil Co., in compliance with a Deed of Guarantee, paid to the respondent the sum of ₱53,510.02 under Official Receipt No. 1001266, to cover the unpaid balance of the specific and compensating taxes due from the petitioner exclusive of the ₱200.00 penalty, on the basis of 4,957 drums of lubricating oil and not 3,055 drums as stated in SPC Invoice No. 8236 (par. 22 STIFACTS; pp. 57, 117 BIR rec.). Thereafter, the petitioner filed his claim for refund of the amount of ₱29,556.03 out of the sum of ₱53,510.02 paid for and in his behalf by the Standard-Vacuum Oil Co.

On November 18, 1954, the Acting Chief, Law Division of the Bureau of Internal Revenue recommended to the respondent the refund to the petitioner of the sum of ₱28,676.03 holding that there was in fact an overpayment of specific and compensating taxes (Exhibit W, pp. 181-186, BIR rec.), to which the Chief of the Specific Tax Division disagreed in a lengthy memorandum dated December 3, 1954 (Exhibit 8 and 8-A; Exhibit X, pp. 187-191, BIR rec.). The respondent Collector of Internal Revenue approved the latter recommendation and in a letter dated March 21, 1955 (Exhibit 10, p. 200, BIR rec.) informed the petitioner of the denial of his entire claim for refund.

The parties are agreed that the only issue in this case is the quantity and kind of oil purchased by petitioner from the Surplus Property Commission on June 29, 1948 as per SPC Invoice No. 8236 upon which specific and compensating taxes could be imposed pursuant to section 142 (b) of the National Internal Revenue Code. In other words, the adjudication of this case narrows down to factual issues viz., the weight that should be given to the respective evidence presented by the parties for the proper determination of petitioner's tax liability.

Petitioner's counsels contends that their client purchased from the Surplus Property Commission only 3,055 drums of lubricating oil and not 4,957 drums as found by BIR Agent Amascual and Storekeeper Maderazo, and that the best evidence in this regard is the invoice itself, Exhibit A (p. 100 BIR rec.), the genuineness and due execution of which is not questioned by respondent. The petitioner did not take the witness stand to explain for the benefit of the Court the circumstances surrounding his oil transaction with the Surplus Property Commission and no explanation was given whatsoever by his counsel why they failed to do so. In addition to the invoice upon which much emphasis is being given, petitioner's counsel also presented the written opinion of other officials and employees of the Bureau of Internal Revenue including that of the Acting Chief of the Law Division sustaining his view on the matter.

Respondent contends on the other hand that the statements and figures appearing on SPC Invoice No. 8236 which read "3,055 drums (more or less) of lubricating oil" should be disregarded and that the actual purchase by petitioner consisted of 4,957 drums of lubricating oil as verified by Agent Amascual and Storekeeper-Gauger Maderazo of the Bureau of Internal Revenue, from the tally-out sheets on file with the Surplus Property Commission.

According to these two investigators who testified for the respondent, they were ordered by Provincial Revenue Agent Jimenez of Leyte sometime in October 1948 to investigate the tax liability of petitioner and to verify the exact number of drums of oil he bought from the Surplus Property Commission since the invoice evidencing the sale did not specify the exact number of drums of oil purchased; that in compliance with said order, they went to the office of the Surplus Property Commission at Guiuan, Samar, to check all the records regarding the transaction; that there they saw in the office of the accounting officer a copy of SPC Invoice No. 8236 and attached to it were mimeographed copies of numerous tally-out sheets stating the number of drums containing lubricating oil delivered to petitioner from the surplus depot as result of the purchase and the different dates of delivery; that they copied the figures appearing on the mimeographed tally-out sheets on their working sheets, Exhibits 5-A, 5-B and 5-C; that they also checked the number of drums of oil at Calicuan Naval Base forming part of the purchase but not yet delivered to petitioner and after summing up all the drums of oil delivered and not yet delivered to petitioner as of that date, it totalled 4,957 drums; that after such verification they computed the tax liability of petitioner and found it to be ₱54,210.02 instead of ₱28,225.00 which they reported to Provincial Revenue Agent Jimenez; and that on October 19, 1948, Provincial Revenue Agent Jimenez in turn reported the matter in writing, Exhibit 5, to the Collector of Internal Revenue, approving the findings and recommendations of these two investigators.

After analyzing carefully the declarations of the two witnesses as summarized above together with their working sheets, Exhibits 5-A, 5-B and 5-C, as prepared by them in the course of their investigation, we find such evidence for the respondent sufficiently reliable and trustworthy in arriving at the correct tax liability of petitioner. In the first place, the petitioner has not shown any possible ulterior motive why the two investigating agents of the Bureau of Internal Revenue should distort the true facts to prejudice his interest. In the second place, granting that there were gross mistakes or inaccuracies committed by the two investigating agents when they copied the figures appearing on the tally-out sheets on their own working sheets, Exhibits 5-A, 5-B and 5-C, the least that could be expected of petitioner was to produce in Court his own duplicate copies of the tally-out sheets to show where the mistakes or inaccuracies were committed for the guidance of the Court.

According to witness Godofredo Bugarin of the Surplus Property Unit of the Board of Liquidators, their practice was to prepare six copies of each tally-out sheet furnishing the buyer with one copy. If this be so, the petitioner should have presented his own copies of the tally-out sheets to destroy the evidentiary value of the working sheets prepared by the two investigators. The petitioner failed to testify before this Court regarding these tally-out sheets. He failed to present his own copies of the same and no explanation was offered whatsoever for his failure to do so. In the absence of proofs to the contrary, therefore, we take it that the figures appearing in the working sheets, Exhibits 5-A, 5-B and 5-C of the two investigators are correct it having been accomplished in the regular discharge of official duty. (Sec. 69 (m), Rule 123, Rules of Court).

Petitioner's counsel contend that the working sheets prepared by the two investigating agents of the Bureau of Internal Revenue, containing facts and figures which they obtained from the tally-out sheets on file with the Surplus Property Commission at Guiuan, Samar, should not be considered, the best evidence in this regard being the tally-out sheets themselves. We hold that secondary evidence of the contents of the tally-out sheets in question consisting of the testimony of witnesses Amascual and Maderazo and the working sheets, Exhibits 5-A to 5-H, are admissible in evidence it having been proven to the satisfaction of this Court, thru the testimony of Godofredo Bugarin, Chief of the Pending Old Invoice Section, Board of Liquidators, that the office of the Surplus Property Commission in Guiuan, Samar is already closed; that all the records of that office were transmitted to Manila and deposited in the <u>bodega</u> of the Board of Liquidators; that he is one of those in charge of the records of said Board; and, that in response to the subpoena duces tecum issued by this Court, he exerted efforts to locate said tally-out sheets but the same could not be located. Under section 51, Rule 123 of the Rules of Court, secondary evidence as to the contents of a document is admissible when the original writing has been lost or cannot be located as has been proven by the respondent in the present. (People vs. Quebral 68 Phil. 564, 568; 3 Wigmore on Evidence, p. 561). On the other hand, we hold the failure of petitioner to present before this Court his own copies of the tally-out sheets in question and his failure to explain the reason for not so doing, as an implied admission on his part that said documents would be adverse to his cause if produced. (Sec. 69 e, Rule 123, Rules of Court).

While it may be true that as a general rule, the best evidence as to the nature and quantity of articles or merchandise purchased would be the invoice or receipt itself, the rule does not apply in sales for a lump sum or under the so-called "paquiao" sale where the nature and quantity of the articles purchased are not described in exact and concise figures. It will be noted in SPC Invoice No. 8236 (p. 100 BIR rec.) upon which petitioner's counsel would want us to base the tax liability of their client, that the sale was not made on the basis of per unit drum or can of lubricating oil, but on the basis of the "entire contents of Fuel Dump Area." This conclusion is obvious from the context of the invoice itself wherein it appears under the column, "Item No.", the figure "I"; under the column, "Quantity", appears the word "entire"; and under the column, "Stock No. and Description", appears the clause, "contents of Fuel Dump Area, consisting of 3,055 (more or less) drums of lubricating oil; Gear oil; Fog oil; Tar and Torpedo oil. Located at NDS, Samar Naval Base, Guiuan, Samar". If the sale under SPC Invoice No. 8236, as petitioner would want us to believe, was on the basis of per unit drum or can of oil, the figure 3,055 indicating the number of drums of oil, should have been placed under the column "Quantity" in the invoice instead of the word, "entire", and the figure 3,055 should not have been placed elsewhere followed by the words in parenthysis "more or less". The use of the words "more or less", and the enumeration of the kinds of oil, such as lubricating oil, Gear oil, Fog oil, Tar and Torpedo oil, after the figure 3,055, renders very logical the conclusion that the sale in question was not limited to 3,055 drums of lubricating oil but to the "entire contents of Fuel Dump Area".

Moreover, the last paragraph of SPC Invoice No. 8236, states that "The buyer has inspected the items covered by this Invoice and found them acceptable". The use of the word "items" in its plural sense instead of in the singular, shows once more that the sale refers to several items composing the entire contents of the fuel dump area.

On the other hand, there is no showing by any kind of evidence, that the entries in the tally-out sheets regarding the deliveries to the petitioner in relation to the sale covered by SIC Invoice No. 8236, which entries were copied by Agent Amascual and Storekeeper-Gauger Maderozo of the Bureau of Internal Revenue in their working sheets, Exhibits 5-A, 5-B, and 5-C and summarized in Exhibit 5-I (p. 94, BIR rec.), were erroneous, irregular, or did not represent an honest and correct copy of the originals as filed in the office of the Accounting Officer of the Surplus Property Commission at Guiuan, Samar. These tally-out sheets, the entries of which were copied in Exhibits 5-A, 5-B and 5-C carry with them the presumption juris tantum of regularity having been prepared and accomplished in the regular performance of official duty. (Section 69 (m), Rule 123, Rules of Court) and the entries in the said official records, are prima facie evidence of the facts stated therein. (Sec. 35, Rule 123, Rules of Court).

The best evidence available therefore, under the circumstances of this case, from which to look into for the true and correct quantity and kind of oil purchased by petitioner from the Surplus Property Commission, is not the Invoice No. 8236 (Exhibit A, Exhibit 1, resp.) but the copy of the entries of the original tally-out sheets, as prepared by the two investigating agents.

Petitioner's counsel have tried to capitalize upon, by picking up here and there from the B.I.R. records of petitioner's present tax case, certain opinions or memoranda of officials of the Bureau of Internal Revenue supporting his side of the controversy. Petitioner's counsel, for example, presented Exhibit X (pp. 196, 197 and 198 BIR rec.), consisting of a memorandum submitted to respondent by the Acting Chief, Law Division of the Bureau of Internal Revenue, based on the original computation, Exhibit 2-A (p. 1, BIR rec.) dated October 12, 1948, of Agents Roman Carzon and Pablo Amascual recommending that he be taxed on the basis of only 3,055 drums of lubricating oil as stated in SPC Invoice No. 8236. The memorandum, Exhibit X, as well as the report, Exhibit 2-A, are nothing more than mere opinions, and the fact that the Collector of Internal Revenue chose instead to adopt the memorandum, Exhibits 8 and 8-A (pp. 187-191 BIR rec.) of the Chief of the Specific Division shows that the Collector has found the findings of his other subordinates erroneous or not well-founded. In this connection it is worthy of note that former Collectors of Internal Revenue Meer and Araneta are both agreed that the tax liability of petitioner should be computed on the basis of 4,957 drums of lubricating oil and not 3,055 drums. (ExhibitsH, 3, 10, pp. 11, 200 BIR rec.) Agents Carzon and Amascual themselves changed their original computation, Exhibit 2-A, after investigating the case thoroughly, as could be seen in their memorandum, Exhibit 4 (pp. 51, 52 C.T.A. rec.) dated October 18, 1948.

The evaluation made by Amascual and Maderazo of the entries appearing in the tally-out sheets, in computing the quantity of lubricating oil subject to specific tax as appearing in their working sheets, Exhibits 5-A, 5-B and 5-C is also assailed by the petitioner on the ground that, while in the tally-out sheets, the contents of the drums were invariably specified to be the full capacity of the containers, nevertheless, in the inventory of the property, Exhibit G, when it was placed under constructive distraint on December 7, 1948, and in the report of the Standard Vacuum Oil Co. (pp. 160-161, BIR rec.), there appears to be empty or partly filled drums. The falsity of the petitioner's contention lies in the wrong premise of the conclusion, because the inventory, Exhibit G, and the report of the STANVAC, were made very much posterior to the date of the consummation of the sale which was effected on January 29, 1948. The inventory, Exhibit G, was prepared on December 7, 1948, that is almost a year after the sale, and the report of the STANVAC was prepared on August 24, 1953, that is almost 5-1/2 years after the sale. The possibility of factors, such as leakage, evaporation and breakage due to exposure to the elements for a long period of time, as the reason for some drums to be empty or partly filled is not at all remote. In fact, although the alleged report (pp. 160-161 BIR rec.) of the STANVAC cannot be properly considered as evidence it not having been formally presented by petitioner, but for the simple purpose of showing the falsity of the argument, the report itself admits that there was a shortage due to leaking drums. In this connection, it should also be noted that in the last paragraph of SPC Invoice No. 8236, Exhibit A, there is a statement to the effect that, "the buyer has inspected the items covered by this Invoice and found them acceptable", and that the amount of consideration paid by petitioner was ₱26,500.00. We find it difficult to believe that the petitioner would accept as he did expressly accept, empty or partially filled drums covered by the invoice, Exhibit A, in exchange for such big amount of consideration paid in cash and in anticipation of a big profit which he estimates to be around ₱18,000.00 (p. 112 BIR rec.). We find it difficult to believe that such an old and conservative firm as the STANVAC would take the risk of paying in full for in behalf of petitioner, the compensating and specific taxes demanded by respondent in the total amount of ₱53,510.02 (based on 4,957 drums and not 3,055 drums) were it convinced that the lot purchased by petitioner contained a substantial number of empty or partially filled drums.

Barely has this Court been in existence for two years since its creation when a great majority of <u>bona fide</u> taxpayers who came to it with their just grievances have seen for themselves the benefits and advantages in its creation. So much so, that this Court has often been referred to in legal circles as well as among tax experts as "a sanctuary of taxpayers against abuses and errors" (The Philippines Herald issue of August 8, 1956; p. 105, Vol. XX, The Lawyers Journal March 31, 1955). True indeed, in consonance with the purpose for its creation, this Court is a sanctuary to the honest taxpayer who comes to it with just grievances and with clean hands. However, it is by no means a refuge to a taxpayer, like the petitioner herein, who, after promising the respondent in the seizure receipt, Exhibit G (p. 20 BIR rec.) that he would not remove any of the articles now in question from the surplus depot at Guiuan, Samar, without previous authority from the respondent, flagrantly violated the trust by removing 70 drums of lubricating oil from the lot placed under constructive distraint by the Collector of Internal Revenue, without first paying the taxes thereon as required by law. This Court cannot serve as sanctuary to a taxpayer like the petitioner herein, who, after the discovery of the anomaly just mentioned, paid the corresponding tax due thereon admitting at the same time in B.I.R. Delinquency Form No. 33.01, Exhibit N (p. 44, BIR rec.) a wanton violation on his part of section 142-b of the National Internal Revenue Code. This Court cannot serve as sanctuary to a taxpayer like the petitioner herein, who, not long after acquiring the oil in question on June 29, 1948, knew all along that his "paquiao" purchase was being investigated by the Bureau of Internal Revenue particularly as to the actual number of drums of oil bought by him from the Surplus Property Commission and, instead of helping the authorities arrive at the exact figures, as is naturally to be expected of a former officer of the Armed Forces of the Philippines, chose not to question the findings of the investigating agents and the assessment dating as far back as October 23, 1948 (Exhibit E, p. 11 BIR rec.) until after more than five (5) years had elapsed from the date of said assessment. Petitioner questioned the assessment after all the contents of the surplus depot purchased by him was disposed of, believing no doubt, that with the lapse of time it would be well nigh difficult for the Government to prove its case. Fortunately, the Bureau of Internal Revenue was able to preserve the working sheets, Exhibits 5-A, 5-B and 5-C, of Agent Amascual and Storekeeper-Gauger Maderazo, containing the exact figures taken from the tally-out sheets of the Surplus Property Commission no longer available at present as explained by witness Godofredo Bugarin. Otherwise, the Government would have had a difficult time defending itself in the present appeal filed by petitioner after a period of eight (8) years from the consummation of the sale.

As correctly invoked by counsel for the respondent, well may we apply to the instant case the ruling of the Supreme Court in Philippine Ready-Mix Concrete Co. vs. Villacorta and the Philippine Ready-Mix Concrete Co. vs. Perez (S.C. G.R. Nos. L-7978 and 7979, promulgated January 20, 1956) wherein it was held that:

> "x x x petitioner relies on pure technicality oblivious of the fact that the rules of evidence and procedure are not ends in themselves, but only means of achieving truth and justice. x x x x Having received the original statements of account, and being presumably in possession thereof it could have shown whether the disputed exhibits were faithful reproductions of those originals, or whether they were in any way deceitful. It did no such thing, but instead choose to raise a question of evidentiary virtuosity." (Underscoring supplied)

And what the Supreme Court said in the case of Tang Ho, et al. vs. The Board of Tax Appeals and the Collector of Internal Revenue (S.C. G.R. No. L-5949, promulgated November 19, 1955, to the effect that:

> "x x Any other view would leave the collection of taxes at the mercy of explanations concocted ex post facto by evading taxpayers, drafted to suit any facts disclosed upon investigation, and safe from contradiction because the passing years have erased all traces of the truth."

WHEREFORE, finding the decision of the respondent of March 21, 1955, appealed from, denying petitioner's request for refund of the amount of ₱29,556.03, in accordance with the evidence and the law, the same is therefore affirmed, with costs against petitioner.

SO ORDERED.

Manila, Philippines, August 29, 1956.

AUGUSTO M. LUCIANO
Associate Judge

WE CON-

DECISION -
C.T.A. CASE NO. 115

CUR:

MARIANO NABLE
Presiding Judge

ROMAN M. UMALI
Associate Judge