DCCD ENGINEERING CORPORATION,
Petitioner,

- versus - C.T.A. CASE NO. 3158

THE COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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

12/27/84

D E C I S I O N

This refers to the claim for refund of petitioner DCCD Engineering Corporation for the sum of ₱96,342.52 as alleged erroneous payment of the 3% contractor's tax for 1976, inclusive of the 25% surcharge, deficiency interest and compromise penalty.

Petitioner, a domestic corporation engaged in business as general contractor and as design and consultant engineers, entered into an "Agreement for Supervision of Construction Services" with the Philippine Government, thru the Ministry of Public Highways, for the Tarlac-Lingayen Road, Dagupan-Damortis Road and Urdaneta-Dagupan Road. After investigation of the business tax liability of petitioner for 1976, respondent Commissioner of Internal Revenue assessed and demanded from the company the amount of ₱96,342.52 as deficiency contractor's tax, when it was found that the 3% contractor's tax on the gross receipts derived by petitioner from its construction supervision services of the above-mentioned projects was neither paid nor withheld by the Ministry of Public Highways. Petitioner paid the said tax to the Bureau of Internal Revenue on October 25, 1978 per Revenue Tax Receipt No. 36789535. (Annex "B", p. 5, CTA records.)

In view of Sections 6.03 and 6.04 of Article VI of the aforesaid "Agreement", petitioner billed on November 6, 1978 the Ministry of Public Highways the amount of ₱96,342.52 which it paid to the Bureau of Internal Revenue, enclosing therewith the "Certification" of tax exemption issued by the Secretary of the then Department of Public Highways to support its claim. (Annexes "C" and "D", pp. 6-7, CTA records.)

As no fund was provided for the payment of said contractor's tax, the Ministry of Public Highways requested the Ministry of Finance in a letter dated November 14, 1978 to intercede on its behalf for the refund of the sum of ₱96,342.52 to petitioner DCCD Engineering Corporation, citing Letter of Instructions No. 128 dated September 14, 1973 as authorizing the Ministry of Public Highways to grant tax exempt status to consultancy agreements similar to that of petitioner's. (Annex "E", p. 8, CTA records.)

The Ministry of Finance in turn indorsed on January 8, 1979 the letter of the Ministry of Public Highways to respondent Commissioner of Internal Revenue for comment and recommendation. (Annex "F", p. 9, CTA records.)

On February 12, 1979, respondent Commissioner of Internal Revenue informed petitioner that its claim for refund was referred to the Chief, Services and Miscellaneous Tax Division of his office for study, but since then no action or decision was seasonably taken or rendered by respondent on the matter.

Hence this petition for review.

The case was submitted for decision on the basis of the pleadings and the records of the Bureau of Internal Revenue in this proceeding, and no memoranda were filed by the parties.

Petitioner contends that on the basis of Section 6.03 of Article VI of the "Agreement" it entered into with the Government through the Ministry of Public Highways, taking into consideration the mandate of Letter of Instructions No. 128, petitioner is not liable for the payment of the contractor's tax assessed against it and is therefore entitled to the refund of the amount of ₱96,342.52 from respondent. Section 6.03 of Article VI is reproduced hereunder: (pp. 7-8 of the Agreement, p. 113, BIR records.)

> "6.03 Any and all compensations, payments, reimbursements or expenses undertaken to be paid or assumed by the Government in favor of the Consultant under this Agreement are understood to have been determined and established to be net of the Contractor Tax, Joint Venture Tax, duties and other forms of Government levy attributable to the services under this Agreement. The Government, for and on behalf of the Consultant, shall assume the burden of such taxes whether national or local, duties or levies, if any, payable on any and

all compensations, payments, reimbursements or expenses undertaken to be paid or assumed by the Government under this Agreement in favor of the Consultant."

Letter of Instructions No. 128 dated September 14, 1973, cited by the Ministry of Public Highways as authorizing it to agree to the above condition, is as follows: (pp. 124-125, BIR records.)

"MALACAÑANG
Manila

September 14, 1973

LETTER OF INSTRUCTIONS
NO. 128

TO : 1. The Secretary of Finance

2. The Director-General
National Economic and
Development Authority

In order to secure uniformity in the tax treatment of consultants contracted by the Philippine Government, its agencies, entities and instrumentalities in connection with projects, financed with foreign loans, the following guidelines, in addition to those already observed in the review and approval of projects proposed for foreign financing, shall be further observed:

1. Approval of projects proposed by government agencies shall prescribe the condition that in negotiating tax provisions in consultancy contracts entered into by such agencies in implementation of the foreign loan and involving utilization of loan proceeds, the agency concerned shall agree to provisions exempting consultants from taxes and duties unless otherwise indicated by the consultants.

> 2. With respect to projects proposed by "proprietary" government corporations, as well as those involving the private section availing of government feasibility loans, approval of such projects shall be under the condition that the consultancy contracts to be entered into by such "proprietary" government corporations, including private sector contracts, in implementation of the foreign loan and involving utilization of loan proceeds, shall provide for the imposition of taxes and duties on the consultants irrespective of whether the taxes and duties are to be paid by the consultants or by the other party on a reimbursement basis.
>
> You are hereby enjoined to act accordingly.
>
> (SGD) FERDINAND E. MARCOS
> President
> Republic of the Philippines"

Respondent in his Answer alleges, among others, as special and affirmative defense, that the provision in the agreement executed between petitioner and the Ministry of Public Highways "is the concern of the contracting parties and therefore, cannot bind the respondent in recognizing their stipulations regarding exemption from the payment of tax." And that "Tax exemption privileges should always emanate from statutes expressly granting such privileges and never implied."

The records of the Bureau of Internal Revenue show that when this matter was referred to that office by the Ministry of Finance for comment on the request for intercession by the Ministry of Public Highways to consider the tax exempt status of petitioner and the granting of its claim for refund, the chiefs of said Bureau's different legal divisions rendered two divergent views. The view entertained by the majority was for favorable action on petitioner's claim for refund while the minority was for the denial of the refund.

The opinion of the Chief of the Law Division (p. 197, BIR records), concurred in by the Deputy Commissioner of Internal Revenue and the Chief of the Litigation Division (p. 202 and pp. 229-236, BIR records), is that the Commissioner of Internal Revenue should grant the refund. To quote:

> "I do not subscribe to the proposed action of the Appellate Division seeking to deny the claim for refund. As stated in my Memorandum of January 15, 1980, the taxpayer is exempt from the payment of the contractor's tax based on LOI 128 which provides that "the agency concerned shall agree to provision <u>exempting</u> consultants from taxes and duties unless otherwise indicated by the consultants." (Underscoring supplied). It may be stated that the agreement providing tax exemption is based on Section 4-A of R.A. No. 4860, as inserted by P.D. No. 150, quoted as follows:
>
> > 'SEC. 4-A. Upon the recommendation of the Secretary of Finance, in consultation with the National Economic and Development Authority and approval of the President of the Philippines, loan agreements as well as contracts involving the availment of or utilization of the proceeds of loans, credits or indebtedness obtained under the provisions of this Act, may provide for the exemption from taxes, charges, or other levies.'
>
> The proviso in the Agreement between the Philippine Government, thru the Ministry of

Public Highways, and the taxpayer stating that payments by the former shall be "net of the Contractor Tax" implements the above provisions of LOI 128 and P.D. No. 150. This means that the contractor shall receive amount without billing the contractor's tax against the Philippine Government. In this particular case, the taxpayer, in effect, was not allowed to pass on the tax to the Government. For in the case of the contractor's tax, the contractor although directly liable for the payment of the tax may legally pass on the same to the contractee. For this reason, and since the government also agreed to assume the payment of the tax, it is clear that the taxpayer was relieved from paying the contractor's tax. Such being the case, the payment of the contractor's tax by the taxpayer is erroneous which entitles it to a refund.

In view thereof, it is respectfully recommended that favorable action be taken on the above claim for refund."

On the other hand, the grounds relied on by the Chief of the Appellate Division and the Revenue Service Chief (Legal) in sustaining the opposite view are as follows: (p. 198, BIR records.)

"1. LOI No. 128 is not a tax-exemption grant. The said directive merely enjoins government agencies concerned to agree to a provision "exempting consultants from taxes and duties unless otherwise indicated by the consultants."

2. The agreement between the Ministry of Public Highways and the herein taxpayer is not a tax-exemption grant either, but it merely stipulates who shall assume the burden of paying the tax."

It is argued further that since the 3% contractor's tax paid by petitioner was not erroneously or illegally received by the Bureau of Internal Revenue, the reimbursement of the tax paid should be a matter to be resolved between the Ministry of Public Highways and petitioner DCCD Engineering Corporation.

Undoubtedly, there is no dispute that in accordance with the Agreement, the government is under obligation to refund the said contractor's tax to petitioner. The controversy hinges on who should issue the refund? Is it the Ministry of Public Highways or the Commissioner of Internal Revenue?

We are in accord with the majority view that respondent Commissioner of Internal Revenue should issue the refund.

As pointed out by the Chief of the Law Division, Article VI, Section 6.03 of the "Agreement for Supervision of Construction Services" implements the provisions of Letter of Instructions No. 128 and Section 4-A of Republic Act No. 4860 as inserted by Presidential Decree No. 150. There is no doubt that the above-mentioned Section 6.03 was included to comply with the provision of Letter of Instructions No. 128 that "approval of projects proposed by government agencies shall prescribe the condition that in negotiating tax provisions in consultancy contracts entered into by such agencies in implementation of the foreign loan and involving utilization of loan proceeds, the agency shall agree to provisions exempting consultants from taxes and duties unless otherwise indicated by the consultants." (Underscoring supplied.) The intention behind the promulgation of Letter of Instructions No. 128 is to secure uniformity in the tax treatment of consultants contracted by the Philippine Government and its agencies in connection with projects financed with foreign loans.

Thus, Article VI, Section 6.03 is explicit that "any and all compensations, payments, reimbursements or expenses undertaken to be paid or assumed by the Government in favor of the Consultant under this Agreement are understood to have been determined and established to be net of the Contractor Tax", which burden the Government shall assume for and on behalf of the Consultant.

Under the above proviso, petitioner's gross receipts are not exempted from the payment of the contractor's tax, but petitioner is relieved from such tax liability by reason of the assumption by the Government of the burden of such tax liability. While it is true that this tax exemption agreement is not a direct tax exemption grant, it is nevertheless binding upon respondent as it is clearly sanctioned by Letter of Instructions No. 128 and Section 4-A of Republic Act No. 4860. Since by authority of the aforementioned laws the Philippine Government had assumed petitioner's liability for the contractor's tax, respondent erred in collecting from petitioner the said tax.

The proponents for the denial of the claim for refund insist that by virtue of Article VI, Section 6.04 which is quoted below, the proper agency to make the reimbursement is the Ministry of Public Highways which is the party to the Agreement: (p. 8 of Agreement, p. 113, BIR records.)

> "6.04 If notwithstanding the assurances of the preceding paragraph, the Consultant is, for any reason, compelled to pay the Contractor Tax, Joint Venture Tax, duties or levies, then, in that event, the Government will anticipate payment to or immediately reimburse the Consultant for such taxes, duties or levies mentioned in Art. 6.03 assessed and collected against him in connection with the Services."

The authority to refund erroneously or illegally received internal revenue taxes, and the 3% contractor's tax is undisputedly an internal revenue tax, is vested exclusively with the Commissioner of Internal Revenue under Section 309 (now Section 295) of the National Internal Revenue Code. Section 309 (now Section 295) of the Tax Code clearly and explicitly authorizes the Commissioner of Internal Revenue to credit or refund taxes erroneously or illegally received. Since the deficiency contractor's tax under consideration was erroneously, if not illegally, collected from petitioner by respondent, it follows that respondent Commissioner of Internal Revenue, and not the Ministry of Public Highways, should issue the refund.

ACCORDINGLY, respondent Commissioner of Internal Revenue is hereby ordered to refund to petitioner DCCD Engineering Corporation the amount of ₱96,342.52. Without pronouncement as to costs.

SO ORDERED.

Quezon City, Metro Manila, December 27, 1984.

AMANTE FILLER
Presiding Judge

I CONCUR:

CONSTANTE C. ROAQUIN
Associate Judge

Dissents in separate opinion.
ALEX Z. REYES
Associate Judge

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

DCCD ENGINEERING CORPORATION,
Petitioner,

- versus - C.T.A. CASE NO. 3158

THE COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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

2/11/84.

DISSENTING OPINION

Upon the facts on record and as so provided in an Agreement for Supervision of Construction Services between the Government represented by the Ministry of Public Highways and the Norconsult A.S./DCCD Engineering Corporation, is that "The Government, for and on behalf of the Consultant, shall assume the burden of such taxes whether national or local, duties or levies, if any" (Sec. 6.03), conformably with the authority that the "Agency concerned shall agree to provisions exempting consultants from taxes and duties unless otherwise indicated by the consultants." (LOI No. 128, September 14, 1973). This contractual stipulation is by no means the contemplated statutory grant of tax exemption privilege binding upon the Bureau of Internal Revenue. The respondent Commissioner of Internal Revenue had therefore rightly demanded and collected the corresponding contractor's tax legally due on the petitioner's undertakings.

Nonetheless, the payment by the petitioner of the tax did not exculpate the Ministry of Public Highways from complying with its obligation per Agreement which remains valid and enforceable. As thus, "If notwithstanding the assurances of the preceding paragraph, the consultant is, for any reason, compelled to pay the Contractor's Tax, Joint Venture Tax, duties or levies, in that event, the Government will anticipate payments to or immediately reimburse the consultant for such taxes, duties or levies mentioned in Article 6.03 assessed and collected against him in connection to the services." (Sec. 6.04 of the Agreement). Suffice it to state that Ministry of Public Highways has not reneged in its commitment with such reassurance that "As a corollary action, we are requesting the Budget Commission for the release of funds to cover the reimbursement in case the reconsideration is denied." (Letter of the Minister of Public Highways to the Minister of Finance on November 14, 1978). The chips otherwise leviable on the petitioner but for the contractual stipulation definitely lie with the Ministry of Public Highways upon which any recourse for relief must be addressed.

The respondent Commissioner of Internal Revenue cannot serve as a convenient "wailing wall" as would relieve petitioner's predicament in a tizzyly whipped-up short order claim to a refund. This sounds sort of a barking at the wrong tree expecting the unexpected. I cannot see my way clear in treading the same path precipitately blazed by my distinguished colleagues.

Petition has to be dismissed with costs.

Quezon City, Metro Manila, February 11, 1985.

ALEX Z. REYES
Associate Judge