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P.J. KIENER COMPANY, LTD., INTERNATIONAL CONSTRUCTION CORPORATION and GAVINO T. UNCHUAN,
Petitioners,

- versus -

C.T.A. CASE NO. 1140

THE COLLECTOR OF INTERNAL REVENUE,
Respondent.

9/14/78

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D E C I S I O N

On the basis of the tax exemption provision written in the Military Bases Agreement between the Republic of the Philippines and the United States of America dated March 14, 1947, and pursued in the "Aide Memoire" between the two Governments on April 27, 1955, petitioners P. J. Kiener Company, Ltd., International Construction Corporation and Gavino T. Unchuan seek in this suit for the recovery of national internal revenue taxes alleged to have been erroneously or illegally collected the refund or tax credit of the following amounts, with legal interest, to wit:

a) ₱3,425.75 alleged to have been paid as sales tax on the dynamite and blasting caps bought from Macondray & Company, Inc.;

b) ₱4,710.96 representing alleged advance sales tax on the gypsum imported and utilized by Republic Cement Corporation on the cement sold to petitioners; and

c) ₱1,601.66 as payment of alleged ad valorem tax on lime extractions by Republic Cement Corporation on cement sold to petitioners.

Petitioner P. J. Kiener Company, Ltd., a domestic limited copartnership with offices at Davao City and Quezon City; petitioner International Construction Corporation, a domestic corporation duly organized and existing under and by virtue of the laws of the Philippines with offices at Manila; and petitioner Gavino T. Unchuan, a duly licensed civil engineer residing at Cebu City; all engaged, among others, in the business of contracting, entered into a joint venture as contractors for the purpose of bidding, and were awarded the contract for, the construction of the Mactan Airfield at Mactan Island, Opon (now Lapu-Lapu City), Cebu. And so, on February 19, 1958, the Republic of the Philippines, represented by the Chief of Staff, Armed Forces of the Philippines, entered into a contract with petitioners, the pertinent provisions of Article I of which states:

> "Article I - That the advertisement, instructions to bidders, general conditions ..... are made integral parts of this contract by incorporation and reference respectively."

and Section 3-19 of the "General Conditions" forming an integral part of the contract provides:

> "3-19 Taxes - In accordance with the Mutual Defense Agreement between the United States of America and the Republic of the Philippines, no tax of any kind or description will be levied on any material, equipment or supplies which may be purchased or otherwise acquired in connection with the project under contract, which material, equipment or supplies are required solely for that project."

During the period covering March 23, 1959 to March 7, 1961, petitioners purchased on terms from Macondray & Co., Inc., several cases of dynamite and several thousands of blasting caps at a total price of ₱101,343.65 for the use, allegedly, in the construction of the Mactan Airfield, which purchase price, it is claimed, included the sales tax in the sum of ₱3,425.75 paid by the seller to the Bureau of Customs. Petitioners likewise made purchases during the period covering September 11, 1959 to September 10, 1960 from Republic Cement Corporation through its distributor, Amon Trading Corporation, of 288,330 bags of portland cement at a total price of ₱803,824.00. And from August 31, 1959 to August 29, 1960, petitioners also purchased from Republic Cement Corporation through another distributor, Theo H. Davies Co., Far East Ltd., some 300,835 bags of portland cement at a total purchase price of ₱836,938.00, all of which were allegedly used in the construction of the Mactan Airfield. The amount of ₱4,710.96 as advance sales tax was allegedly paid on the gypsum imported and utilized by Republic Cement Corporation in the manufacture of the cement; while the sum of ₱1,601.66 representing ad valorem tax was allegedly paid on lime extractions used by Republic Cement Corporation in the manufacture of its cement, all of which were paid by Republic Cement Corporation as manufacturer to respondent, but claimed to have been billed to petitioners as part of the purchase price.

Pursuant to the provisions of Section 3-19 of the "General Conditions" embodied in the above-mentioned contract, and also on the basis of their assertions that the prices at which the cement and explosives (dynamite and blasting caps) were sold to them included the internal revenue taxes paid by the sellers to respondent, directly or through the Bureau of Customs, which were allegedly passed on to and shouldered by them, petitioners on September 22, 1961 requested the Collector (Commissioner) of Internal Revenue for the refund of the amounts of P4,710.96 and P1,601.66, supposedly paid by Republic Cement Corporation as advance sales tax upon the importation of gypsum and ad valorem tax on lime extractions, respectively, used by Republic Cement Corporation in the manufacture of the cement purchased by petitioners. On October 6, 1961 petitioners also requested the Collector (Commissioner) of Internal Revenue for the refund of the amount of P3,425.75 as sales tax allegedly paid by Macondray & Company, Inc. to the Bureau of Customs, as agent of respondent, on the explosives sold to them which were used in the construction of the Mactan Airfield.

After the issues were joined, the case was set for trial on the merits. After several postponements, however, petitioners, through counsel, manifested during the hearing of the case on August 11, 1970 that they are abandoning their claim for refund or tax credit of the advance sales tax paid on the imported gypsum and *ad valorem* tax on the lime extractions, covered under paragraph 9 of their petition for review, limiting their claim only to the refund of the sales tax paid on the explosives (dynamite and blasting caps) purchased from Macondray & Company, Inc. (Minutes of the session held by the Court of Tax Appeals on August 11, 1970, p. 104, CTA records; t.s.n., pp. 2-3, hearing held on August 11, 1970.) Thereafter, petitioners proceeded to offer evidence, oral and documentary, in support of their claim for refund of the sales tax in question. Failing to present the original receipts evidencing payment of the sales tax, petitioners however requested time within which to secure from the Bureau of Customs a certification of such payment. After several postponements of the trial of the case to afford them enough time to get the required certification, petitioners, during the hearing on February 18, 1977, finally submitted the case for decision without presenting the original receipts or certification of payment of the sales tax sought to be refunded.

For his part, respondent requested that he be given time to file a motion to dismiss. However, he eventually submitted this case for decision, without the motion to dismiss, after filing his memorandum. No memorandum was submitted by petitioners although they were given ample time to do so.

Petitioners' claim that they are entitled to the refund or tax credit of the amount of ₱3,425.75 representing alleged payment of the sales tax on the dynamite and blasting caps sold to them by Macondray & Company, Inc., is positively without basis.

As correctly pointed out by respondent, the question involved in this case is not of first impression. In the case of Commissioner of Internal Revenue vs. P. J. Kiener Company, Ltd., International Construction Corporation, Gavino T. Unchuan and the Court of Tax Appeals, L-24754, July 18, 1975, 65 SCRA 142, involving the same parties; the same tax exemption provision provided in the Military Bases Agreement between the Philippines and the United States, and pursued in the "Aide Memoire" of the two Governments; and the identical question of whether petroleum products purchased to run and maintain machineries and equipment are "materials" or "supplies" "purchased or otherwise acquired in connection with" the construction of the Mactan Airfield and which "materials" or "supplies" are required "solely" for such project for the exemption to apply, the Supreme Court ruled that only materials and supplies that are needed to be <u>incorporated</u> in the construction of the airfield are covered by the tax-exemption proviso. Explained by the Supreme Court in the following rationale:

> The sense which private respondents (petitioners herein) proffer to attach to the terms "materials" and "supplies" eludes the <u>link</u> welded into the Military Bases Agreement and "Aide Memoire" and recognized

in Section 3-19 of the "General Conditions". The Military Bases Agreement states that "No import, excise, consumption or other tax ..... shall be charged on material, equipment, supplies or goods, ... for exclusive use in the construction ..... of the bases ....." The "Aide Memoire" provides: "..... no internal taxes of any kind or description, except income taxes, shall be levied on any materials, equipment, supplies and/or services which may be purchased or otherwise acquired in connection with the /construction of the Mactan Airfield/ . . . ." Section 13-9 of the "General Condition" stipulates that "..... no tax of any kind or description will be levied on any material, equipment or supplies which may be purchased or otherwise acquired in connection with the project ....." Reduced into simple terms, the underscored phrases continuously used in the two treaties and in the contract could only mean, collectively, "construction" materials or supplies which must necessarily be incorporated in the construction of the airfield. For the terms "materials" and "supplies" refer to something "going into or consumed" in the performance of the work such as mortar, cement, sand, bricks, lumber or nails, glass, hardware and a thousand other things that might be meant, which are necessary to the completed erection of a building or structure. x x x x x.

x x x x x   x x x x x   x x x x x

x x x x x. Explicitly, the "materials" and "supplies" must be for exclusive use in, in connection with, and required solely for the construction of the Mactan Airfield. In short, the "materials" and "supplies" need be incorporated in the construction for the exemption to apply. x x x x x.

Since the subject dynamite and blasting caps were not incorporated in the construction of the Mactan Airfield but were used in removing rocks in the process of grading the airfield (t.s.n., pp. 41-42), we find no cogent and valid reason to depart from the conclusion reached by the Supreme Court in the above-cited case as expressed in the above-quoted opinion, and the same

should

should resolve the identical problem now brought before us in this proceeding. It therefore results, as respondent contends, that petitioners' cause of action is in effect now barred by prior judgment.

We can press further the reason why petitioners are not entitled to the refund of the alleged sales tax in question based on their failure to prove to the satisfaction of the Court the fact of payment of the said tax. In the course of the trial of this case, petitioners have offered in evidence Exhibits B, B-1 to B-11, which consist of photostatic copies of alleged receipts of payment of the sales tax of the dynamite and blasting caps made during the years 1959 to 1961 in the total amount of ₱3,425.75 by Macondray & Company, Inc. to the Bureau of Customs. Being merely secondary evidence, and there being no proof that the originals have been lost, destroyed or cannot be produced in court, respondent objected to their admission. The Court therefore requested petitioners to present the original receipts, or in their absence, to secure from the Bureau of Customs a certification of the fact of payment of the alleged sales tax sought to be refunded. (t.s.n., p. 10, hearing on August 11, 1970.) While the trial of this case was postponed several times to give petitioners the chance to present the required original receipts or certification from the Bureau of Customs, they (petitioners) never submitted any of these documents. Instead, during the hearing on February 18, 1977, petitioners submitted the case for decision without presenting proof positive on record of the payment of the alleged sales tax.

Needless to say, there can never be a refund of a tax alleged to have been erroneously or illegally paid or collected without proof of payment thereof. And one who pleads payment has of course the burden of proving it. Petitioners have therefore the burden of proof not only to show that they are entitled to the refund of the sales tax in question but also to establish the fact of payment of the said tax. Consequently, failure on their part to prove to the satisfaction of the Court the payment of the sales tax alleged to have been erroneously or illegally assessed or collected is fatal to their claim for refund.

One who claims to be exempt from the payment of a particular tax must do so under clear and unmistakable terms found in the statute. Tax exemptions are strictly construed against the taxpayer, they being highly disfavored and may almost be said "to be odious to the law." He who claims an exemption must be able to point to some positive provision of law creating the right; it cannot be allowed to exist upon a mere vague implication or inference. (Asiatic Petroleum vs. Llanes, 49 Phil., 466,471; Union Garment Co., Inc., vs. Court of Tax Appeals, L-16809, January 31, 1962, 4 SCRA 304;

Philippine Acetylene Co., Inc. vs. Commissioner of Internal Revenue, L-19707, August 17, 1967, 20 SCRA 1056; Republic Flour Mills, Inc. vs. Commissioner of Internal Revenue, L-25602, February 18, 1970, 31 SCRA 520; Commissioner of Customs vs. Philippine Acetylene Co., & Court of Tax Appeals, L-22443, May 29, 1971, 39 SCRA 71; Davao Light and Power Co., Inc. vs. Commissioner of Customs, L-28902, March 29, 1972, 44 SCRA 122.) The right of taxation will not be held to have been surrendered unless the intention to surrender is manifested by words too plain to be mistaken (Ohio Life Insurance & Trust Co., vs. Debolt, 60 Howard, 416), for the state cannot strip itself of the most essential power of taxation by doubtful words; it cannot, by ambiguous language, be deprived of this highest attribute of sovereignty (Erie Railway Co. vs. Commonwealth of Pennsylvania, 21 Wallace, 492,499). So, when exemption is claimed, it must be shown indubitably to exist, for every presumption is against it, and a wellfounded doubt is fatal to the claim (Farrington vs. Tennesse & County Shelby, 95 U.S. 679.686.) (See Asiatic Petroleum Co. vs. Llanes, supra; Manila Electric Company vs. Vera, L-29987, October 22, 1975 & Manila Electric Company vs. Tabios, L-23847, October 22, 1975, 67 SCRA 351.) Especially when it is considered that for the Philippine Government, "the exception contained in the tax statutes must be strictly construed against the one claiming the exemption" (Union Garment Co., Inc. vs. Court of Tax Appeals, L-16809, January 31, 1962, 4 SCRA 304; Commissioner of Internal Revenue vs. Guerrero, L-20942, September 22, 1967, 21 SCRA 180; Republic Flour Mills, Inc. vs. Commissioner of Internal Revenue, L-25602, February 18, 1970, 31 SCRA 520) because the Court "does not look with favor in tax exemptions and that he who would seek to be thus privileged must justify it by words too plain to be mistaken and too categorical to be misinterpreted." (Reagan vs. Commissioner of Internal Revenue, L-26379, December 27, 1969, 30 SCRA 968.)

WHEREFORE, we find no merit in this appeal and the same is hereby dismissed at petitioners' costs.

SO ORDERED.

Quezon City, September 14, 1978.

AMANTE FILLER
Acting Presiding Judge

I CONCUR:

CONSTANTE C. ROAQUIN
Associate Judge