REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ANSCOR CONTAINER CORPORATION,
Petitioner,

- versus -

C.T.A. CASE NO. 4467

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated : APR 24 1995

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DECISION

On appeal before this Court is a petition for review of respondent's decision assessing petitioner for 1984 deficiency sales tax and deficiency final tax on dividends in the respective amounts of P1,541,073.95 and P39,722.30.

Allegedly, petitioner is a service contractor processing raw materials provided by its customers into steel drums and other containers based on specifications provided by such customers.

Since 1955, its directors have been receiving as their compensation an amount of equal to two and one-half per cent (2½%) of the net profits of the company for the preceding fiscal year, to be equally apportioned among them.

On May 30, 1988, it filed a protest with respondent to question the aforesaid assessments.

On June 1, 1990, petitioner received a letter from respondent denying its protest.

Hence, this appeal filed with this Court on June 29, 1990.

Issues raised in the case are the following:

1. Whether or not subject assessments are barred by prescription;

2. Whether or not petitioner acted as a contractor in the subject transactions with Pilipinas Shell Petroleum Corporation (Pilipinas Shell) and Marinduque Mining Industrial Corporation (MMIC);

3. Whether or not the directors' fees given by petitioner constitute dividends subject to 15% final tax.

On hand for primary consideration is the issue on prescription. Petitioner contends that the assessment for deficiency sales tax was issued on May 23, 1988. Its subject matter are sale transactions that occurred before December 31, 1984. This being so, the percentage tax return for the said transactions should be filed on the 20th day of the month after the end of the last quarter in 1984 or not later than April 20, 1985, to be exact. Three years from April 20, 1985 is April 20, 1988.

Petitioner asserts that respondent's right to assess should be exercised on or before April 20, 1988. As the assessment in question was issued only on May 23, 1988, petitioner concludes that respondent's right to assess has already prescribed.

The same argument has been applied by petitioner to respondent's assessment for deficiency final tax on dividends. It professes that respondent has only up to April 15, 1988 within which to issue valid income tax assessment. Obviously, since subject assessment was similarly issued on the same date of May 23, 1988, the same right of respondent to assess has already prescribed.

We beg to disagree. Respondent's right to assess has not prescribed. A waiver of the defense of prescription (Exhibit "4" of Respondent, p. 341, BIR records) was duly executed by Mr. Raul V. Locsin on February 24, 1988, in his capacity as president of petitioner in consideration of its request for reinvestigation of its internal revenue tax liabilities for 1984. The existence of this waiver was mentioned by respondent in his answer under paragraph 6 of his special and affirmative defenses. The validity of this waiver finds support in Section 223 of the Tax Code, pertinent provisions of which are quoted as follows:

> "Section 223. *Exceptions as to period of limitation of assessment and collection of taxes -*
>
> (a) x x x
>
> (b) If before the expiration of the time prescribed in the preceding section for the assessment of the tax, both the Commissioner and the taxpayer have agreed in writing to its assessment after such time, the tax may be assessed within the period agreed upon. The period so agreed upon may be extended by subsequent written agreement made before the expiration of the period previously agreed upon.
>
> (c) x x x
>
> (d) x x x
>
> (e) x x x ." (Underscoring supplied)

Applying the foregoing, it is beyond question that the waiver was legally and/or validly executed. It was put into writing on February 24, 1988 which is prior to April 20, 1988, respondent's deadline to assess. And it was signed by both the Deputy Commissioner of Internal Revenue, Eufracio D. Santos and the President of petitioner, Raul V. Locsin.

Petitioner argues that respondent could not invoke that waiver as it specifically pertains to assessments for income tax for "prior year's expenses" and the percentage tax assessment. Therefore, even if the waiver is assumed to be valid such could not be deemed to apply with respect to the assessment for the deficiency withholding tax on dividends.

Again, we beg to disagree. A reading of the said waiver stating that:

> "I, Raul V. Locsin x x x do hereby waive the defense of prescription under the statute of limitations prescribed in Sections 268 and 269 and other related provisions of the National Internal Revenue Code, <u>and consent to the assessment and/or collection of the tax or taxes for said year which may be found due after investigation/reinvestigation</u> at any time before or after the lapse of the period of limitations fixed by said sections of the National Internal Revenue Code.
>
> x x x." (Underscoring supplied)

shows clearly that petitioner, through its president, agrees in writing that the waiver's application is not limited to income and percentage tax assessments of its contract sales but extends to all other taxes which may be found due after the investigation or reinvestigation.

The Court now comes to the second issue. Petitioner contends that its subject transactions with Pilipinas Shell and MMIC were mere contracting services on the ground that the raw materials it used in processing the drums and other steel containers were supplied by said customers. Moreover, these drums or containers were made in accordance with the designs or specifications provided by Pilipinas Shell and MMIC.

On the contrary, respondent's examiner, Ms. Olivia Lao, maintains that petitioner's transactions are not only limited with Pilipinas Shell and MMIC. There are other customers similarly situated and yet were charged with manufacturer's tax. Pertinent portion of Ms. Lao's testimony taken during the hearing of January 17, 1995 is reproduced hereunder:

"ATTY. URBANO

Q. Now, in your report, Miss Witness, your reason or one of your reasons in recommending an assessment for deficiency sales tax in the amount of P1,463,605.43 is that petitioner is really a manufacturer, is that correct?

A. Yes, because their SEC registration papers would show that. And on top of that, they also serve customers who are similarly situated and yet they charge them for sales tax and not contractor's tax. Because, actually, the sales there are sales arising from sale to Shell, I think, and the other one is Marinduque Mining, wherein it was subjected to contractor's tax because according to them the raw materials were provided by the customers. But in other instances wherein they also serve clients who are similarly situated, meaning, they also serve clients in the chemical industry and also in the mining industry, they charge the sales tax and not the contractor's tax. (T.S.N., hearing of January 17, 1994, pp. 21-22; Underscoring supplied)

Based on the above findings, the Court holds the view that it is erroneous for petitioner's counsel to limit its discussion of the second issue only to transactions of petitioner with Pilipinas Shell and MMIC. As it will be shown later, petitioner has no less than a hundred of customers to transact with.

Be that as it may, the Court still finds for the respondent. Petitioner's transactions with Pilipinas Shell and MMIC are manufacturing in nature. The fact that the drums or steel containers were made in accordance with specifications or designs provided by aforesaid customers is of no moment. Petitioner's witness, Atty. Rodolfo Padilla, has admitted in open court that the mainline of petitioner's business is manufacturing of drums. Thus, in the hearing of January 27, 1993, T.S.N. pp. 36-37, he testified as follows:

"JUDGE GRUBA

I will just ask some questions?

How many customers do Anscor Container Corporation have?

A. We have at least a hundred.

JUDGE GRUBA

The mainline of your business is manufacturing of drums?

A. Yes, Your Honor."

In one case, it has been held that:

> "x x x The important thing to remember is that Celestino Co and Company habitually makes sash, windows and doors, as it has represented in its stationery and advertisements to the public. That it "manufactures" the same is practically admitted by appellant itself. The fact that windows and doors are made by it only when customers place their orders, does not alter the nature of the establishment, for it is obvious that it only accepted such orders as called for the employment of such materials - moulding, frames, panels - as it ordinarily manufactured or was in a position habitually to manufacture." (**Celestino Co and Co. vs. Collector of Internal Revenue**, 99 Phil. 843-844)

In the same way, petitioner in the ordinarily course of its business habitually manufactured drums and other containers, although in the case of sale to Shell and Marinduque Mining, the same were manufactured upon their specific orders.

In another decision it has been ruled that:

> Petitioner wants to impress upon this Court that under Article 1467, the true test of whether or not the contract is a piece of work (and thus classifying private respondent as a contractor) or a contract of sale (which would classify private respondent as a manufacturer) is the *mere existence of the product at the time of the perfection of the contract* such that if the thing already exists, the contract is of sale, if not, it is work.
>
> This is not the test followed in this jurisdiction. As can be clearly seen from the wording of Art. 1467, what determines whether the contract is one of work or of sale is *whether the thing has been "manufactured specially for the customer and upon his special*

order." Thus, if the thing is specially done at the order of another, this is a contract for a piece of work. If, on the other hand, the thing is manufactured or procured for the general market in the ordinary course of one's business, it is a contract of sale.

Jurisprudence has followed this criterion. As held in ***Commissioner of Internal Revenue vs. Engineering Equipment and Supple Co.*** (L-27044 and L-27452, June 30, 1975, 64 SCRA 590, 597), "the distinction between a contract of sale and one for work, labor and materials is tested by the inquiry whether the thing transferred is one not in existence and *which never would have existed but for the order of the party desiring to acquire it,* or a thing which would have existed and has been the subject of sale to some other persons even if the order had not been given." (Italics supplied.) And in a BIR ruling, which as per Sec. 236 (now Sec. 277) of the Tax Code the Commissioner has the power to make and which, as per settled jurisprudence is entitled to the greatest weight as an administrative view [**National Federation of Sugar Workers (NFSW) vs. Ovejera**, G.R. No. 59743, May 31, 1982, 114 SCRA 354, 391; **Sierra Madre Trust vs. Hon. Sec. of Agriculture and Natural Resources**, Nos. L-32370 and L-32767, April 20, 1983, 121 SCRA 384; **Espanol vs. Chairman and Members of the Board of Administrators, Phil. Veterans Administration**, L-44616, June 29, 1985, 137 SCRA 314], "one who has ready for the sale to the general public finished furniture is a manufacturer, *and the mere fact that he did not have on hand a particular piece or pieces of furniture ordered does not make him a contractor only*" (BIR Ruling No. 537, series of 1960). Likewise,

xxx xxx xxx

When the vendor enters into a contract for the delivery of an article which in the ordinary course of his business he manufactures or procures for the general market at a price certain (Art. 1458) such contract is one of sale *even if at the time of contracting he may not have such article on hand.* Such articles

> fall within the meaning of "future goods" mentioned in Art. 1462, par. 1. [5 Padilla, Civil Law: Civil Code Annotated 139 (1974)].
>
> xxx xxx xxx
>
> (**Commissioner of Internal Revenue vs. Arnoldus Carpentry Shops Inc.** pp. 206-207; Underscoring supplied)

From the above-quoted decision, it is too clear that even if petitioner did not have on hand a particular drum which is being ordered, such situation will not alter its classification as a manufacturer. As enunciated by the aforequoted jurisprudence, the contract will remain that of sales because the manufacture of drum is in the ordinary course of its business which it does or procures for the general market at a price certain. To put it in another way, thus, the articles ordered by the purchaser are exactly what the manufacturer makes and keeps on hand for sale to anyone. The transaction would remain that of sale although in the case of Shell and Marinduque Mining, the same were manufactured upon their specific orders.

Furthermore, the representation or declaration to the public that it is a manufacturer was made in the purpose clause of its Articles of Incorporation (p. 11, BIR records), in its Residence Certificate for 1984 (p. 51, <u>ibid</u>.), as well as in its Management Contract with A. Soriano (p. 21, <u>supra</u>). Petitioner cannot have its own cake and eat it too. Why did it declare in said records or documents that it is a manufacturer and then for taxation purposes, it claims that it is a mere contractor? By not divulging the true intention/s or purpose/s of its incorporation, petitioner clearly puts the government at its mercy. If petitioner wants to be known or taxed as a manufacturer, then so be it, for it is expressly provided in its Articles of Incorporation. However, if petitioner wants to be charged a lower rate of tax, then it will also claim it is a mere contractor. It will simply present a Contract or Agreement it entered into with its customer to the effect that petitioner will manufacture metal containers pursuant to said customer's order and specifications. This Court feels that this situation is not conducive to a stable tax administration. Although it may be admitted that on some occasions petitioner does some contracting services, the fact remains, as borne by its accounting and public records, that it is principally a manufacturing concern. This is backed up by the figures lifted from its journal entries that gave rise to the total amount of P65,737,959.32 that was subjected to sales tax. Breakdown of said amount, as appearing on page 178, BIR records is as follows:

"Manufacturing Sales	P61,751,611.19
Contract Sales	3,977,466.79
Total per F/S - Exh. "D-3" of petitioner (p. 97, BIR records)	P65,729,077.96
Add: Special Price Discount	8,881.36
Taxable Sale	P65,737,959.32"

Evidently from the above, the principal line of business of petitioner is manufacturing as its manufacturing sales in the amount of P61,751,611.19 comprises 94% of its total taxable sales. Contract sales in the minimal amount of P3,977,466.77 is only 6% of its total taxable sales.

From all the foregoing, petitioner therefore is a manufacturer and not a mere contractor of services. It is truly a manufacturer and hence, subject to 10% sales tax.

With regard to the third issue, respondent asserts that the director's fees were actually dividends issued to directors who have substantial holdings in A. Soriano Corporation (par. 9, Answer, p. 31, CTA records).

Respondent's assertion is without merit. His examiner miserably failed to prove in court that the director's fees were dividends in reality. The list of director's shareholdings and fees from 1983 to 1985 which was marked as Exhibit "5" for respondent (p. 334, BIR records) and the general information sheet of A. Soriano Corporation did not prove anything favorable to the respondent. On the contrary, said Exhibit "5" all the more strengthened petitioner's stance that the director's fees paid were not in any way related to the number of shares held by the directors. The director's fees, if they were indeed dividends, were overproportioned to the nominal shares held by the directors.

Moreover, even if the directors of subject petitioner own substantial shareholdings in A. Soriano Corporation, respondent has no legal nor factual basis to presume that management fees issued by petitioner to directors of A. Soriano are in the guise of dividends. Well-settled is the rule that "the presumption of correctness of assessment being a mere presumption cannot be made to rest on another presumption." (**Commissioner of Internal Revenue vs. Benipayo**, G.R. No. L-13656, Jan. 31, 1962)

WHEREFORE, in view of all the foregoing, respondent's assessment for deficiency final tax on dividends in the amount of P39,772.30 is hereby cancelled for lack of merit.

However, petitioner is hereby ordered to pay the respondent the amount of P1,541,073.95 as deficiency sales tax for 1984, plus 25% surcharge and 20% interest thereon from May 23, 1988 until fully paid pursuant to Sections 248 and 249 of the Tax Code as re-numbered and re-arranged by Executive Order No. 273, which took effect on January 1, 1988.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

MANUEL K. GRUBA
Associate Judge

RAMON O. DE VEYRA
Associate Judge

CERTIFICATION

I hereby certify that the decision was reached after due consultation among the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge
Court of Tax Appeals