

WONG & LEE, PETITIONERS, VS. COLLECTOR OF INTERNAL REVENUE AND COURT OF TAX APPEALS, RESPONDENTS.

G. R. No. 10155. August 30, 1958

Ponente: MONTEMAYOR, J.

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MONTEMAYOR, J.:

This is an appeal by Wong & Lee from the decision of the Court of Tax Appeals, affirming that of respondent Collector of Internal Revenue and ordering petitioners to pay the Collector the sum of P3,170.03, representing deficiency amusement tax, inclusive of surcharges, with costs.

During the period included between January, 1952, and December 31, 1953, the petitioners Wong Lee Din and Juanito Lee Tim, doing business under the firm name Wong & Lee, operated under a lease contract, the Riviera, "a night club located at Dewey Boulevard, Pasay City, owned by Mariano Zamora". At the beginning of the year 1953, Ted Lewin promoted the coming of the Xavier Cugat Orchestra for a series of performances at the International Fair Auditorium in Manila. Acting as promoter and booking agent of the Cugat Orchestra, Ted Lewin entered into a contract with Wong & Lee in the early part of February, 1953, whereby the Cugat Orchestra, after its matinee and evening performances at the International Fair Auditorium, was to play and hold floor shows at the Riviera for nineteen nights, from February 13 to March 8, 1953. Under the contract, Ted Lewin was to get all the cover charges collected from the patrons of the night club as his compensation for sponsoring the playing and holding of floor shows by the Cugat Orchestra at the Riviera, while petitioners were to get the proceeds derived from food and drinks served within the club premises during said period.

Under the provisions of Sections 260 of the National Internal Revenue Code, as amended by Republic Act No. 43, imposing upon operators, proprietors and lessees of night clubs the amusement tax of 10 per cent of the gross receipts, petitioners, for the period from February 13 to March 8, 1953, declared in their amusement tax return on cover charges the sum of P23,102.50, for which they paid the corresponding amusement tax of 10 per cent or P2,310.25.

On or about March 18, 1953, while the Bureau of Internal Revenue (BIR) agents Suarez, Lontok and Jongko were, on orders of their superiors, examining the books of accounts and other papers of Ted Lewin at the Bay View Hotel in connection with his different business ventures and promotions, the said agents found various working sheets, chits, receipts and other papers, Exhibits 2 to 11, which they found to have some connection with the performances rendered by the Cugat Orchestra at the Riviera Night Club. The papers formed part of the bundle of records, delivered to the agents by Carlos Magdaluyo, accountant-bookkeeper of Ted Lewin. The BIR agents issued a receipt for the exhibits and took them away with them. After a careful examination and evaluation of the same, they concluded that the real amount of the cover charges collected at the Riviera during the nineteen nights that the Cugat Orchestra played and gave floor shows there, was P41,217 and not P23,102.50, as declared by petitioners in their return. As a result, respondent Collector assessed against petitioners the sum of P3,170.03, as follows:

"Total receipts per investigation..... P41,217.00
 Less: Total gross receipts per return 23,102.50
 Undeclared gross receipts..... P18,114.50
 10% tax due on P18,114.50 P1,811.45
 25% surcharge for late payment..... 452.86
 50% surcharge for willful under-declaration of gross receipts..... 905.72
 AMOUNT STILL DUE AND COLLECTIBLE P3,170.03"

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Petitioners appealed that assessment and decision of the Collector to the Court of Tax Appeals, which as already stated, was affirmed by the Tax Court. Pending appeal of the case in the Court of Tax Appeals, and during the last stages of the trial held in said court, where the only issue involved in the appeal was the legality or illegality of the P3,170.03 deficiency assessment made by the Collector, petitioners' counsel filed a motion with said Tax Court to amend their original petition for review of the assessment so as to include by way of second cause of action a claim for refund of the amount of P2,310.25, allegedly already paid by them to the Collector for the gross receipts of P23,102.50, previously declared in their original amusement tax return, this on the ground that they were not liable for the payment of any amusement tax at all. This petition was denied by the Court of Tax Appeals and although no motion for reconsideration of said ruling of denial was filed, the same is now included in their fourteen assignment of errors before this Tribunal.

We do not propose to discuss all said assignment of errors. In our opinion, the only issues involved in the present appeal is whether or not the real amount of cover charges collected by petitioners Wong & Lee at their night club during the period that the Cugat Orchestra performed there, was P23,102.50, as per their return, or P41,217.00 as found by the BIR agents; and also, though incidentally, whether the petitioners were liable to pay the amusement tax on said cover charges at all.

In order to determine whether or not petitioners really collected P41,217.00 as cover charges during the period in question, it is necessary to determine whether the working sheets, chits, and other papers, Exhibits 2 to 11, found and taken by the BIR agent from the office files of Ted Lewin are sufficient to support the deficiency amusement tax assessment by the Collector. In connection with said Exhibits 2 to 11, BIR agent Reynaldo Suarez testified for the Collector, while Carlos Magdaluyo took the witness stand for the petitioners. On the question of credibility and the reason for deciding who was the more credible, we quote the following pertinent portion of the decision of the Court of Tax Appeals, which we find to be correct and make our own:

"* * * On the question of credibility, we find testimony of B.I.R. Agent Reynaldo Suarez, who with two other agents, made a thorough examination and evaluation of the documents in question, more reliable and trustworthy than that of petitioners' witness, Carlos Magdaluyo. The petitioners have not shown any possible ulterior motive why B.I.R. Agent Suarez should distort the truth. There is in his favor the presumption of regularity in the performance of official duties which has not been disproved by petitioners. On the other hand, it is easy to understand why Carlos Magdaluyo testified in the manner he did in favor of petitioners. By admitting a greater sum than what the petitioners claim to have delivered to Ted Lewin as his share of the cover charges, the latter would undoubtedly be held liable for a bigger amount of income tax than that declared by him, if he has declared this income at all.

It is a fact that Ted Lewin was engaged in various business ventures and promotions, such as, the Ortiz, Dado

Marino, and Joe Louis prize fights, Roller Derby, Ice Follies and Harlem Globe Trotters (basketball players), and counsel for the petitioners contended that Exhibits 2 to 11 referred not only to the performances and Floor shows held by the Cugat Orchestra at the Riviera, but also to these other ventures and promotions of Ted Lewin. We have examined these exhibits and we agree to the analysis and evaluation thereof made by the Court of Tax Appeals, to the effect that said exhibits refer to the performances or rather the amount of gross receipts of the cover charges collected by the petitioners during the nights that the Cugat Orchestra performed at the Riviera. We quote with favor pertinent portions of the decision of the Court of Tax Appeals:

"As correctly pointed out by respondent's counsel in his memorandum, the notations 'Lee' 'Wong' or 'Wong and Lee', written on Exhibits 4-B, 5-A, 8-C, 9-A, 9-B, 10-A and 11-A refer to no other person or persons but the herein petitioners. The figures appearing on these exhibits could not have been in connection with other business ventures and/or promotions of Ted Lewin because none of his ventures or promotions were held at the Riviera Night Club except the Xavier Cugat show. It will be noted in Exhibit 2-A that the entries therein are for the period from February 13 to March 8 which, far from being just a mere coincidence, tally with the dates when the Xavier Cugat Orchestra performed at the Riviera Night Club. The respective amounts appearing at each date represent no doubt the total amount of cover charges received for that particular day by Ted Lewin from the petitioners in accordance with their contract. Obviously, the words and figures 'at P5' appearing after each day on Exhibit 2-A refer to the admission price or cover charge charged by the petitioners for the Cugat show which they admitted to be actually P5 per ticket. This unit price appearing on Exhibit 2-A certainly could not refer to drinks and food served in the premises of the Riviera. Neither can it be said that the amounts appearing on said exhibit ranging from P70 to P5,020 include receipts for food and drinks served at the Riviera. As per contract, the receipts for food and drinks are for the petitioners and not Ted Lewin. The accuracy of the figures appearing on Exhibit 2-A, which total P41,217, becomes the more convincing if we are to note as we do note, that after each item there appears the initial of approval of Alberto K. Darosa, a trusted employee of Ted Lewin.

"With the admission of witness Magdaluyo that he does not keep a regular journal for his employer, these chits, ruled sheets and working sheets, Exhibits 2 to 11, are in our opinion the best source of an accurate and true record of the total amount of cover charges received by the petitioners from the Riviera Night Club during the Xavier Cugat Show which the petitioners in turn delivered to Ted Lewin in accordance with their contract.

"Another clear and convincing proof to show that the various figures appearing in Exhibits 2 to 11, as summarized in Exhibit 2-A, represent the actual gross receipts of the petitioners on cover charge from February 13 to March 8, 1953, is the fact that the first entry for February 13, 1953, marked as Exhibit 2-B or Exhibit 2, for P3,340 also appears in the books of account of the Riviera Night Club for the same date."

Under the second and third assignment of errors, petitioners contend that the Court of Tax Appeals erred in finding that the papers in question, Exhibits 2 to 11, were delivered voluntarily to the BIR agents by Carlos Magdaluyo, and that the said court equally erred in holding that the said papers were admissible in evidence against petitioners. Examining the evidence on this point, we find that while Magdaluyo on the one hand claims that he refused to deliver the papers to the BIR agent in the absence of his employer, Ted Lewin, and so Tagle, chief of the BIR agents, had to contact Ted Lewin who was abroad, by long distance telephone, and Magdaluyo heard Tagle say in his conversation with Ted Lewin that he would not get any papers from Ted Lewin's office, on the other hand, Suarez testified that after the conversation of Tagle with Ted Lewin, Magdaluyo delivered the papers, particularly Exhibits 2 to 11, to the agents who gave him a receipt therefor. On the basis of the evidence, the Tax Court found that the delivery of the papers by Magdaluyo to the agents was voluntary. Evidently, and from a reading of the decision of the Tax Court, the latter gave more credence to the declaration of Suarez as against that of Magdaluyo and we find no reason for disturbing said action of the Tax Court.

Petitioners also urge that assuming that the gross receipts for the cover charges were subject to the amusement

tax, still, the same should be paid not by themselves but by Ted Lewin who received said amount, petitioners merely acting as collectors thereof. But Section 260 of the Internal Revenue Code is clear:

"SEC. 260. Amusement taxes.—There shall be collected from the proprietor,' lessee, or operator of theaters, cinematographs, concert halls, circuses, and other places of amusement the following taxes: * * *.

"In the case of cockpits, cabarets, and night clubs, there shall be collected from the proprietor, lessee, or operator a tax equivalent to ten per centum, and in the case of race-tracks, twenty per centum of the gross receipt, * * *." (*Italics supplied*).

The tax is imposed on the lessee or operator of night clubs, like the Riviera, and not on any person to whom said gross receipts are destined and eventually paid, like Ted Lewin in the present case. If the petitioners feel that they have overpaid him by delivering to him all the receipts for the cover charges, without deducting the amusement tax, that is their own concern and clearly not of the Collector of Internal Revenue. Petitioners should have known from the beginning that they were liable to pay this tax, and if they" failed to consider and include it in their contract with Ted Lewin, they have no one but themselves to blame for a supposedly poor bargain.

Petitioners finally urge that under the provisions of Republic Act No. 722, Section 1, which "exempts the holding of operas, concerts, recitals, dramas, painting and art exhibitions, flower shows, and literary or oratorical or musical programs from the payment of any national or municipal amusement tax," the performances and floor shows held by the Cugat Orchestra at the Riviera came under "musical programs", and consequently, they (petitioners) were not liable to pay the amusement tax on the proceeds of the same. We fully agree with the Court of Tax Appeals that the exemption contemplated by Republic Act No. 722 refers to musical programs, operas, concerts, recitals, etc., where the exhibitions or performances have for their primary purpose the propagation and development of art and culture, and where the element of profit is only incidental. The same may not be said in favor of petitioners. The purpose of petitioners in engaging the, services of the Cugat Orchestra was not to propagate or promote art and culture among their patrons. As correctly said by the Court of Tax Appeals, judging by the gross receipts realized by the petitioners during the period in question, which run to several thousand pesos, the conclusion is that the primary objective of the petitioners was to popularize their night club and to bolster the sale of drinks and food in their establishment, and that furthermore, the patrons of the Riviera during those nights, went there mainly to dine and "dance to the tune of a world renowned orchestra," because if their purpose was for culture and for the sake of art, they could and should have gone to the Philippines International Fair Auditorium to hear the same orchestra play with a better repertoire, and at less expense to themselves.

As to the admissibility of this kind of evidence, it is the established doctrine in this jurisdiction that documents offered in evidence, if competent and relevant, are admissible, no matter how they were obtained—whether legally or illegally.[1]

We find it unnecessary to discuss and rule upon the other points raised in the appeal.

In view of the foregoing, and finding the appealed decision to be in accordance with law and the evidence, the same is hereby affirmed, with costs.

Bengzon, Bautista Angelo, Concepcion, Endencia, Reyes, J. B. L. and Felix, JJ., concur.

Paras, C. J. and Reyes, A., J., concurs in the result.

[1]Moncado vs. People's Court, 8 Phil., 1; Moran Comments on the Rules of Court, Vol. II, pp. 737-739.

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