

CONCRETE AGGREGATES, INC. PETITIONER, VS. COURT OF TAX APPEALS AND COMMISSIONER OF INTERNAL REVENUE, RESPONDENTS.

G.R. No. 55793. May 18, 1990

Ponente: REGALADO, J.

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REGALADO, J.:

This petition for review on certiorari seeks the annulment of the decision of respondent Court of Tax Appeals[1] dated September 19, 1980, and its resolution denying reconsideration thereof, dated December 3, 1980, both promulgated in CTA Case No. 2433, entitled "Concrete Aggregates, Inc. vs. Commissioner of Internal Revenue," the decretal portion of which decision reads:

"Having reached the conclusion that petitioner is a manufacturer subject to the 7% sales tax under Section 186 of the then National Internal Revenue Code, the decision of respondent dated July 24, 1972 should therefore be sustained. Accordingly, petitioner Concrete Aggregates, Inc. is hereby ordered to pay to respondent Commissioner of Internal Revenue the total amount of P244,022.76 representing sales and ad valorem taxes for the first semester of 1968 inclusive of surcharges, plus interest at the rate of 14% per centum from January 1, 1973 up to the date of full payment thereof pursuant to Section 183 (now 193) of the National Internal Revenue Code.

"WHEREFORE, the decision appealed from is hereby affirmed at petitioner's costs.

"SO ORDERED." [2]

The records disclose that petitioner is a domestic corporation, duly organized and existing under the laws of the Philippines, with business address at Longos, Quezon City. It has an aggregate plant at Montalban, Rizal which processes rock aggregates mined by it from private lands. Petitioner also maintains and operates a plant at Longos, Quezon City for the production of ready-mixed concrete and plant-mixed hot asphalt.

Sometime in 1968, the agents of respondent commissioner conducted an investigation of petitioner's tax liabilities. As a consequence thereof, in a letter dated December 14, 1970 said respondents assessed and demanded payment from petitioner of the amount of P244,002.76 as sales and ad valorem taxes for the first semester of 1968, inclusive of surcharges. Petitioner disputed the said assessment in its letter dated February 2, 1971 without, however, contesting the portion pertaining to the ad valorem tax.

In his letter dated July 24, 1972, respondent reiterated the said assessment of sales and ad valorem taxes which, as explained in his preceding letter, had been arrived at as follows:[3]

Taxable sales.....

P

4,164,092.44

7% sales tax due thereon.....

291,486.47

Less: Tax already paid.....

P

116,523.55

Deficiency tax due,.....

P

174,962.92

Add: 25% surcharge.....

43,740.73

Total deficiency tax and surcharge.....

P

218,703.65

Add: 1 1/2% ad valorem on

25% surcharge thereon

P20,239.29

5,059.82

25,299.11

TOTAL AMOUNT DUE & COLLECTIBLE... .**P**

244,002.76

Consequently, demand for the payment of the said amount within ten days from receipt of the letter was made by respondent on petitioner, otherwise the same would be collected thru the summary remedies provided for by law. Instead of paying, petitioner appealed to respondent court.

As earlier stated, a judgment adverse to petitioner was handed down by respondent court, whereupon he came to this Court on a petition for review. In its resolution dated September 7, 1981, the Court, through its First Division,

denied the petition for review for lack of merit.[4] Petitioner filed motion for reconsideration which was likewise denied in the resolution of October 19, 1981 for lack of merit, the denial being expressly declared to be final.[5] With leave of court, petitioner filed its second motion for reconsideration which was granted by the Court in its resolution dated November 23, 1981.[6]

The sole issue in this case is whether petitioner is a contractor subject to the 3% contractor's tax under Section 191 of the 1968 National Internal Revenue Code or manufacturer subject to the 7% sales tax under Section 186 of the same Code.

Petitioner disclaims liability on the ground that it is a contractor within the meaning of Section 191 of the 1968 Tax Code, the pertinent portion of which reads;

"Sec. 191. Percentage tax on road, building, irrigation, artesian well, waterworks, and other construction work contractors, proprietors or operators of dockyards, and others. -- Road, building, irrigation, artesian well, waterworks, and other construction work contractors; x x x and other independent contractors; x x x shall pay a tax equivalent to three per centum of their gross receipts."

x x x

Petitioner contends that its business falls under "other construction work contractors" or "other independent contractors" and as such, it was a holder of a license under Republic Act. No. 4566, otherwise known as the "Contractors Licensing Law" and was classified thereunder as a "general engineering contractor" and "specialty asphalt and concrete contractor." [7] It advances the theory that it produced asphalt and concrete mix only upon previous orders, which may be proved by its system of requiring the filling of job orders where the customer specify the construction requirements, and that without such order, it would not do so considering the highly perishable nature of the asphalt and concrete mix. [8]

It emphasizes that the mixing of asphalt and cement, if they were to be sold to the public, is not a simple matter of putting things together in a rotating bowl but involves a careful selection of components, proper measuring and weighing of ingredients, calibration of the plant to arrive at the right mixing temperature, and testing of the strength of the material, altogether using its own means and methods without submitting itself to control by the customers. [9]

Thus, it adopts the view that if the article subject of the sale is one which is not ready for delivery, as it is yet to be manufactured according to the order, the seller thereof is a contractor. However, if the article subject of the sale is one which is ready for delivery when the order therefor is placed, the seller is a manufacturer. [10] Complementary to this, it postulates that as a contractor dealing exclusively in the construction of roads, buildings and other building or construction works, its business consists of rendering service by way of furnishing its customers with pre-mixed concrete or asphalt, in effect merely doing for the customers what the latter used to do themselves, that is, to buy the ingredients and then mix the concrete or asphalt. [11] It concludes that in doing so, it does not become a manufacturer.

We have had the occasion to construe Section 191, now Section 205, of the Tax Code in *Commissioner of Internal Revenue vs. The Court of Tax Appeals, et al.* [12] where we reiterated the test as to when one may be considered a contractor within its context, thus;

"The word 'contractor' has come to be used with special reference to a person who, in the pursuit of the independent business, undertakes to do a specific job or piece of work for other persons, using his own means and methods without submitting himself to control as to the petty details. (Aranas, Annotations and Jurisprudence on the National Internal Revenue Code, p. 318, par. 191(2), 1970 Ed.) The true test of a contractor as was held in the cases of *Luzon Stevedoring Co. vs. Trinidad*, 43 Phil. 803, 807-808, and *La*

Carlota Sugar Central vs. Trinidad, 43 Phil. 816, 819, would seem to be that he renders service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." (Emphasis supplied)

It is quite evident that the percentage tax imposed in Section 191 is generally a tax on the sale of services or labor. In its factual findings, respondent court found that petitioner was formed and organized primarily as a manufacturer; that it has an aggregate plant at Montalban, Rizal, which processes rock aggregates mined by it from private lands; it operates a concrete batching plant at Longos, Quezon city where the specified aggregates from its plant at Montalban are mixed with sand and cement, after which water is added and the concrete mixture is sold and delivered to customers; and at its plant site at Longos, Quezon City, petitioner has also an asphalt mixing machinery where bituminous asphalt mix is manufactured. [13]

We see no reason to disturb the findings of respondent court. Petitioner is a manufacturer as defined by Section 194(x), now Section 187(x), of the Tax Code.

"Section 194. Words and phrases defined. -- In applying the provisions of this Title, words and phrases shall be taken in the sense and extension indicated below:

x x x

(x) 'Manufacturer' includes every person who by physical or chemical process alters the exterior texture or form or inner substance of any raw material or manufactured or partially manufactured product in such manner as to prepare it for a special use or uses to which it could not have been put in its original condition, or who by any such process alters the quality of any such raw material or manufactured or partially manufactured product so as to reduce it to marketable shape or prepare it for any of the uses of industry, or who by any such process combines any such raw material or manufactured or partially manufactured products with other materials or products of the same or different kinds and in such manner that the finished product of such process or manufacture can be put to a special use or uses to which such raw material or manufactured or partially manufactured products, in their original condition could not have been put, and who in addition alters such raw material or manufactured or partially manufactured products, or combines the same to produce such finished products for the purpose of their sale or distribution to others and not for his own use or consumption."

As aptly pointed out by the Solicitor General, petitioner's raw materials are processed under a prescribed formula and thereby changed by means of machinery into a finished product, altering their quality, transforming them into marketable state or preparing them for any of the specific uses of industry. Thus, the raw materials become a distinct class of merchandise or "finished products for the purpose of their sales or distribution to others and not for his own use or consumption." Evidently, without the above process, the raw materials or aggregates could not, in their original form, perform the uses of the finished product.[14]

In a case involving the making of ready-mixed concrete, it was held that concrete is a product resulting from a combination of sand or gravel or broken bits of limestones with water and cement: a combination which requires the use of skill and most generally of machinery. Concrete in forms designed for use and supplied to others for buildings, bridges and other structures is a distinct article of commerce and the making of them would be manufacturing by the corporation doing so.[15]

Selling or distribution is an essential ingredient of manufacturing. The sale of a manufactured product is properly incident to manufacture. The power to sell is an indispensable adjunct to a manufacturing business.[16] Petitioner, as a manufacturer, not only manufactures the finished articles but also sells or distributes them to others. This is inferable from the testimonial evidence of petitioner's witness that, in the marketing of its products, the company has marketing personnel who visit the client, whether he is a regular or a prospective customer, and that it is the customer who specifies the requirement according to his needs by filling up a purchase order, after which a job

order is issued. This is followed by the delivery of the finished product to the job site.[17]

Petitioner relies heavily on the case of *The Commissioner of Internal Revenue vs. Engineering Equipment and Supply Co., et al.*[18] and on the basis thereof posits that it has passed the test of a contractor under Article 1467 of the Civil Code which provides:

"Art. 1467. A contract for the delivery at a certain price of an article which the vendor in the ordinary course of his business manufactures or procures for the general market, whether the same is on hand at the time or not, is a contract of sale, but if the goods are to be manufactured specially for the customer and upon his special order, and not for the general market, it is a contract for a piece of work."

It is readily apparent that, in declaring private respondent in the aforesaid *Engineering Equipment* case as a contractor, the Court relied on findings of fact distinguishable from those in the case at bar.

"x x x We find that Engineering did not manufacture air conditioning units for sale to the general public, but imported some items (as refrigeration coils, x x x) which were used in executing contracts entered into by it. Engineering, therefore, undertook negotiations and execution of individual contracts for the design, supply and installation of air conditioning units of the central type x x x, taking into consideration in the process such factors as the area of the space to be air conditioned; the number of persons occupying or would be occupying the premises; the purpose for which the various air conditioning areas are to be used; and the sources of heat gain or cooling load on the plant such as the sun load, lighting, and other electrical appliances which are or may be in the plan. x x x Engineering also testified during the hearing in the Court of Tax Appeals that relative to the installation of air conditioning system, Engineering designed and engineered complete each particular plant and that no two plants were identical but each had to be engineered separately.

"As found by the lower court, which finding We adopt --

'Engineering, in a nutshell, fabricates, assembles, supplies and installs in the buildings of its various customers the central type air conditioning system; prepares the plans and specifications therefor which are distinct and different from each other; the air conditioning units and spare parts or accessories thereof used by petitioner are not the window type of air conditioners which are manufactured, assembled and produced locally for sale to the general market; and the imported air conditioning units and spare parts or accessories thereof are supplied and installed by petitioner upon previous orders of its customers conformably with their needs and requirements.'

"The facts and circumstances aforequoted support the theory that Engineering is a contractor rather than a manufacturer."

It is still good law that a contract to make is a contract of sale if the article is already substantially in existence at the time of the order and merely requires some alteration, modification or adaptation to the buyer's wishes or purposes. A contract for the sale of an article which the vendor in the ordinary course of his business manufactures or procures for the general market, whether the same is on hand at the time or not is a contract for the sale of goods.[19]

Petitioner insists that it would produce asphalt or concrete mix only upon previous job orders otherwise it would not do so. It does not and will not carry in stock cement and asphalt mix.[20] But the reason is obvious. What practically prevents the petitioner from mass production and storage is the nature of its products, that is, they easily harden due to temperature change and water and cement reaction.[21] Stated differently by respondent court, "it is self-evident that it is due to the highly perishable nature of asphalt and concrete mix, as petitioner itself argues, that makes impossible for them to be carried in stock because they cool and harden with time, and once hardened, they become useless." [22]

Had it not been for this fact, petitioner could easily mass produce the ready-mixed concrete or asphalt desired and

needed by its various customers and for which it is mechanically equipped to do. It is clear, however, that petitioner does nothing more than sell the articles that it habitually manufactures. It stocks raw materials, ready at any time, for the manufacture of asphalt and/or concrete mix.[23] Its marketing system would readily disclose that its products are available for sale to anyone needing them. Whosoever would need its products, whether builder, contractor, homeowner or paver with sufficient money, may order aggregates, concrete mix or bituminous asphalt mix of the kind manufactured by petitioner.[24] The habituality of the production of goods for the general public characterizes the business of petitioner.

We are likewise persuaded by the submissions of the Solicitor General that the ruling in *Celestino Co & Company vs. Collector of Internal Revenue*[25] is applicable to this case in that unless an activity is covered by Section 191 of the Tax Code, one who manufactures articles, although upon a previous order and subject to the specifications of the buyer, is nonetheless a manufacturer.

We also reject petitioner's theory that, with the amendment of Section 191 of the Tax Code, it can be considered as a "specialty contractor." As observed by respondent, a specialty contractor is one whose operations pertain to construction work requiring special skill and involves the use of specialized building trades or crafts. The manufacture of concrete and cement mix do not involve the foregoing requirements as to put it within such special category.

ON THE FOREGOING CONSIDERATIONS, certiorari is DENIED and the appealed decision of respondent Court of Tax Appeals is AFFIRMED.

SO ORDERED.

Melencio-Herrera, (Chairman), Paras, Padilla, and Sarmiento, JJ., concur.

[1] Per Presiding Judge Amante Filler, with the concurrence of Associate Judges Constante C. Roaquin and Alex Z. Reyes.

[2] Rollo, 51-52.

[3] Ibid., 25.

[4] Ibid., 130.

[5] Ibid., 140.

[6] Ibid., 170.

[7] Ibid., 257-259.

[8] Ibid., 34.

[9] Ibid., 127-128.

[10] Ibid., 134.

[11] Ibid., 257-263.

[12] 134 SCRA 49 (1985).

[13] Rollo, 41-42.

[14] Ibid., 99-100.

[15] Commonwealth vs. McCrady-Rodgers Co., 316 Pa, 155, 174 Atlantic Reporter 395.

[16] 38 C.J. 989.

[17] Rollo, 255.

[18] 64 SCRA 590 (1975).

[19] Inchausti & Co. vs. Cromwell, etc., 20 Phil. 345 (1911); Commissioner of Internal Revenue vs. Arnoldus Carpentry Shop, Inc., et al., 159 SCRA 199 (1988).

[20] Rollo, 123.

[21] Ibid., 271.

[22] Ibid., 45-46.

[23] Ibid., 230.

[24] Ibid., 47.

[25] 99 Phil. 841 (1956).

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