510 Phil. 268

THIRD DIVISION

[G.R. NO. 122472, October 20, 2005]

APEX MINING CO., INC., PETITIONER, VS. COMMISSIONER OF INTERNAL REVENUE AND COURT OF APPEALS, RESPONDENTS.

D E C I S I O N

GARCIA, J.:

Thru this petition for review on certiorari under Rule 45 of the 1997 Rules of Court, petitioner Apex Mining Company, Inc., seeks the reversal and setting aside of the following issuances of the Court of Appeals (CA) in *C.A.-G.R. SP No. 37054*, to wit:

> 1) **Decision dated August 18, 1995**,[1] modifying that of the Court of Tax Appeals by upholding the assessment made by the respondent Commissioner of Internal Revenue of deficiency excise tax on minerals purchased by petitioner from small-scale miners and subsequently sold to the Central Bank; and
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> 2) **Resolution dated October 27, 1995**,[2] denying petitioner's Motion for Extension of Time to File Motion for Reconsideration, as well as the motion for reconsideration itself.

As summarized in the decision under review, the facts are, as follows:

> During the period from January to June 1988, Apex Mining Co. Inc. (or Apex for brevity) was engaged in the business of mining, milling, concentrating, converting, smelting, manufacturing, buying, selling and otherwise producing and dealing in all kinds of ores, metals and mineral, as well as the products and by-products thereof.
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> During the same period, Apex either produced its own minerals/mineral products or made purchases from small scale miners. For this reason, the Bureau of Internal Revenue assessed Apex *ad valorem* tax due on the minerals/mineral products it produced at the rate of 5% and on minerals it purchased from small scale miners pursuant to Section 151 in relation to Section 127 of the Tax Code in a Pre-assessment notice issued on 7 November 1989.
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> On 17 November 1989, [petitioner] protested the assessment. On 11 December 1989, [respondent Commissioner of Internal Revenue] in a letter advised [petitioner] to pay the amount of P3,748,961.21 representing the uncontested portion of the latter's deficiency *ad valorem* tax assessment due on its own mineral products.
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> Likewise, [petitioner] protested on 25 January 1990 the *ad valorem* tax imposed on the minerals it purchased from small scale miners in the

> amount of P8,212,983.50. At the same time, Apex informed [respondent] that it is not contesting the *ad valorem* tax assessment corresponding to its production of mineral products in the amount of P2,570,863.17, exclusive of increments to delinquency.
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> On 23 February 1990, [petitioner] reiterated its protest against the assessment issued on the mineral products it purchased from small scale miners. This was denied by [respondent] in a letter dated 12 March 1990 and simultaneously demanding payment of the amounts of P10,225,637.87 and P4,659,368.13, representing [petitioner's] deficiency *ad valorem* tax assessment due on the mineral products it purchased from small scale miners and its own production, respectively.
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> On 27 April 1990, [petitioner] filed with the Court of Tax Appeals a petition for review questioning the validity of said assessment. The CTA rendered its decision ordering [petitioner] to pay the *ad valorem* tax due on the mineral products it produced in the amount of P2,570,863.17 plus 25% surcharge and 20% interest thereon per annum from date of removal from its place of production until the same is fully paid, pursuant to Sections 248(a) (3) and 249 (c) (3) of the Tax Code. **However, the assessment for deficiency excise tax due on the mineral products purchased from the small scale miners was declared cancelled for lack of legal basis. [Respondent] filed a motion for reconsideration which was denied by the Court of Tax Appeals in a Resolution dated 15 March 1995.**[3] (Words in brackets ours; Emphasis supplied).

Taking exception from the tax court's ruling cancelling the assessment of deficiency excise tax on petitioner's purchase of mineral products from small scale miners, and insisting on the legality thereof, respondent Commissioner of Internal Revenue went on appeal to the Court of Appeals (CA) whereat the recourse was docketed as *CA-G.R. SP No. 37054*.

As stated at the outset hereof, the appellate court, in a Decision dated August 18, 1995, modified that of the tax court by upholding respondent's assessment of *ad valorem tax* on minerals purchased by petitioner from small scale miners and later sold to the Central Bank. More specifically, the CA decision dispositively reads:

> WHEREFORE, premises considered, the appealed decision of the Court of Tax Appeals dated 6 October 1994 is MODIFIED only with respect to the assessment of ad valorem tax on minerals purchased from small scale miners against [petitioner]. The assessment for deficiency excise tax on minerals purchased from small scale miners and subsequently sold to the Central Bank is upheld. The decision of the Court of Tax Appeals is affirmed in all other respects.
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> SO ORDERED.[4] (Word in bracket ours)

In sustaining respondent's assessment on the petitioner *vis a vis* mineral products purchased by it from small scale miners, the CA preliminary explained that since in the case of those locally extracted or produced minerals, the rate of the *ad valorem* tax is based on the actual market value of the gross output thereof at the time of

removal from place of production pursuant to Section 151(a)(3) of the (old) Tax Code, the excise tax on the extracted minerals while still in the hands of the small scale miners cannot as yet be determined, not until the same is given a value when sold to a buyer like petitioner. The appellate court then ratiocinated that because the liability of petitioner as regards minerals purchased from small scale miners cannot be as a manufacturer or producer nor the present owner or possessor of the same in accordance with Section 127(a) of the (old) Tax Code,[5] said provision should be related to other provisions of the Code, specifically Section 151 (c) thereof which provides that the excise tax on minerals shall be due and payable upon removal of the minerals from the locality where mined. Hence, since there was no showing of a tax return filed by the small scale miners upon their extraction of the minerals, petitioner should be the one assessed for having caused the removal of the minerals from the locality where mined when it purchased the same from the small scale miners. Partly says the CA in its decision:

> The acts of Apex in causing the minerals to be removed from the place where extracted and a value thereof determined by purchased, after which with evident intention to profit sold it to the Central Bank leads to the conclusion that the excise tax became due while the minerals where in the possession and ownership of Apex. To rule otherwise, will permit Apex to evade the payment of the tax[6].

Receiving a copy of the same Decision on September 11, 1995, petitioner, thru counsel, filed on September 22, 1995, a motion for a 30-day extension of time to file motion for reconsideration. And, on October 11, 1995, petitioner did file its **Motion for Reconsideration**,[7] therein asserting that the conclusion reached by the appellate court is a conclusion of law which extended by implication the provisions of Section 127 (a), in relation to Section 151 both of the Tax Code beyond what said provisions expressly and clearly declare, or enlarged the operation thereof by embracing persons not specifically pointed out.

In its equally impugned Resolution of October 27, 1995, the appellate court denied not only petitioner's motion for extension of time to file a motion for reconsideration, but also the very motion for reconsideration itself for having been filed out of time.[8]

Hence, petitioner's instant petition for review.

We DENY.

A judicious perusal of the records reveals that the assailed decision of the appellate court had become final and executory due to petitioner's failure to file a timely motion for reconsideration thereof.

It is a matter of record that petitioner received a copy of the CA decision on **September 11, 1995**. Going by the Rules, petitioner had only fifteen (15) days therefrom or until September 26, 1995, within which to move for a reconsideration. However, instead of a motion for reconsideration, what petitioner filed on September 22, 1995 was a **motion for extension of time**. The very motion for reconsideration itself was in fact filed only on October 11, 1995, or 30 days later from petitioner's receipt of the copy of the appellate court's decision, a fatal procedural lapse.