REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

En Banc

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

AEROTECH INDUSTRIES PHILIPPINES, INC.,
Respondent.

CTA EB CASE NO. 882
(CTA Case No. 7964)

Present:
Del Rosario, P.J.
Castañeda, Jr.,
Bautista,
Uy,
Casanova,
Fabon-Victorino,
Mindaro-Grulla,
Cotangco-Manalastas, *and*
Ringpis-Liban, JJ.

Promulgated:

AUG 13 2013 Anapolinario 9:35 a.m.

X -- X

DECISION

BAUTISTA, J.:

Before the Court *En Banc* is a "Petition for Review" filed by the Commissioner of Internal Revenue ("CIR") appealing the Decision of the First Division of this Court ("Court in Division") dated October 20, 2011,[1] granting Aerotech Industries Philippines, Inc.'s ("Aerotech") "Petition for Review," and accordingly, cancelling and setting aside the assessment for final withholding tax in the amount of P1,555,659.54, inclusive of interests, for the taxable year 2002 on the ground of prescription; and the Resolution dated March 5, 2012 denying CIR's "Motion for Reconsideration."

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[1] *Rollo,* (CTA EB CASE No. 882) pp. 15-33, Penned by Associate Justice Erlinda P. Uy, with Presiding Justice Ernesto D. Acosta and Associate Justice Esperanza R. Fabon-Victorino, concurring.

The Parties

Petitioner, Commissioner of Internal Revenue is the chief of the Bureau of Internal Revenue, the government agency officially responsible for the assessment and collection of all national internal revenue taxes, fees and charges and the enforcement of all forfeitures, penalties and fines connected with such taxes[2] with office address at the BIR National Office Building, Agham Road, Diliman, Quezon City.[3]

Respondent, Aerotech Industries Philippines, Inc., is a corporation duly registered with the Bureau of Internal Revenue, Revenue District Office (RDO) No. 44 of Revenue Region No. 8. Makati City, Philippines under Tax Identification Number (TIN) 000-431-432-000.[4]

Antecedent Facts

The relevant antecedents are stated by the Court in Division in its Decision dated October 20, 2011as follows:

> "On November 27, 2003, petitioner received Letter of Authority No. 2000-00043011 dated November 18, 2003 issued by the Regional Director Anselmo G. Adriano, authorizing Revenue Officer Edwin Montealegre under the supervision of Group Supervisor Edgardo Dimanog of RDO No. 44 - Revenue Region No. 8 to examine/audit petitioner's internal revenue taxes for the period from January 1, 2002 to December 31, 2002. After the investigation, petitioner received on December 1, 2005 a Preliminary Assessment Notice (PAN) dated November 29, 2005, assessing petitioner the following deficiency internal revenue taxes for the taxable year 2002, in the total amount of P4,493,398.27, inclusive of interest and compromise penalties, to wit:

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[2] *Ibid.*, p. 16.
[3] *Ibid.*, p. 16.
[4] *Ibid.*, p. 15-16.

	Basic Tax Due	Surcharge/ Compromise	Interest	TOTAL
Income Tax	P2,611,004.80	-	P1,394,920.37	P4,005,925.17
Expanded Withholding Tax	64,108.74	-	37,411.40	101,520.14
Withholding Tax on Compensation	243,724.62	-	142,228.34	385,952.96
TOTAL				**P4,493,398.27**

Petitioner, through counsel, filed its letter-protest dated December 15, 2005, disputing the said PAN. Subsequently, respondent issued Assessment Notices: (a) No. IT-43011-02-06-022 for P4,086,043.67; (b) No. WE-43011-02-06-022 for P103,487.31, and (c) No. WC-43011-02-06-0023 for P393,431.63, all dated January 10, 2006, with the corresponding Formal Assessment Notice and Details of Discrepancies both dated January 10, 2006. These documents were all received by petitioner's Finance Manager, Lourdes R. De Luna, on January 11, 2006.

Thus, petitioner, through counsel, filed another protest through a letter dated February 9, 2006. Relative thereto, respondent sent a letter dated March 3, 2006, informing petitioner that the entire tax docket together with the letter of protest had been forwarded to the ROO No. 44, Taguig-Pateros, for the resolution of the factual issues raised in the administrative protest.

On May 9, 2006, petitioner received Tax Verification Notice No. 2002-00122672 dated March 13, 2006, informing that Revenue Officer Rene Tabtab under the supervision of Group Supervisor Enrique de Jesus had been authorized to verify the supporting documents and/or pertinent records relative to the request for reinvestigation of petitioner.

Thereafter, petitioner received on December 16, 2008, a Post-Reporting Notice from Revenue District Officer Leida G. Buscaino, informing petitioner that

Revenue Officer Margiely P. Belgera under Group Supervisor Melba N. Gador has already submitted a report on the result of reinvestigation of petitioner's internal revenue tax liabilities for taxable year ending December 31, 2002. In the same Notice, Ms. Buscaino invited petitioner for an informal conference, and stated that should petitioner fail to attend the same, such failure will be construed as a waiver of its right to present its side of the case, hence, the tax assessment of the Revenue Officers concerned will be submitted to the higher authority for the issuance of a formal notice of assessment. Attached to said Notice is a computation of petitioner's deficiency tax, the details of which are as follows:

WITHHOLDING TAX DUE ON INCOME PAYMENTS MADE

Payments to NRAETB [Sec 25(B)]	P	35,300.00 x 25%	P	9,375.00
Less: Remittance				5,625.00
Deficiency Tax			P	3,750.00
Payments to NRFC [Sec. 28(B)(1)]	P	3,918,582.44 x 32%		1,253,946.38
Less: Remittance				587,786.36
Deficiency Tax			P	66,160.02
Total Deficiency Tax excluding penalties			P	669,910.02
Add: Interest	P	893,191.02		
Compromise		25,000.00		918,191.02
Total amount due and collectible			**P**	**1,588,101.04**

Apparently, the foregoing withholding tax impositions sprung from the pertinent explanations of petitioner in its protest letter dated February 9, 2006, to wit:

> **"2. That the alleged underdeclared sources of funds amount[ing] to P3,918,582.44 represents the deductible expenses in 2001, the corresponding withholding taxes had been withheld and remitted in 2002;**

Evidently, the records of our client revealed that the above refers to the technical assistance of Aerotech to NRFC-Pampanga in the total amount of P3,918,582.44 deducted in the 2001 financial statements and paid in 2001 and 2002 but whose withholding taxes were filed and remitted in 2002 to the Bureau of Internal Revenue through its authorized agent banks. As a matter of proof we attached herewith the following documents and made an integral part hereof, to wit:

- Invoice No. CF40194 dated November 27, 2001 **'Annex A'**
- SIR Form No. 1601-F dated January 2002 **'Annex B'**

From the above documents it is very clear that our client had paid such technical assistance to **AERMACCHI S.P.A**. a nonresident foreign corporation in 2001 in accordance with the contractual services rendered by the former to our client, and the proper withholding taxes of which had been withheld and remitted to your good office in 2002.

xxx xxx xxx

- **Director's Fees**

Records of our client revealed that the amount of P56,250.00 assessed by your office as not being subjected to withholding tax refers to payments to Italian and Filipino directors broken down as follows:

• Italian Directors	P 37,500.00
• Filipino Directors	18,750.00
Total	56 ,250.00

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> These Italian directors are provided with legal papers to permit them to visit the country and stays in the country for not more than 180 days throughout the taxable year. Upon payments to such Italian Directors amounting to P37,500 in total, out of the P56,250.00 claimed by your office as not allowable expense for non-withholding, the same were subjected to final withholding taxes at 15% in relation to the provision of RP-Italy Tax Treaty. Thus, there is no basis for your good office to assess the same.
>
> xxx xxx xxx"

The informal conference was held on January 8, 2009 between Ms. Gador and petitioner's Finance Manager, Ms. Lourdes R. De Luna. On January 15, 2009, the SIR received a letter dated January 15, 2009 from Ms. De Luna, formally contesting the above computation.

On July 29, 2009, petitioner received the questioned Final Decision on Disputed Assessment (FDDA) and Details of Discrepancies, both dated July 22, 2009, informing petitioner that its request for reinvestigation has been given favorable action. Particularly, the assessments in the amounts of P4,086,043.67 for Income Tax, P103,487.31 for Expanded Withholding Tax, and P393,431.63 for Withholding Tax on Compensation, were all deleted.

However, petitioner was still held liable to pay deficiency Final Withholding Tax for taxable year 2002, to wit:

Final Withholding Tax		
Payments to Non-resident alien engaged in Trade or Business		
Basic Tax Due	P	3,750.00
Add: Interest (1.16.03 to 8.25.09)		4,958.22
Total Amount Due	**P**	**8,708.22**

Payments to Non-resident foreign corporation		
Basic Tax Due	P	666,160.02
Add: Interest (1.16.03 to 8.25.09)		880,791.30
Total Amount Due	**P**	**1,546,951.32**

The foregoing basic tax dues were determined as follows:

		Nonresident Alien engaged in trade/business		*Nonresident foreign corporation*
Income Payments	P	37,500.00	P	3,918,582.44
Multiple by Rate		25%		32%
Tax Due		9,375.00		1,253,946.38
Less: Amount Remitted		5,625.00		587.786.36
Basic Tax still due	**P**	**3,750.00**	**P**	**666,160.02**

The above deficiency Final Withholding Tax were assessed because of petitioner's failure to a submit a copy of the Application for Tax Treaty duly stamped by the International Tax Affairs Division (ITAD), pursuant to Revenue Memorandum Order No. (RMO) 1-2000. Parenthetically, the income payment in the amount of P37,500.00 was for the month of December 2002; while the income payment in the amount of P3,918,582.44 was for the month of January 2002. The FDDA expressly states that the BIR was giving petitioner until August 25, 2009 to settle the above liabilities and that the same is the final decision of respondent.

Hence, petitioner filed the instant Petition for Review on August 25, 2009.[5]"

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[5] *Ibid.*, pp. 16-21.

The Ruling of the Court in Division

In determining the issues raised in the petition, the Court in Division found it necessary to resolve whether Aerotech's right to due process was violated; and whether the assessments had prescribed.

The Court in Division found Aerotech's assertion that it should have been issued a new PAN in accordance with Revenue Regulation (RR) No. 12-99 dated September 6, 1999 unmeritorious. The Court in Division pointed out that the records clearly show that Aerotech was given the opportunity to present its case and ventilate its side and was thus, afforded administrative due process. Furthermore, the Court in Division noted that the FDDA issued to Aerotech gave them 2 options: either to appeal said final decision with the CTA or to the Office of the Commissioner of Internal Revenue within thirty (30) days from date of receipt thereof, otherwise, the decision shall become final, executory and demandable. Aerotech chose to file a petition with the Court in Division; thus, it cannot validly claim that it was deprived of its right to due process.

However, regarding the issue of prescription, the Court in Division found that CIR's right to assess Aerotech for any form of deficiency tax had long expired when Aerotech received the FDDA and Details of Discrepancy July 29, 2009.

The Court in Division noted that Aerotech filed its Monthly Remittance Return for January 2002, on February 11, 2002, reflecting the withholding tax on the income payment to AERMACCHI S.P.A. and the Monthly Remittance Return for December 2002, on January 15, 2003, reflecting the withholding tax the income payment to Aerotech's Italian Directors. Pursuant to Section 203 of the NIRC of 1997,[6] the CIR had three (3) years from the last day prescribed by law

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[6] **SEC. 203.** *Period of Limitation Upon Assessment and Collection.* - Except as provided in Section 222, internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return , and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period : Provided, That in a case where a return is filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day.

for the filing of the return, or from the date of actual filing of the return. Thus, the CIR had from February 11, 2002 to February 11, 2005 to assess withholding tax on the income payment to AERMACCHI S.P.A. and from January 15, 2003 to January 15, 2006 tp assess withholding tax on income payment made to Aerotech's Italian Directors.

On October 20, 2011, the Court in Division promulgated a Decision as follows:

> "**WHEREFORE,** premises considered, the instant Petition for Review is hereby **GRANTED**.
>
> Accordingly, the assessment for final withholding tax in the total amount of P1,555,659.54, inclusive of interests, for taxable year 2002, is hereby **CANCELLED** and **SET ASIDE** on the ground of prescription.
>
> **SO ORDERED.**"

On November 10, 2011, the CIR filed her "Motion for Reconsideration"[7] arguing that the date of the release of the demand letter or notice ought to be the reckoning point of the assessment; that the conduct of Aerotech persuaded the CIR to postpone the collection of taxes in order to make the taxpayer feel that the demand was not unreasonable, and that no harassment or injustice was meant by the Government; and that since Aerotech failed to raise the defense of prescription at the administrative level, the same cannot be raised for the first time in appeal.

On December 9, 2011, Aerotech filed its "Comment"[8] stated that the PAN and FAN issued to it by the CIR in 2006 did not include any deficiency Final Withholding Tax, in fact those issuances covered Income Tax, Expanded Withholding Tax, and Withholding Tax on Compensation. It was only in the FDDA issues in 2009 that

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[7] *Records*, (CTA Case No. 7964), pp. 244-249.
[8] *Records*, (CTA Case No. 7964), pp. 256-258.

assessment for Final Withholding Tax was made; and contrary to the CIR"s claims, Aerotech did not request for a reinvestigation.

On March 5, 2012, the Court in Division denied CIR's "Motion for Reconsideration."[9]

On March 21, 2012, CIR filed its "Petition for Review" before the Court *En Banc*.[10]

Issues Raised by Petitioner

In its Petition for Review [11] before the Court *En Banc*, CIR raised the following issues:

"I.

WHETHER THE HONORABLE COURT OF TAX APPEALS (FIRST DIVSION) ERRED WHEN IT GRANTED THE PETITION FOR REVIEW WHICH IN EFFECT CANCELLED AND SET ASIDE THE ASSESSMENT ISSUED BY THE PETITIONER AGAINST RESPONDENT ON THE GROUND OF PRESCRIPTION RELATIVE TO THE RESPONDENT'S 2002 ALL INTERNAL REVENUE TAX LIABILITIES; and

II. (sic)

WHETHER THE RESPONDENT IS ALREADY BARRED FROM RAISING THE ISSUE OF PRESCRIPTION CONSIDERING THAT IT FAILED TO RAISED(sic) THE SAME AT THE ADMINISTRATIVE LEVEL."[12]

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[9] *Records*, (CTA Case No. 7964), pp. 261-266.
[10] *Rollo*, (CTA EB CASE NO. 882), pp. 1-13.
[11] *Ibid*.
[12] *Id*., pp. 4-5.

The Ruling of the Court En Banc

The petition is bereft of merit.

The Court *En Banc* notes that the points raised by the CIR in its "Petition for Review" are the same issues raised, thoroughly discussed, and ruled upon by the Court in Division in both its Decision dated October 20, 2011 and the Resolution denying the CIR's "Motion for Reconsideration" dated December 9, 2011. The CIR provides two main arguments against the Court in Division's finding that the Final Withholding Tax assessment issued against Aerotech has prescribed.

First, the CIR asserts that Aerotech sought a re-investigation, thus causing the suspension of the prescriptive period. However, Aerotech denies the request for a reinvestigation, emphasizing that it merely sent protest letters dated December 15, 2005 in response to the Preliminary Assessment Notice (PAN) dated November 29, 2005 and February 9, 2006 in response to the Formal Assessment Notice (FAN) dated January 10, 2006. Aerotech further states that it did not execute a waiver from the defense of prescription in favor of the CIR.

This issue was discussed and ruled upon by the Court in Division states as follows:

> "This is what transpired in the instant case. Pursuant to the Tax Verification Notice dated March 13, 2006, respondent informed petitioner that its request for reinvestigation was granted (or at the very least, have been given due course) only on May 9, 2006- which date is already way beyond the legal period to issue a valid assessment. Plainly, there is no period to suspend when the same has already expired. Therefore, the subject final withholding tax assessments must perforce be cancelled and set aside on the ground of prescription."

Section 223 of the NIRC[13] clearly states that in order to suspend the running of the prescriptive periods for assessment and collection, a request for reinvestigation must be made by the taxpayer and the same must be granted by the CIR. After perusal of the records of the case, the Court *En Banc* agrees with the Court in Division's finding that no such request was made.

Second, CIR argues that Aerotech cannot raise the issue of prescription for the first time during appeal. Aerotech on the other hand, argues that it was only made aware of the Final Withholding Tax assessment when it received the FDDA in 2009.

Again, the Court *En Banc* finds no reason to disturb the findings of the Court in Division. There can be no failure to invoke or raise the defense of prescription at the administrative level, if Aerotech was not given any opportunity to do so. The Court in Division found that Aerotech learned about the subject assessments for the first time when it received the FDDA (dated July 22, 2009) on July 29, 2009, stating that it is the final decision of CIR.[14] Thus, Aerotech chose to raise its objection to the new assessment in its Petition for Review.

In ruling on the opposing interests of the government and taxpayers, the Supreme Court in the case of *Republic of the Philippines vs. Ablaza*[15] states as follows:

> "The law prescribing a limitation of actions for the collection of the income tax is beneficial both to the

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[13] **SEC. 223**. *Suspension of Running of Statute of Limitations.* The running of the Statute of Limitations provided in Sections 203 and 222 on the making of assessment and beginning of distraint or levy or a proceeding in court for collection, in respect of any deficiency, shall be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or levy or a proceeding in court and for sixty (60) days thereafter; when the taxpayer requests for a reinvestigation which is granted by the Commissioner; when the taxpayer cannot be located in the address given by him in the return filed upon which a tax is being assessed or collected: Provided, That, if the taxpayer informs the Commissioner of any change in address, the running of the Statute of Limitations will not be suspended; when the warrant of distraint or levy is duly served upon the taxpayer, his authorized representative, or a member of his household with sufficient discretion, and no property could be located; and when the taxpayer is out of the Philippines

[14] *Ibid.* p. 29.

[15] G.R. No. L-14519, July 26, 1960, 108 Phil. 1105.

> Government and to its citizens; to the Government because tax officers would be obliged to act promptly in the making of assessment, and to citizens because after the lapse of the period of prescription citizens would have a feeling of security against unscrupulous tax agents who will always find an excuse to inspect the books of taxpayers, not to determine the latter's real liability, but to take advantage of every opportunity to molest, peaceful, law-abiding citizens. Without such legal defense taxpayers would furthermore be under obligation to always keep their books and keep them open for inspection subject to harassment by unscrupulous tax agents. The law on prescription being a remedial measure should be interpreted in a way conducive to bringing about the beneficient purpose of affording protection to the taxpayer within the contemplation of the Commission which recommended the approval of the law." (Underlining ours.)

Given the above, the Court *En Banc* finds no reason to overturn or modify the conclusions arrived at by the Court in Division in its Decision dated October 20, 2011 and/or the Resolution dated December 9, 2011.

WHEREFORE, in view of the foregoing, the Petition for Review is hereby **DENIED** for lack of merit. Accordingly, the impugned Decision dated October 20, 2011, and the Resolution dated March 5, 2012 issued by the First Division of the Court are hereby **AFFIRMED**.

SO ORDERED.

LOVELL R. BAUTISTA
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

Pursuant to Section 13 of Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of this Court.

ROMAN G. DEL ROSARIO
Presiding Justice