REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

PEOPLE OF THE PHILIPPINES,
Plaintiff,

- versus -

HERNANE A. AYON,
(Purok 4, Lumbo, Valencia City Bukidnon and/or

P-12 Malingon, Bagontaas, Valencia City, Bukidnon)
Accused.

CTA CRIM. CASE NOS. O-589 & O-590

For: Violation of Section 254 of the National Internal Revenue Code (NIRC) of 1997, as amended (Attempt to Evade or Defeat Tax)

Members:

DEL ROSARIO, *P.J., Chairperson,*
UY, *and*
MINDARO-GRULLA, *JJ.*

Promulgated:
SEP 18 2018 11:45 am

x - x

RESOLUTION

For the Court's resolution is accused's **Demurrer to Evidence**, filed on July 4, 2018, with plaintiff's **Comment on the Demurrer to Evidence filed by the Accused**, filed on July 16, 2018.

Accused, Hernane A. Ayon, is charged under CTA Criminal Case Nos. O-589 and O-590 for violations of Section 254 of the National Internal Revenue Code (NIRC) of 1997, as amended, allegedly committed as follows:

CTA Crim. Case No. O-589:

"That on or about April 15, 2011, in Valencia City, Bukidnon and within the jurisdiction of this Honorable

Court the above-named accused, a Filipino Citizen residing in the Philippines and a registered taxpayer, owner of H.A. Herbal Marketing, which is engaged in the business of selling goods and as such required by law, rules and regulations to file his annual income tax return and pay the appropriate tax, said accused did then and there willfully, unlawfully and knowingly attempt to evade or defeat tax, by not declaring in his 2010 Income Tax Return his income earned from his gross sales to AG Global Pharma in 2010 amounting to Eight Million One Hundred Twenty Nine Thousand Three Hundred and Fifty Pesos (₱8,129,350.00), which resulted to a basic deficiency income tax of Two Million Six Hundred Twenty Eight Thousand Eight Hundred Thirty Three Pesos and Ninety Four Centavos (₱2,628,833.94), exclusive of penalties, surcharge and interest, to the damage and prejudice of the Government of the Republic of the Philippines.

CONTRARY TO LAW."[1]

CTA Crim. Case No. O-590:

"That on or about April 15, 2012, in Valencia City, Bukidnon and within the jurisdiction of this Honorable Court, the above-named accused, a Filipino Citizen residing in the Philippines and a registered taxpayer, owner of H.A. Herbal Marketing, which is engaged in the business of selling goods and as such required by law, rules and regulations to file his annual income tax return and pay the appropriate tax, said accused did then and there willfully, unlawfully and knowingly attempt to evade or defeat tax, by not declaring in his 2011 Income Tax Return his income earned from his gross sales to AG Global Pharma in 2011 amounting to Eleven Million Five Hundred Forty Nine Thousand three Hundred Eighty Four Pesos and 85/100 (₱11,549,384.85), which resulted to a basic deficiency income tax of Three Million Two Hundred Sixty Four Thousand Eight Hundred Twenty Four Pesos and 24/100 (₱3,264,824.24), exclusive of penalties, surcharge and interest, to the damage and prejudice of the Government of the Republic of the Philippines.

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[1] Amended Information, docket, CTA Crim. Case No. O-589, vol. I, p. 163.

CONTRARY TO LAW."[2]

On July 12, 2017, accused was arrested at Valencia City, Bukidnon and was detained at the National Bureau of Investigation (NBI) North Eastern Mindanao Regional Office detention facility.[3] Thereafter on July 14, 2017, accused posted the required bail before the Office of the Executive Judge, Regional Trial Court of Misamis Oriental, Cagayan de Oro City.[4]

During his arraignment on October 25, 2017, accused pleaded "not guilty" to the crime charged in CTA Crim Case Nos. 0-589 and 0-590, with the assistance of defense counsel de parte, Atty. Vic P. Alvaro.[5]

On February 7, 2018, the pre-trial conference was held[6], and the parties agreed to adopt the following issues:

a. Whether or not accused is liable for the offenses charged in Criminal Case Nos. O-589 and O-590; and

b. Whether he is civilly liable for the payment of the assessed deficiency income taxes for taxable years 2010 and 2011.

In their Joint Stipulations of Facts and Issues[7], the parties admitted the following:

1. The accused is the same Hernane A. Ayon who is the accused in the above-captioned cases;

2. The jurisdiction of the Court to hear and decide the above-captioned cases;

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[2] Amended Information, docket, CTA Crim. Case No. O-589, vol. I, p. 166.

[3] Letter dated July 13, 2017 from NBI Special Investigator III Norodin D. Pundamudag, with enclosures, docket, CTA Crim. Case No. O-589, vol. I, pp. 193-199.

[4] Letter dated August 8, 2017 from NBI Regional Office 10 Officer In-Charge Atty. Sally Hans C. Barbaso, with enclosures, docket, CTA Crim. Case No. O-589, vol. I, pp. 219-226; Letter dated August 24, 2017 from Acting Clerk of Court Atty. Dick Carlo J. Cabanlas transmitting documents relative to the bond put up by the accused, with enclosures, docket, CTA Crim. Case No. O-589, vol. I, pp. 243-269.

[5] Certificate of Arraignment, docket, CTA Crim. Case No. O-589, vol. I, p.288; Order dated October 25, 2017, docket, CTA Crim. Case No. O-589, vol. I, pp. 292-293.

[6] Minutes of the Hearing held on February 7, 2018, docket, CTA Crim. Case No. O-589, vol. I, pp. 538-540.

[7] Docket, CTA Crim. Case No. O-589, vol. I, pp. 553-554.

3. Accused is a Filipino citizen with residential address at Purok 4, San Roque, Lumbo, Valencia City, Bukidnon; and

4. Accused is a registered taxpayer of Revenue District Office No. 99, Malaybalay City, Bukidnon, with Taxpayer Identification No. (TIN) 191-178-370-000.

During trial, plaintiff presented the following witnesses: (1) Jamaloden D. Guro; (2) Haron R. Laingan; (3) Diosdado C. Capapas, Jr.; (4) Gil E. Dalogdog; and (5) Cherry P. Pepito. The direct testimonies of said witnesses were by way of Judicial Affidavits. They testified as follows:

1) Jamaloden D. Guro[8], Special Investigator III of the Regional Investigation Division (RID), Revenue Region (RR) No. 16, Cagayan de Oro City, testified as follows: a Letter of Authority (LOA) No. LOA-211-2014-00000128 dated May 6, 2014 was issued by then Bureau of Internal Revenue (BIR) Commissioner Kim S. Jacinto-Henares authorizing his group supervisor, Diosdado Capapas, Jr., and himself to conduct an examination/investigation against accused for the period January 1, 2010 to December 31, 2010. The basis for the issuance of the LOA was the result of their preliminary investigation on the letter dated March 5, 2013 of then Revenue District Officer (RDO) Myrna L. Bernardo to the Regional Director of RR No. 16, recommending that the accused be investigated and included under the Run After Tax Evaders (RATE) program. They served the LOA with First Notice for the submission of books of accounts and other accounting records/documents to the accused on May 8, 2014. Subsequently, they issued the Second Notice which was received by accused's wife, Arlyn Ayon, on May 28, 2014, and the Final Notice which was likewise received by Arlyn Ayon on June 10, 2014. Thereafter, he submitted a Memorandum to the Regional Director of RR No. 16 recommending the issuance of a Preliminary Assessment Notice (PAN) against accused for his income and value-added tax (VAT) deficiencies for taxable year 2010. The PAN was subsequently issued on July 27, 2015 and this was indorsed to the Mailing Section of the Administrative Division for registered mailing to the taxpayer. Afterwards, they recommended the issuance of a Formal Letter of Demand (FLD) against accused, which was issued on August 27, 2015 by then Regional Director Alberto S. Olasiman.

[8] Supplemental Judicial-Affidavit (Jamaloden D. Guro), docket, CTA Crim. Case No. O-589, vol. I, pp. 318-326; Minutes of the Hearing dated March 16, 2018, docket, CTA Crim. Case No. O-589, vol. I, pp. 602-606.

On cross-examination, Jamaloden Guro testified that it was accused himself who affixed his signature in the LOA, that it was Mrs. Ayon who admitted that she is the wife of accused, and that it was Mrs. Ayon herself who affixed her signature in the Notices that she received. Witness Guro confirmed that accused failed to file his Annual Income Tax Return (ITR) and pay income tax for taxable years 2010 and 2011. On re-direct examination, he clarified that his statement was based on the March 5, 2013 letter of then RDO Bernardo recommending the conduct of investigation against accused and his inclusion under the RATE program for failure to file his ITR for 2010 and 2011. When asked by the Court, witness Guro maintained that there was deliberate non-filing of ITR on the part of the accused.

2) Haron Laingan[9], Chief Revenue Officer II/Group Supervisor assigned in the RID, RR No. 16 Cagayan de Oro City, testified as follows: LOA No. LOA-211-2014-00000127 dated May 6, 2014 was issued by then BIR Commissioner Jacinto-Henares authorizing Revenue Officer Pangadapun I. Ambol and himself to conduct an examination/investigation against accused for the period January 1, 2011 to December 31, 2011. The basis for the issuance of the LOA was the result of their preliminary investigation on the letter dated March 5, 2013 of then RDO Bernardo to the Regional Director of RR No. 16, recommending that the accused be investigated and included under the RATE program. They served the LOA with First Notice for the submission of books of accounts and other accounting records/documents upon accused Hernane Ayon on May 8, 2014. Thereafter, they issued the Second Notice and was received by accused's wife, Arlyn Ayon, on May 28, 2014. They also issued the Final Notice for the submission of books of accounts and other accounting records/documents which was received by Arlyn Ayon on June 10, 2014. Subsequently, he requested for the issuance of a PAN against accused representing the alleged income tax and VAT deficiencies of accused for taxable year 2011, and the same was issued on May 15, 2015 by then Regional Director Alberto S. Olasiman. The PAN was indorsed to the Mailing Section of the Administrative Division on May 25, 2015 for registered mailing to the taxpayer. The FLD against accused was recommended and thereafter issued, together with the Details of Discrepancies, on June 30, 2015.

On cross-examination, witness Laingan confirmed that the

[9] Supplemental Judicial-Affidavit (Haron Laingan), docket, CTA Crim. Case No. O-589, vol. I, pp. 361-369; Minutes of the Hearing dated March 16, 2018, docket, CTA Crim. Case No. O-589, vol. I, pp. 602-606.

Joint-Complaint Affidavit was filed and initiated together with his co-employees prior to him serving the Final Notice for the submission of the books of accounts and other accounting records/documents. He confirmed that accused failed to file his ITRs for taxable years 2010 and 2011, and accordingly failed to pay income taxes for the same years. He also confirmed that the criminal complaint was initiated against accused prior to the service of the Final Notice for the submission of books of accounts and other accounting records or documents. On re-cross examination, Laingan said that the basis of the Joint Complaint Affidavit is the letter of RDO Bernardo recommending the inclusion of accused in the RATE Program. When questioned by the Court, Laingan clarified that when the Complaint-Affidavit was prepared, there was an initial finding already by RDO Bernardo on the alleged tax fraud committed by accused.

3) Diosdado C. Capapas, Jr.[10], Intelligence Officer II assigned in the RID RR No. 16 Cagayan de Oro City, corroborated the testimony of witness Jamaloden D. Guro and added the following: They allegedly recommended to the Prosecution Division of the BIR National Office the criminal prosecution of accused, and subsequently, their Joint Complaint Affidavit was referred by then Commissioner Jacinto-Henares to the Department of Justice (DOJ) for preliminary investigation and filing of the appropriate information in court, if the evidence warrants. Thereafter, the issuance of a PAN was recommended by Guro, which was subsequently issued by Regional Director Olasiman. They also recommended the issuance of a FLD against the accused, which was issued together with the Details of Discrepancies on August 27, 2015 by then Regional Director Olasiman.

On cross-examination, witness testified that they recommended to the Prosecution Division the filing of the criminal case on May 22, 2014, the same date when the Joint Complaint Affidavit was filed with the DOJ, and before the service of the Second and Final Notices for the submission of books of accounts and other accounting records. Although witness admitted that the investigation was still ongoing to determine the tax liability of accused, he said that the basis for filing the complaint with the DOJ was accused's failure to file VAT Returns and the Certification from the District Office of Malaybalay that there was no ITR filed by accused for 2010. When asked by the Court, he confirmed that AG Global Pharma gave

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[10] Supplemental Judicial-Affidavit (Diosdado C. Capapas, Jr.), docket, CTA Crim. Case No. O-589, vol. I, pp. 380-385; Minutes of the Hearing dated March 16, 2018, docket, CTA Crim. Case No. O-589, vol. I, pp. 602-606.

information that it made purchases from the accused in the years 2010 and 2011, and stated that it was during the investigation of AG Global Pharma that the investigating examiner discovered that there were substantial purchases by AG Global Pharma from accused. Mr. Capapas, Jr. also testified that he was only aware that there was a filing of ITRs for the years 2010 and 2011 after they filed the criminal complaint.

4) Gil E. Dalogdog[11], Section Chief, Data Capture Section of the Document Processing Division, RR No. 16, Cagayan de Oro City, testified as follows: He encountered the name of the accused when he verified the accused's tax compliance, such as the returns filed and not filed. He also stated that on April 25, 2014, he issued the Certification stating that Hernane A. Ayon, proprietor of H.A. Marketing, Harley's Car Service Center and Nanz Signature Saloon, had no returns filed for the following: (1) 2010 4th Quarter (VAT), (2) 2010 Annual Income Tax Return, (3) 2010 February to December Withholding Tax-Expanded, (4) 2011 1st, 2nd, 3rd & 4th Quarters (VAT), (5) 2011 Annual Income Tax Return, and (6) 2011 January to December Withholding Tax-Expanded.

On cross-examination, Dalogdog testified that he learned, in the early part of 2015, that there were returns filed late by accused that covers taxable year 2010 and that these returns were filed by accused in October 2013, before he issued the Certification mentioned in his testimony. Witness explained that when the Document Processing Section of the District Office in Malaybalay was created, there were only two employees, and considering that there are more or less ten thousand (10,000) returns coming in every month, there are a lot of backlogs. He stated that the instruction given was to work on the current returns for the taxpayers to facilitate their use. On re-direct examination, Dalogdog explained that they rely on their computers, hence, he confirmed that he issued the Certification because, at that time, based on the computer or the Integrated Tax System (ITS), there were no returns filed; also, prior to the issuance of the Certification, he did not see the annual ITR for 2010 and 2011 of the accused.

When asked by the Court, Dalogdog admitted that the Certification is no longer accurate in so far as the statement that there are no ITRs filed by the accused for the years 2010 and 2011.

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[11] Judicial-Affidavit (Gil E. Dalogdog), docket, CTA Crim. Case No. O-589, vol. I, pp. 339-342; Minutes of the Hearing dated March 16, 2018, docket, CTA Crim. Case No. O-589, vol. I, pp. 602-606.

4) Cherry P. Pepito[12], Revenue Officer II (Collection) assigned in Revenue District Office No. 99, Malaybalay City, testified that: she knows the accused because he is a registered taxpayer of Valencia City which is under the jurisdiction of Revenue District Office No. 99, and then RDO Bernardo requested her to monitor if Hernane Ayon is filing his returns. She verified from their records the following returns filed by accused under his tradenames H.A. Marketing and Nanz Signature Salon, to wit: (1) Value Added Tax Return for the month of November 2010; (2) 2009 Annual Income Tax Return; (3) 3rd Quarter 2010 Quarterly Income Tax Return, and (4) January to December 2010 Withholding Tax Expanded. She then wrote RDO Bernardo on February 6, 2013 to inform the latter of the results of her verification. She also verified accused's 2010 annual ITR and the Comparative Statement of Financial Operation for 2009 and 2010, and his 2011 annual ITR with the attached Comparative Statement of Financial Operation for 2010 and 2011.

On cross-examination, Cherry Pepito confirmed that the annual ITR for 2010 with the Comparative Statement of Financial Operation for December 31, 2009 and 2010 were from the District Office and forwarded to the Regional Office. She further confirmed that she does not know about the complaint filed against accused and that whether her co-employees who filed the case against accused knew of the letter she executed dated February 6, 2013. When asked by this Court, Pepito stated that the 2010 and 2011 annual ITRs were both filed on October 10, 2013.

Upon completion of its presentation of its witnesses, plaintiff formally offered its evidence[13] on April 10, 2018, and the following exhibits were admitted[14] by the Court:

Exhibit	*Description*
"P-1"	Letter Referral dated May 22, 2014 of then BIR Commissioner Kim J. Henares
"P-2"	Joint Complaint-Affidavit dated May 22, 2014 of Jamaloden D. Guro, Diosdado C. Capapas, Jr., Pangadapun I. Ambol and Haron R. Laingan
"P-2-A to P-2-D"	Signatures of Jamaloden D. Guro, Diosdado C. Capapas, Jr., Pangadapun I. Ambol and Haron R. Laingan

[12] Judicial-Affidavit (Cherry P. Pepito), docket, CTA Crim. Case No. O-589, vol. I, pp. 347-352; Minutes of the Hearing dated March 16, 2018, docket, CTA Crim. Case No. O-589, vol. I, pp. 602-606.
[13] Docket, CTA Crim. Case No. O-589, vol. II, pp. 647-688.
[14] Resolution dated June 13, 2018, docket, CTA Crim. Case No. O-589, vol. II, pp. 794-796.

"P-3"	Memorandum for Myrna L. Bernardo, Revenue District Officer, RDO No. 99, Malaybalay City dated April 16, 2013 of Revenue Collection Officer Cherry P. Pepito
"P-9"	Letter of Authority (LOA) No. LOA-211-2014-00000128 dated May 6, 2014 for the period from January 1, 2010 to December 31, 2010 issued by then Commissioner Kim S. Jacinto-Henares to Hernane Akut Ayon
"P-9-A"	Signature over the printed name of Hernane Ayon
"P-9-B"	Date of Receipt of LOA on 5-8-14
"P-10"	1st Notice to LOA-211-2014-00000128 for the submission of books of accounts and other accounting records dated May 8, 2014 issued by Alberto K. Daba, Jr. and received by Hernane Ayon
"P-10-A"	Signature over the printed name of Hernane Ayon
"P-11"	2nd Notice to LOA-211-2014-00000128 for the submission of books of accounts and other accounting records/documents dated May 28, 2014 issued by Alberto K. Daba, Jr. and received by Arlyn Ayon on May 28, 2014
"P-11-A"	Signature over the printed name of Arlyn Ayon
"P-11-B"	Date of receipt of 2nd Notice on May 28, 2014
"P-12"	Final Notice to LOA-211-2014-00000128 for the submission of books of accounts and other accounting records dated June 10, 2014 issued by Alberto K. Daba, Jr. and received by Arlyn Ayon on June 10, 2014
"P-12-A"	Signature of Arlyn Ayon
"P-12-B"	Date of Receipt of Final Notice on June 10, 2014
"P-69"	Letter to the Regional Director, Revenue Region No. 16, Cagayan de Oro City dated March 5, 2013 of Myrna L. Bernardo, then Revenue District Officer of RDO 99, Malaybalay City
"P-71"	Preliminary Assessment Notice (PAN) of RR 16 Regional Director Alberto S. Olasiman dated July 27, 2015 for the 2010 tax liabilities of Hernane A. Ayon
"P-72"	Details of Discrepancies of the Income and Value-Added Taxes for 2010 attached to the Preliminary Assessment Notice dated July 27, 2015
"P-73"	Formal Letter of Demand of RR 16 Regional Director Alberto S. Olasiman dated August 27, 2015 for the 2010 tax liabilities of Hernane A. Ayon
"P-74"	Details of Discrepancies of the Income and Value-Added Taxes for 2010 attached to the Formal Letter of Demand dated August 27, 2015
"P-75"	Preliminary Assessment Notice of RR 16 Regional

	Director Alberto S. Olasiman dated May 15, 2015 for the 2011 tax liabilities of Hernane A. Ayon
"P-76"	Details of computation of the Income and Value-Added Tax liabilities for 2011 attached to the Preliminary Assessment Notice
"P-77"	Formal Letter of Demand of RR 16 Regional Director Alberto S. Olasiman dated June 30, 2015 for the 2011 tax liabilities of Hernane A. Ayon
"P-78"	Details of computation of Income and Value-Added Taxes for 2011 attached to the Formal Letter of Demand
"P-79"	Memorandum for the Regional Director, Revenue Region No. 16, Cagayan de Oro City of Jamaloden D. Guro
"P-80"	Certification dated April 25, 2014 of Gil E. Dalogdog
"P-80-A"	Signature of Gil E. Dalogdog
"P-81"	Annual Income Tax Return for 2010 of Hernane Ayon
"P-82"	Comparative Statement of Financial Operation for the years 2009 and 2010 of Hernane Ayon
"P-82-A"	Declaration of sales for 2010 in the amount of ₱746,895.20 in the Comparative Statement of Financial Operation of Hernane Ayon
"P-85"	Letter to the Revenue District Officer, Revenue District Office No. 99, Malaybalay City dated February 6, 2013 of Cherry P. Pepito
"P-86"	Supplemental Judicial Affidavit dated November 17, 2017 of Jamaloden D. Guro
"P-86-a"	Signature over the printed name Jalamoden D. Guro
"P-87"	Supplemental Judicial Affidavit dated November 17, 2017 of Haron R. Laingan
"P-87-a"	Signature over the printed name Haron R. Laingan
"P-88"	Supplemental Judicial Affidavit dated November 17, 2017 of Diosdado C. Capapas, Jr.
"P-88-a"	Signature over the printed name Diosdado C. Capapas, Jr.
"P-89"	Judicial Affidavit dated November 17, 2017 of Gil E. Dalogdog
"P-89-a"	Signature over the printed name of Gil E. Dalogdog
"P-90"	Judicial Affidavit dated November 17, 2017 of Cherry P. Pepito
"P-90-a"	Signature over the printed name of Cherry P. Pepito

On the other hand, the following exhibits were denied admission, to wit:

Exhibit	*Description*
"P-4"	Certification dated April 24, 2013 of Assistant Revenue District Officer Mama B. Sanggacala
"P-14" to "P-68"	Official Receipts issued by H.A. Herbal Marketing to AG Global Pharma
"P-5", "P-5-A" and "P-5-B"	Letter of Authority (LOA) No. LOA-211-2014-00000127 for the period from January 1, 2011 to December 31, 2011 dated May 6, 2014 issued by then Commissioner Kim S. Jacinto-Henares to Hernane Akut Ayon; Signature over the printed name of Hernane Ayon; and Date of Receipt of LOA on 5-8-14
"P-6", "P-6-A" and "P-6-B"	1st Notice to LOA-211-2014-00000127 for the submission of books of accounts and other accounting records dated May 8, 2014 issued by Alberto K. Daba, Jr. and received by Hernano Ayon on even date; Signature over the printed name of Hernane Ayon; and Date of Receipt of 1st Notice on 5-8-14
"P-7", "P-7-A" and "P-7-B"	2nd Notice to LOA-211-2014-00000127 for the submission of books of accounts and other accounting records dated May 28, 2014 issued by Alberto K. Daba, Jr. and received by Arlyn Ayon on even date; Signature over the printed name of Arlyn Ayon; and Date of Receipt of 2nd Notice on 5-28-14
"P-8", "P-8-A" and "P-8-B"	Final Notice to LOA-211-2014-00000127 for the submission of books of accounts and other accounting records dated June 10, 2014 issued by Alberto K. Daba, Jr. and received by Arlyn Ayon on even date; Signature over the printed name of Arlyn Ayon; and Date of Receipt of Final Notice on 6-10-14
"P-83"	Annual Income Tax Return for 2011 of Hernane Ayon
"P-84"	Comparative Statement of Financial Operation for the years 2010 and 2011 of Hernane Ayon
"P-84-A"	Declaration of sales for 2011 in the amount of P574,515.62 in the Comparative Statement of Financial Operation of Hernane Ayon
"P-13"	Affidavit dated April 5, 2014 of Jo-Ann C. Grino

During the hearing on March 16, 2018, counsel for accused moved for leave to file a demurrer to evidence, which was granted by this Court.[15] Hence, on July 4, 2018, accused filed his Demurrer to Evidence, and on July 16, 2018, the prosecution filed its comment thereto.

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[15] Order dated March 16, 2018, docket, CTA Crim. Case No. O-589, vol. I, pp.607-609.

In his Demurrer to Evidence, accused claims that the evidence presented by the prosecution against him is insufficient to warrant his conviction of the crimes charged.

Allegedly, the Court's denial of the admission of the supposed official receipts issued by H.A. Herbal Marketing to AG Global Pharma proved fatal to the cause of the prosecution because these were the documents which were the basis of the filing of the criminal charges against him. Accused claims that without the said documentary evidence, he cannot be successfully prosecuted for willfully, unlawfully and knowingly attempting to evade or defeat tax because there is no proof of such attempt as alleged in the subject Amended Informations. Accused further contends that the remaining documentary evidence of the prosecution, such as the PAN and FLD, would likewise acquit the accused of the crime charged as these were issued to him, although not received by him personally, more than one year after the commencement of the formal complaint with the DOJ. Hence, he was allegedly denied due process.

In its comment, plaintiff avers that the denial made by this Court of the admission of the affidavit of Jo-Ann C. Grino and the official receipts issued by H.A. Herbal Marketing to AG Global Pharma is not fatal to the case of the prosecution because it presented witnesses and identified documents to prove that the accused willfully, unlawfully, and knowingly attempted to evade or defeat his income taxes for 2010 and 2011.

Plaintiff avers that the Joint Complaint-Affidavit dated May 22, 2014 which was affirmed, confirmed and identified as duly executed by Jamaloden Guro, Diosdado C. Capapas, Jr., and Haron Laingan, alleges that the recommendation by then RDO Bernardo for the investigation of the accused for tax fraud was an offshoot of the investigation done by Revenue District Office No. 99 on the income and other tax liabilities of Jo-Ann C. Grino, owner of AG Global Pharma. The investigation allegedly showed that she made substantial purchases in 2010 and 2011 from H.A. Herbal Marketing which is allegedly owned by accused. Since this was the case, the said office allegedly checked its records and it showed that accused failed to file annual ITRs for the years 2010 and 2011. Plaintiff argues that the testimonies of its witnesses and the documentary evidence marked and identified for the prosecution, even absent the testimony of Jo-Ann Grino, are sufficient to constitute moral certainty, or that degree of proof which produces conviction in an unprejudiced mind.

THE ISSUE

The issue in the instant Demurrer to Evidence is whether or not the evidence presented by the prosecution as against accused, Hernane A. Ayon, is sufficient to warrant his conviction of the crimes with which he stands charged.

THE COURT'S RULING

An assessment of a deficiency is not necessary to a criminal prosecution for willful attempt to defeat and evade the income tax.

At the outset, the Court shall address the argument of the accused on the alleged denial of his right to due process.

In this case, accused contends that he was denied due process because the PAN and FLD were issued to him more than one year after the criminal complaint was filed with the DOJ.

We are not convinced.

In the case of *Commissioner of Internal Revenue vs. Pascor Realty and Development Corporation, et.al.*[16], the Supreme Court ruled that in cases where a false or fraudulent return is submitted or in cases of failure to file a return, proceedings in court may be commenced without an assessment, *viz:*

> "Private respondents maintain that the filing of a criminal complaint must be preceded by an assessment. This is incorrect, because Section 222 of the NIRC specifically states that in cases where a false or fraudulent return is submitted or in cases of failure to file a return such as this case, proceedings in court may be commenced *without an assessment.* Furthermore, Section 205 of the same Code clearly mandates that the civil and criminal aspects of the case may be pursued

[16] G.R. No. 128315, June 29, 1999.

> simultaneously. In *Ungab v. Cusi*, petitioner therein sought the dismissal of the criminal Complaints for being premature, since his protest to the CTA had not yet been resolved. The Court held that such protests could not stop or suspend the criminal action which was independent of the resolution of the protest in the CTA. This was because the commissioner of internal revenue had, in such tax evasion cases, discretion on whether to issue an assessment or to file a criminal case against the taxpayer or to do both." *(Citations omitted and underscoring supplied)*

Moreover, in the case of *Adamson, et al. vs. Court of Appeals, et al.,*[17] the Supreme Court held that a crime is complete when the violator has knowingly and willfully filed a fraudulent return, with intent to evade and defeat the tax, to wit:

> "Thus, the applicability of *Ungab v. Cusi* is evident to the cases at bar. In this seminal case, this Court ruled that there was no need for precise computation and formal assessment in order for criminal complaints to be filed against him. It quoted Merten's Law of Federal Income Taxation, Vol. 10, Sec. 55A.05, p. 21, thus:
>
>> An assessment of a deficiency is not necessary to a criminal prosecution for willful attempt to defeat and evade the income tax. A crime is complete when the violator has knowingly and willfully filed a fraudulent return, with intent to evade and defeat the tax. The perpetration of the crime is grounded upon knowledge on the part of the taxpayer that he has made an inaccurate return, and the government's failure to discover the error and promptly to assess has no connections with the commission of the crime."

Based on the foregoing jurisprudential pronouncements, it is clear that there is no merit to accused's contention that he was denied due process when the criminal complaint was filed one year prior to the issuance of the PAN and the FLD, considering that a formal assessment is *not* a prerequisite to the institution of a criminal complaint.

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[17] G.R. Nos. 120935 & 124557, May 21, 2009.

Plaintiff failed to present competent and sufficient evidence to support a verdict of guilt in the instant criminal cases.

Anent the main issue in this case, this Court finds that the prosecution was unable to sufficiently discharge its burden of proving all the elements of the crime charged.

A demurrer to evidence is an objection by one of the parties in an action, to the effect that the evidence which his adversary produced is insufficient in point of law, whether true or not, to make out a case or sustain the issue. The party demurring challenges the sufficiency of the whole evidence to sustain a verdict. The court, in passing upon the sufficiency of the evidence raised in a demurrer, is merely required to ascertain whether there is competent or sufficient evidence to sustain the indictment or to support a verdict of guilt.[18]

In every criminal conviction, the prosecution is required to prove two things beyond reasonable doubt: first, the fact of the commission of the crime charged, or the presence of all the elements of the offense; and second, the fact that the accused was the perpetrator of the crime.[19]

In the instant cases, accused is charged under Section 254 of the NIRC of 1997, as amended, for tax evasion, which states:

> "SECTION 254. *Attempt to Evade or Defeat Tax.* – Any person who willfully attempts in any manner to evade or defeat any tax imposed under this Code or the payment thereof shall, in addition to other penalties provided by law, upon conviction thereof, be punished by a fine of not less than Thirty thousand pesos (P30,000) but not more than One hundred thousand pesos (P100,000) and suffer imprisonment of not less than two (2) years but not more than four (4) years: *Provided,* That the conviction or acquittal obtained under this Section shall not be a bar to the filing of a civil suit for the collection of taxes."

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[18] *Gutib vs. Court of Appeals, et al.,* G.R. No. 131209, August 13, 1999.
[19] *Guilbemer Franco vs. People of the Philippines,* G.R. No. 191185, February 1, 2016.

Based on the provisions of Section 254 of the NIRC, as amended, to be held liable for attempt to evade or defeat tax, the following elements must concur: (a) a tax is imposed under the NIRC; (b) a person, natural or juridical, is liable for that tax; and (c) such person willfully attempts in any manner to evade or defeat such tax.

Moreover, tax evasion connotes the integration of three factors: (1) the end to be achieved, *i.e.*, the payment of less than that known by the taxpayer to be legally due, or the non-payment of tax when it is shown that a tax is due; (2) an accompanying state of mind which is described as being evil, in bad faith, willful, or deliberate and not accidental; and (3) a course of action or failure of action which is unlawful.[20]

In this case, the Court finds that the prosecution failed to present competent and sufficient evidence to support a verdict of guilt in the instant criminal cases.

Anent the first and second elements, plaintiff miserably failed to prove that the payment of the taxes by the accused was less than what is legally due.

A reading of the Amended Informations herein shows that plaintiff anchors its case on the alleged attempt to evade or defeat taxes by the accused through his alleged failure to declare in his 2010 and 2011 ITRs his income earned from his gross sales to AG Global Pharma in the subject years amounting to ₱8,129,350.00 and ₱11,549,384.85, respectively.

However, the prosecution failed to establish that accused had any undeclared sales to AG Global Pharma. The alleged official receipts issued by H.A. Herbal Marketing to AG Global Pharma (Exhibits "P-14" to "P-68") and the Affidavit dated April 5, 2014 of Jo-Ann C. Grino (Exhibit "P-13"), cannot be taken into consideration by the Court. The said official receipts were denied admission for failure to have these receipts identified; while the affidavit was denied admission for failure to present the original thereof for comparison and for failure to identify.

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[20] *Commissioner of Internal Revenue vs. The Estate of Benigno P. Toda, Jr.*, G.R. No. 147188, September 14, 2004.

It should be noted that the filing of the criminal complaint against accused is based solely on the alleged substantial purchases in 2010 and 2011, made by AG Global Pharma, owned by Ms. Jo-Ann Grino, from H.A. Herbal Marketing, allegedly owned by accused. Moreover, these alleged purchases were discovered during the investigation of the tax liabilities of Ms. Grino. Thus, the authentication or verification of these official receipts by Ms. Grino is vital. Without the presentation of these official receipts, the veracity of the alleged undeclared sales to AG Global Pharma was not established.

In addition, this Court notes that the 2011 ITR (Exhibit "P-83") and the corresponding Comparative Statement of Financial Operation (Exhibits "P-84" and "P-84-A") were denied admission by this Court for failure to present the originals for comparison.

It must be stressed that plaintiff did not provide any explanation for the said failure to produce the originals. Without the 2011 ITR, it was not established whether the alleged sales to AG Global Pharma were declared in the 2011 ITR or not.

Assuming *arguendo* that the foregoing documents were to be admitted by this Court, the prosecution still failed to present evidence sufficient enough to convince the Court that H.A. Herbal Marketing is owned by accused, as alleged in the amended informations.

The Court notes that the parties merely stipulated that accused is a registered taxpayer of Revenue District Office No. 99, Malaybalay City, Bukidnon, with TIN **191**-178-370-000.

For the purpose of proving that accused is the proprietor of H.A. Marketing, the prosecution presented the Memorandum for Myrna L. Bernardo, Revenue District Officer, RDO No. 99, Malaybalay City dated April 16, 2013 of Revenue Collection Officer Cherry P. Pepito (Exhibit "P-3" [21]). However, a close scrutiny of the said memorandum shows that Hernane A. Ayon with TIN **919**-178-370 per ITS is the proprietor of "**H.A. Marketing**".

Hence, it is not clear whether **H.A. <u>Herbal</u> Marketing**, the establishment alleged in the information, is the same as H.A.

[21] Docket, CTA Crim. Case No. O-589, vol. I, p. 620.

Marketing referred to in the said memorandum. Moreover, there is a discrepancy between the TIN of accused as stipulated by the parties and as indicated in the memorandum.

Plaintiff argues that the Joint Complaint-Affidavit and the testimony of its witnesses on the alleged investigation done by Revenue District Office No. 99 on the income and other tax liabilities of Jo-Ann C. Grino, which showed that she made substantial purchases from H.A. Herbal Marketing, is sufficient to constitute moral certainty of the guilt of the accused.

We are not swayed.

The Joint Complaint-Affidavit and the testimony of its witnesses, without any other evidence, are insufficient to prove that Jo-Ann C. Grino made substantial purchases from H.A. Herbal Marketing. Moreover, it is readily apparent from the witnesses' testimonies that they were not the officers who conducted the investigation on Ms. Jo-Ann C. Grino, and hence, they have no personal knowledge on the said investigation.

In light of the absence of the first and second elements, this Court finds it unnecessary to discuss if there was willfulness on the part of the accused.

In view of the foregoing, the Court is constrained to grant accused's Demurrer to Evidence.

Plaintiff failed to establish by preponderance of evidence that accused should be held civilly liable in these consolidated cases.

As for the civil aspect of this case, the same is deemed simultaneously instituted and jointly determined with the instant criminal case pursuant to Section 7(b)(1) of Republic Act (RA) No. 1125, as amended by RA No. 9282, which provides that "the criminal action and the corresponding civil action for the recovery of civil liability for taxes and penalties shall at all times be simultaneously instituted with, and jointly determined in the same proceeding by the

CTA, the filing of a criminal action being deemed to necessarily carry with it the filing of the civil action, and no right to reserve the filing of such civil action separately from the criminal action will be recognized."

For taxable year 2010, evidence shows that an LOA (Exhibit "P-9"[22]) was issued to accused on May 6, 2014 and received by him on May 8, 2014 (Exhibits "P-9-A" and "P-9-B"[23]). A PAN (Exhibit "P-71"[24]) was then issued on July 27, 2015. According to plaintiff's witness, Mr. Guro, the PAN was indorsed to the Mailing Section of the Administrative Division for registered mailing to the taxpayer. However, plaintiff did not present in evidence the registry receipt and registry return receipt to prove that the PAN was sent to the accused by registered mail. Likewise, the FLD (Exhibit "P-73"[25]) was issued on August 27, 2015, however, the plaintiff's evidence is silent on whether the FLD was sent and actually received by accused.

In *Commissioner of Internal Revenue vs. Metro Star Superama, Inc.*[26], the Supreme Court held that failure to send the PAN stating the facts and the law on which the assessment was made as required by Section 228 of the NIRC of 1997, as amended, renders the assessments made by the Commissioner of Internal Revenue (CIR) void.

Moreover, in *Commissioner of Internal Revenue vs. Pascor Realty and Development Corporation, et al.*[27], the Supreme Court held that:

> An assessment contains not only a computation of tax liabilities, but also a demand for payment within a prescribed period. It also signals the time when penalties and interests begin to accrue against the taxpayer. To enable the taxpayer to determine his remedies thereon, **due process requires that it must be served on and received by the taxpayer**." (*Emphasis supplied*)

As for the taxable year 2011, the Court noted that the LOA for

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[22] Docket, CTA Crim. Case No. O-589, vol. I, p. 621.
[23] *Ibid.*
[24] Docket, CTA Crim. Case No. O-589, vol. I, p. 626.
[25] Docket, CTA Crim. Case No. O-589, vol. I, p. 629.
[26] G.R. No. 185371, December 8, 2010.
[27] G.R. No. 128315, June 29, 1999.

taxable year 2011 (Exhibit "P-5") was denied admission for failure to present its original for comparison. Considering that there is no proof that there was an LOA issued for taxable year 2011, then the income tax assessment for taxable year 2011 is void for being issued without an LOA.

As held in the Supreme Court case of *Medicard Philippines, Inc. vs. Commissioner of Internal Revenue*[28], an LOA is the authority given to the appropriate revenue officer assigned to perform assessment functions. It empowers or enables said revenue officer to examine the books of account and other accounting records of a taxpayer for the purpose of collecting the correct amount of tax. Hence, when there is no authority to examine the taxpayer's books of accounts and other accounting records, the assessment issued is void.

Even if the said LOA was admitted in evidence, still, the assessment is void considering that there was no proof presented that the PAN dated May 15, 2015 (Exhibit "P-75"[29]) and FLD dated June 30, 2015 (Exhibit "P-77"[30]) were sent and received by accused. According to plaintiff's witness, Mr. Laingan, the PAN was indorsed to the Mailing Section of the Administrative Division for registered mailing to the taxpayer on May 25, 2015 while the FLD was also mailed. However, on cross-examination, he admitted that he has no proof that the PAN and FLD were received by accused.

On the basis of the foregoing, it is clear that the prosecution failed to prove that the PAN and FLD for taxable years 2010 and 2011, were sent and actually received by accused. This is a clear violation of the due process requirement, requiring that taxpayers be informed of the assessment, otherwise, the subject assessment is rendered void.

In any case, this Court notes that the FLDs for taxable years 2010 and 2011 lack factual basis.

For taxable year 2010, the Details of Discrepancies attached to the FLD (Exhibit "P-74"[31]) show that the "Sales per Official receipts to AG Global Pharma-July to December" amounts to ₱7,258,348.22

[28] G.R. No. 222743, April 5, 2017.
[29] Docket, CTA Crim. Case No. O-589, vol. I, p. 632.
[30] Docket, CTA Crim. Case No. O-589, vol. I, p. 635.
[31] Docket, CTA Crim. Case No. O-589, vol. I, pp. 630-631.

while the "Undeclared sale" amounts to ₱7,577,585.87 and the explanation provided is that "Verification of receipts data gathered as evidenced by an official receipts issued by AG Global Pharma-July to December and sales declared per quarterly income tax returns, it was found that there were undeclared sales totaled ₱7,577,585.87 subject to income tax xxx".

On the other hand, for taxable year 2011, the Details of Computation attached to the FLD (Exhibit "P-78"[32]) show that there is an "Undeclared Sales per audit" in the amount of ₱10,311,950.76 and the explanation provided is that "Verification of information obtained from third party disclosed total sales of ₱10,311,950.76 to AG Global Pharma for taxable year 2011".

Based on the foregoing, no further details were provided on the undeclared sales to AG Global Pharma. It may be argued that even though the FLDs lack material details as to how the amounts were arrived at, still, accused is presumed to be aware of the details because the alleged official receipts were attached to the Joint Complaint-Affidavit and a breakdown was likewise provided in the Joint Complaint-Affidavit against accused filed with the DOJ.

However, the law requires that the legal and factual bases of the assessment be stated in the formal letter of demand and assessment notice. Thus, such cannot be presumed.[33]

Interestingly, the amount alleged in the Joint Complaint-Affidavit as the amount of purchases made by AG Global Pharma from H.A. Herbal Marketing amounts to ₱8,129,350.00 for 2010 and ₱11,549,384.85 for 2011[34], which do not match with the undeclared sales stated in the FLD. Hence, all the more reason that accused must be provided with the details or breakdown of the alleged undeclared sales to AG Global Pharma. Moreover, as discussed earlier, the alleged undeclared sales were gathered from third party information which was unverified.

In view of the foregoing, the assessments issued against accused for taxable years 2010 and 2011 are void for being issued in violation of the accused's right to due process.

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[32] Docket, CTA Crim. Case No. O-589, vol. I, pp. 636-637.
[33] *Commissioner of Internal Revenue vs. Enron Subic Power Corporation*, G.R. No. 166387, January 19, 2009.
[34] Docket, CTA Crim. Case No. O-589, vol. I, p. 89.

WHEREFORE, in light of the foregoing consideartions, accused's Demurrer to Evidence is **GRANTED**. Accordingly, CTA Criminal Case Nos. O-589 and O-590 are **DISMISSED** due to insufficiency of evidence.

SO ORDERED.

ROMAN G. DEL ROSARIO
Presiding Justice

ERLINDA P. UY
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice