REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

C.T.A. EB No. 405
(C.T.A. Case No. 7018)

-versus-

Present:
Acosta, *P.J.*,
Castañeda, Jr.,
Bautista,
Uy,
Casanova, and
Palanca-Enriquez, *JJ.*

VAN MELLE (PHILS.), INC.,
Respondent.

Promulgated:
JUN 29 2009

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DECISION

CASTAÑEDA, JR., J.:

This is a Petition for Review filed before the Court of Tax Appeals *en banc* assailing the Decision dated April 25, 2008 and the Resolution dated July 8, 2008 issued by the First Division of this Court in the case entitled, *"Van Melle (Phils.), Inc. vs. Commissioner of Internal Revenue"*, docketed as CTA Case No. 7018.[1]

[1] In the Petition for Review *en banc*, petitioner mistakenly referred to this case as C.T.A Case No. 7108.

The assailed Decision CANCELLED and WITHDRAWN the assessment for deficiency income tax in the amount of P9,264,593.29 for taxable year 1997 for having been issued beyond the three-year period to assess.

THE FACTS

The facts of the case as found by the Court in First Division are as follows:

> Van Melle (Phils.) Inc. (petitioner) is a domestic corporation duly organized and existing under Philippine laws and registered with the Securities and Exchange Commission (SEC).
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> Commissioner of Internal Revenue (respondent) is the officer of the Bureau of Internal Revenue (BIR) duly appointed and empowered to perform the duties of his office, including, among others, the powers to compromise, cancel, and abate tax liabilities pursuant to Section 204(B) of the National Internal Revenue Code (NIRC) of 1997, as amended.
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> Sometime in 1998, a certain Mario A. Carandang provided information to the Tax Fraud Division of the BIR that petitioner had fraudulently claimed a deduction of approximately P15,000,000.00 from its taxable income in its Annual Income Tax Return for 1997. After verifying the information provided by Mr. Carandang, respondent issued a Letter of Authority against petitioner on December 3, 1999.
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> On November 4, 2003, petitioner received from respondent a Final Assessment Notice (FAN) dated October 1, 2003, covering the taxable year 1997, which states that petitioner had deficiency income tax due to the government in the total amount of P9,264,593.29, inclusive of surcharge, interest, and compromise penalty, computed as follows:

Disallowance Deduction: Inventory Write-Off	
(27, 355 cartons of Mentos Pillowpacks 6x300)	$ 389,535.20
Existing Forex Rate in 1996	P 26.22
Total Amount in Php	P10,213,612.94
Income Tax Rate	35%
Basic Income Tax Deficiency	P 3,574,762.69
Add: Surcharge (50%) -	1,787,381.34
Interest at 20% p.a.	3,902,449.26
TOTAL Income Tax Deficiency	**P 9,264,593.29**

> In arriving at the income tax deficiency, respondent's position was that petitioner erroneously deducted the amount of $389,535.20, or an equivalent of P10,213,612.94 from its taxable income for the year 1997.
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> On December 4, 2003, petitioner, through its external auditor, filed with BIR Tax Fraud Division its Protest Letter dated December 4, 2003 which specified its factual and legal bases and requested that the deficiency tax assessments be withdrawn and cancelled.
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> As of June 1, 2004, the BIR had not issued any official action with respect to the Protest Letter. Hence, the instant Petition for Review was filed on July 1, 2004.
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> xxx xxx xxx xxx

Acting on the Petition, the First Division of this Court issued a Decision on April 25, 2008 which is now the subject of appeal. The said Decision cancelled and withdrew the assessment for deficiency income tax in the amount of P9,264,593.29 for taxable year 1997 of herein respondent.

The Commissioner of Internal Revenue filed a Motion for Reconsideration of the Decision dated April 25, 2008 against the respondent. In a Resolution dated July 8, 2008, the First Division denied the Motion for lack of merit.

Hence, this Petition for Review *en banc.*

Despite due notice, respondent failed to submit its Comment and Memorandum, thus, in a Resolution dated January 22, 2009 the Court *en banc* submitted the case for decision.

THE ISSUES

The issues in this case are as follows:

(1) Whether or not the assessment has become final and executory.

(2) Whether or not respondent's 1997 income tax return is fraudulent.

(3) Whether or not the assessment was issued within the prescriptive period provided for under the NIRC of 1997.

THE COURT'S RULING

The petition is without merit.

First Issue

Petitioner contends that the assessment has become final and executory due to respondent's failure to submit pertinent documents in support of its Protest Letter[2] dated December 4, 2003. The failure to submit supporting documents pursuant to Section 228 of the National Internal Revenue Code (NIRC) of 1997 made the Protest Letter no more than a mere scrap of paper – a *pro forma* protest of words in an attempt to give life to a hollow argument. It is as if no protest was ever filed. Therefore, the assessment has become final and executory.

We do not agree.

We find the said Protest Letter dated December 4, 2003 a valid request for reinvestigation of the Final Assessment Notice (FAN) dated October 1, 2003. It raised valid defenses which contradict petitioner's allegation of fraud.

The pertinent portion of Section 228 of the NIRC of 1997 provides:

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> "Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner

[2] *Rollo*, pp. 214-222, Exhibit "C".

> as may be prescribed by implementing rules and regulations. **Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.**
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> If the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within thirty (30) days from receipt of the said decision, or from the lapse of one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable. (*Emphasis ours*)

The afore-quoted provision states that respondent has 60 days to submit all "supporting documents" in support of its protest. Should the protest be denied or unacted by herein petitioner within one hundred eighty (180) days from the submission of the supporting documents, the taxpayer may appeal before the CTA within thirty (30) days from the receipt of decision or the lapse of the 180-day period.

In relation to this, the Supreme Court recognized the two types of protest pursuant to Revenue Regulations No. 12-85, to wit:[3]

> "Section 6. *Protest.* – The taxpayer may protest administratively an assessment by filing a written request for reconsideration or reinvestigation specifying the following particulars:
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> xxxx
>
> For the purpose of protest herein -
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> (a) *Request for reconsideration* – refers to a plea for a re-evaluation of an assessment on the basis of existing records without need of additional evidence. It may involve both a question of fact or of law or both.
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> (b) *Request for reinvestigation* – refers to a plea for re-evaluation of an assessment on the basis of newly-discovered evidence or additional evidence that a taxpayer intends to present in the investigation. It may also involve a question of fact or law or both.

[3] *Commissioner of Internal Revenue vs. Philippine Global Communications, Inc.*, G.R. No. 167146, October 31, 2006, 506 SCRA 427.

The main difference between these two types of protests lies in the records or evidence to be examined by internal revenue officers, whether these are existing records or newly discovered or additional evidence.[4]

In the Protest Letter dated December 4, 2003, respondent raised a question of fact to which it signified its intention to present additional evidence. Evidently, the said Protest Letter was in the nature of a request for reinvestigation which as defined refers to a re-evaluation of an assessment on the basis of newly discovered or additional evidence. Contrary to petitioner's allegations, respondent submitted documentary evidence in support of its protest. In fact, these documents were already attached to its Protest Letter, to wit:

1. Assessment Notice No. TFD-97-IT-141-03;
2. Formal Letter of Demand;
3. Commercial Invoice No. 00063;
4. Respondent's Financial Statement for taxable year 1997;
5. Reconciliation of Net Income and Analysis of Changes in Retained Earnings/Computation of Tax Due of Respondent's Income Tax Return for taxable year 1997;
6. Certification of Destruction;
7. Finished Goods Tabulation and physical count of respondent's inventory of finished goods; and
8. Copy of email sent by Van Melle Shenzen China (VMSC) to Van Melle Phils. Inc. (VMPI) dated November 28, 2003.

Hence, the Protest Letter is not just a mere *pro forma* protest but a valid protest which suspended the running of the period for the filing of the Petition for Review before the CTA.

We also ruled in *Commissioner of Internal Revenue vs. SolidBank Corporation (Now: First Metro Investment Corporation)* [5] that the submission of supporting documents lies on the sound discretion of the taxpayer for it is in the best position, being the affected party in the

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[4] *Ibid.*
[5] C.T.A. EB No. 114, February 22, 2007.

assessment, to determine which documents are necessary and essential to garner a favorable decision. The pertinent portion of the decision reads:

> xxx. The submission of relevant supporting documents lies in the sound discretion of the respondent, which it considers will be necessary to its protest. As aptly ruled by this Court in the case of *Standard Chartered Bank-Philippine Branches v. Commissioner of Internal Revenue*:
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> > "... As stated earlier, the determination of the 'relevant supporting documents' initially rests upon the one who filed the protest, in this case, the Petitioner. However, in cases where the BIR finds that additional documents must be submitted, it should have informed the taxpayer-protester to submit whatever documents are lacking in order that a complete determination of the propriety of the assessment may be had. Thus, Respondent has been remiss in informing the Petitioner of any other additional supporting documents to be submitted which fact should not unduly prejudice Petitioner's protest."
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> Lastly, We quote with approval the Court in Division's disquisition on this issue:
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> > "x x x In other words, the finality of the assessment, as worded in the provision of law, simply means that where the taxpayer decides to forego with its opportunity to present the documents in support of its claim within sixty (60) days from the filing of its protest, it merely lost its chance to further contest the assessment.
> >
> > Effectively, its non-compliance with the submission of the necessary documents would either mean that the petitioner no longer wishes to further submit any document for the reason that its protest letter filed was more than enough to support its claim, or that the petitioner failed to comply thus it can no longer give justification with regard to its objections as to the correctness of the assessment notices.
> >
> > Nonetheless, the necessity of the submission of the supporting documents lies on the petitioner. It cannot be left to the discretion of the respondent for in doing so would leave the petitioner's case at the mercy of the whims of the respondent. In other words, it is for the petitioner to decide whether or not supporting documents are necessary to support its protest, for it is in the best position, being the affected party to the assessment, to determine which documents are necessary and essential to garner a favorable decision from the respondent."

Corollary thereto, in the case of *Fil-Hispano Holdings Corporation vs. Commissioner of Internal Revenue* [6] the Court *en banc* ruled that if in case the taxpayer fails to submit the pertinent supporting documents within the 60-day period from the filing of the protest, and in case of inaction by the BIR and the taxpayer chooses to appeal to the CTA, the filing of the appeal must be made within 30 days from the lapse of the 180-day period. The 180-day period must be reckoned from the date the protest was filed. The 60-day period shall not be added to the computation of the 180 days because from the wordings of the law, in case the taxpayer fails to submit relevant supporting documents, the assessment becomes final.

In the present case, even assuming that respondent failed to submit supporting documents within the 60-day period, the provision of law under Section 228 of the NIRC of 1997 still favors the respondent. Applying the said provision, the reckoning of the 180-day period shall be counted from the date the protest was filed which was on December 4, 2003 and shall end on June 1, 2004. Accordingly, respondent had 30 days from June 1, 2004 or until July 1, 2004 within which to file a Petition before the CTA.

The Petition for Review was filed on July 1, 2004, which is within the period allowed by law.

Second and Third Issues:

Petitioner argues that the First Division of this Court erred when it held that respondent's 1997 tax return was not fraudulent. Petitioner asserts that respondent submitted a fraudulent return for the taxable year 1997 when the latter erroneously claimed as deduction the amount of $389,535.00 or an equivalent of P10,213,612.94 representing an inventory write-off. According to petitioner, respondent no longer possesses the right Je

[6] C.T.A. EB No. 343, June 12, 2008.

to write off the subject inventories because these were already sold to Van Melle Confectionery (Shenzhen) China, Ltd. (VMSC) evidenced by Commercial Invoice No. 00063.

Petitioner theorizes that the 27,355 cartons of Mentos Pillowpacks were included in inventories disposed of by means of burning evidenced by Certifications of Destruction issued on several dates by the Revenue District Office No. 41 of Mandaluyong City.

Furthermore, petitioner alleges that respondent exhibited an adamant refusal to submit documents for examination for the taxable year 1997 during the investigation of the case which further lends credence to respondent's fraudulent intent.

The Court *en banc* is not convinced by petitioner's allegations.

First, We have re-examined the *Certificates* [7] issued by Revenue District Office No. 41 of Mandaluyong City dated June 30, 1997, September 19, 1997 and November 26, 1997 which were all signed by Revenue Officers attesting to the destruction/burning of the respondent's inventory items with their corresponding supporting documents. These *Certificates* together with the supporting documents revealed that the bulk of inventories destroyed were raw materials. Although some of the items disposed of were Finished Goods, none of these pertained to the 27,355 cartons of Mentos Pillowpacks. There was nothing that will show the inclusion of the subject inventories among the items disposed of and written off. Contrary to the allegations of the petitioner that the subject inventories were destroyed and eventually written off, the findings of this Court proved otherwise.

[7] Exhibits "G", "H", and "I", *Rollo* pp. 243, 263 and 276.

Second, with respect to the issue on ownership over the subject inventories, We agree with the findings of the Court in Division. We quote the pertinent portion of the decision:

> xxx While the sale between the petitioner and VMSC cannot be denied, some of the documents (fax message memos) on which respondent's examiners based their assessment also indicated that the same sale was rescinded by VMSC; as VMSC had already written off these stocks and decided not to have them shipped to it anymore. In fact, VMSC questioned the warehousing fees being charged against it by petitioner for "safekeeping" the subject stocks despite being "written off" by VMSC; confirming the said rescission. Rescission creates the obligation to return the things which were the object of the contract, together with their fruits, and the price with its interest. Due to the rescission, the legal title over the said cartons of Mentos belonged to petitioner. (*footnotes omitted*)

Following the above discussions, We find no sufficient reason to alter the conclusion reached by the Court in Division.

Fraud was not established in this particular case by reason of petitioner's failure to prove and at least disprove respondent's evidence. Despite several opportunities granted petitioner, he still failed to present evidence that will support his allegation of fraud. For one, the person of a certain Mr. Mario Carandang, the one who provided information to the Tax Fraud Division of the BIR that respondent fraudulently claimed a deduction from its taxable income, was not presented in Court. The said information remains to be hearsay and is thus inadmissible in evidence.

We reiterate the well established doctrine that fraud cannot be presumed but must be proven. The fraud contemplated by law is actual and not constructive. It must be intentional fraud, consisting of deception willfully and deliberately done or resorted to in order to induce another to give up some legal right. [8] *Fraud* in its general sense "is deemed to

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[8] *Aznar vs. Court of Tax Appeals and Collector of Internal Revenue*, No. L-20569, August 23, 1974, 58 SCRA 519.

comprise anything calculated to deceive, including all acts, omissions, and concealment involving a breach of legal or equitable duty, trust or confidence justly reposed, resulting in the damage to another, or by which an undue and unconscionable advantage is taken of another."[9]

In the case of *Commissioner of Internal Revenue vs. Ayala Securities Corporation*, [10] the Supreme Court did not sustain the findings of fraud by the Commissioner of Internal Revenue simply because there was no iota of evidence presented to support the allegation of fraud or falsity on the return with intent to evade payment of tax. It ruled:

> xxx Petitioner merely relies on the provisions of Section 25 of the National Internal Revenue Code, violation of which, according to petitioner, presupposes the existence of fraud. But this is begging the question and We do not subscribe to the view of the petitioner.
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> **Fraud is a question of fact and the circumstances constituting fraud must be alleged and proved in the court below.** The finding of the trial court as to its existence and non-existence is final and cannot be reviewed here unless clearly shown to be erroneous (Republic of the Philippines vs. Ker & Company, Ltd., L-21609, Sept. 29, 1966, 18 SCRA 207; Commissioner of Internal Revenue vs. Lilia Yusay Gonzales and the Court of Tax Appeals, L-19495, Nov. 24, 1966, 18 SCRA 757) **Fraud is never lightly to be presumed because it is serious charge** (Yutivo Sons Hardware Company vs. Court of Tax Appeals and Collector of Internal Revenue, L-13203, January 28, 1961, 1 SCRA 160) (*Emphasis ours*)

In the case of *Commissioner of Internal Revenue vs. Javier, Jr.*,[11] the Supreme Court held that fraud is never imputed and the courts never sustain findings of fraud upon circumstances which, at most, create only

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[9] *Commissioner of Internal Revenue vs. Estate of Benigno P. Toda, Jr.*, G.R. No. 147188, September 14, 2004, 438 SCRA 290.
[10] No. L-29485, March 31, 1976, 70 SCRA 204.
[11] G.R. No. 78953, July 31, 1991, 199 SCRA 824.

suspicion. Fraud is a serious charge and, to be sustained, it must be supported by clear and convincing proof. [12]

Moreover, the Court of Appeals in the case of *Commissioner of Internal Revenue vs. Procter & Gamble Philippine Manufacturing Corp. and Court of Tax Appeals,*[13] was categorical in saying that the burden of proof of the existence of fraud lies with the Commissioner of Internal Revenue.

It is also worth emphasizing that assessments should not be based on mere presumptions no matter how reasonable or logical said presumptions may be. [14] Besides, in order to stand the test of judicial scrutiny, the assessment must be based on actual facts. The presumption of correctness of assessment being a mere presumption cannot be made to rest on another presumption. [15]

Considering that no fraud was established, the applicable prescriptive period within which the Bureau of Internal Revenue may assess deficiency tax is three years from the date the return was actually filed or from the last date prescribed by law of such return, whichever came later. The Court in Division was correct when it ruled that the assessment for taxable year 1997 has already prescribed:

> There being no fraud, the applicable period of limitation to assess is three (3) years from the filing of the return as provided in Section 203 of the NIRC of 1997,[16] as amended. Since the Annual Income Tax Return for 1997 was filed on March 31, 1998, respondent had until March 30, 2001 to assess petitioner. Unfortunately, the Final Assessment Notice and Formal Letter of Demand were only issued on October 1, 2003, beyond the three-year period to assess. (*footnotes omitted*)

[12] *Collector of Internal Revenue vs. Benipayo,* No. L-13656, January 31, 1962, 4 SCRA 182.
[13] CA-G.R. SP No. 22800, September 13, 1999.
[14] *Commissioner of Internal Revenue vs. Island Garment Manufacturing Corporation*, G.R. No. L-46644, September 11, 1987, 153 SCRA 665.
[15] Ibid.
[16] This should be NIRC of 1977, as amended.

The assessment issued after the lapse of the three (3)-year prescriptive period is invalid and without force and effect. [17] Since a prescribed assessment is an invalid assessment, then such assessment has no leg to stand on. A void assessment bears no valid fruit. [18]

WHEREFORE, in light of the foregoing law and jurisprudence, the Petition for Review *en banc* is **DISMISSED** for lack of merit. Accordingly, the Decision dated April 25, 2008 and the Resolution dated July 8, 2008 issued by the First Division are **AFFIRMED**.

SO ORDERED.

Juanito C. Castaneda, Jr.
JUANITO C. CASTANEDA, JR.
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

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[17] *Barcelon, Roxas Securities, Inc. vs. Commissioner of Internal Revenue*, CTA Case No. 5662, May 17, 2000.
[18] *Commissioner of Internal Revenue vs. Reyes*, GR. No. 159694, January 27, 2006, 480 SCRA 382.

CERTIFICATION

Pursuant to Section 13, 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 the Court.

ERNESTO D. ACOSTA
Presiding Justice