REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION
****

BANFF REALTY & DEVELOPMENT CORP.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondents.

CTA Case No. 8803

Members:

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

Promulgated:
SEP 06 2017 : 2:26 pm

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RESOLUTION

UY, J.:

For resolution are the following:

1. respondent's **"MOTION FOR RECONSIDERATION (Re: Decision dated May 23, 2017)"** filed on May 31, 2017, with petitioner's **"COMMENT/OPPOSITION *AD CAUTELAM* (Re: Motion for Reconsideration dated 29 May 2017)"** filed on July 3, 2017; and

2. petitioner's **"OMNIBUS MOTION A. TO EXPUNGE THE RESPONDENT'S MOTION FOR RECONSIDERATION DATED 29 MAY 2017; and, B. TO DECLARE THE FINALITY OF THE HONORABLE COURT'S DECISION DATED 23 MAY 2017"** filed on June 19, 2017, with respondent's **"COMMENT/ OPPOSITION (Re: Petitioner's Omnibus Motion to Expunge the Respondent's Motion for Reconsideration dated May 29, 2017 and to Declare the Finality of the Honorable Court's Decision dated May 23, 2017)"** filed on July 10, 2017.

In his *Motion for Reconsideration*, respondent seeks the reconsideration of this Court's Decision dated May 23, 2017, the dispositive portion of which reads:

> "**WHEREFORE**, in light of the foregoing considerations, the instant *Petition for Review* is **GRANTED** on the ground of prescription. Accordingly, the Final Assessment Notice/Demand Letter No. 39-B08-07 dated March 11, 2013 issued by respondent is hereby declared **VOID**, and is thus **CANCELLED** and **SET ASIDE**.
>
> **SO ORDERED**."

On the other hand, in its *Omnibus Motion*, petitioner prays that the said *Motion for Reconsideration* be expunged from the records of this case, and thereafter, that this Court issue an order declaring the finality of the said Decision.

Respondent's Motion for Reconsideration:

Respondent argues that this Court erred in ruling that his right to assess petitioner has already prescribed.

According to respondent, the 10-year prescriptive period has application in this case even in the absence of allegations of fraud, considering that there is difference between "false returns" and "fraudulent returns". Respondent points out that in the case of petitioner, there was a clear deviation from the truth when there exists findings of substantial over-statement of deductions as evidenced by the schedule of expenses submitted by no less than petitioner to Revenue Officer (RO) Flordeliza Reyes, and under Section 248(B)[1] of the National Internal Revenue Code (NIRC), as amended, where it provides that substantial under-declaration of sales, receipts or income, or over-statement of deductions shall constitute *prima facie* evidence of false or fraudulent return.

Furthermore, respondent avers that petitioner failed to rebut the presumption of the correctness of the assessment.

[1] Erroneously referred to as "Section 148(B)".

Respondent further streses that the letter dated June 26, 2014 executed by RO Flordeliza Reyes is not authorized by her superiors and the Bureau of Internal Revenue (BIR). And even granting, for the sake of argument, that she is authorized to execute said letter, the particular prescriptive period referred to by said RO was the three-year prescriptive period and not the ten-year prescriptive period.

For its part, petitioner counter-argues in its ***Comment/ Opposition,*** that it was able to present evidence to prove, among other things, that the BIR was wrong and/or mistaken in belatedly assessing petitioner the amounts of ₱18,855,340.08 and ₱2,587,623.71, as deficiency income tax and expanded withholding tax, respectively.

Allegedly, the undeniable fact remains that absolutely, no proof whatsoever, was actually offered and/or presented by respondent to establish, not only the fact that the subject Income Tax Return was false or erroneous, but that the filing thereof was fraudulent and/or attended by a witting attempt on the part of petitioner to evade the payment of the correct taxes.

According to petitioner, the most important proof that the herein questioned assessment had long prescribed, as correctly pointed out by this Court in its Decision, remains the letter dated June 26, 2014, which respondent's own witness in this case, namely, RO Reyes, actually sent to the petitioner in Reyes' admitted attempt to convince petitioner to withdraw the filing of the instant petition.

Petitioner's Omnibus Motion:

In its Omnibus Motion, petitioner argues that while respondent's *Motion for Reconsideration* was unilaterally scheduled by respondent to be heard on June 1, 2017, at 9:00 am, petitioner was only furnished with a copy thereof, as well as the notice of such scheduled hearing, on June 14, 2017, or thirteen (13) long days after the scheduled hearing of the said *Motion for Reconsideration*, in gross and undeniable violation of the three-day notice rule under Section 4, Rule 15 of the Rules of Court.

Moreover, petitioner contends that being a mere scrap of paper, the said *Motion for Reconsideration* should not have been accepted for filing in the first place. But, having actually been filed, it is nonetheless not entitled to judicial cognizance, and must forthwith be expunged from the record of this case for being fatally defective.

Upon the other hand, respondent counter-argues in his ***Comment/Opposition*** that there has been inadvertence on the part of respondent's counsel; that June 1, 2017 was typed, instead of June 15, 2017, which was the intention; and that said date suggested was still subject to the discretion and availability/convenience of the Court for "at such date as may be convenient to the Honorable Court's calendar, *sans* oral arguments" was written.

Moreover, respondent submits that the ten (10) year prescriptive period has application in this case even in the absence of allegations of fraud, because there was clear deviation from the truth when there exists findings of substantial overstatement of deductions as evidenced by the schedules of expenses submitted by no less than petitioner.

THE COURT'S RULING

Both *Motion for Reconsideration* and *Omnibus Motion* must be denied for want of merit.

We shall first resolve petitioner's *Omnibus Motion* vis-à-vis respondent's explanation relevant thereto.

In the spirit of liberality, We give credence to respondent's explanation that the setting of the date of hearing in the instant *Motion for Reconsideration* was done inadvertently as there is no indication that it is otherwise.

Apropos, lapses in the literal observance of a rule of procedure, such as the three-day notice rule under Section 4, Rule 15 of the Rules of Court, will be overlooked when they arose from an honest mistake, when they have not prejudiced the adverse party.[2]

Technicality aside, We proceed to resolve respondent's *Motion for Reconsideration*.

[2] *Tiangco, et al. vs. Land Bank of the Philippines*, G.R. No. 153998, October 6, 2010, citing *Aguam vs. Court of Appeals, et al.*, 388 Phil. 587 (2000).

In the said *Motion for Reconsideration*, respondent is, in effect, changing his previous stand in saying that the basis for the application of the ten-year prescriptive period in the issuance of the subject tax assessments is that petitioner's returns were false, instead of being fraudulent.

In view thereof, it becomes necessary to point out the distinction between a false return and a fraudulent return. We recognized this distinction in the assailed Decision, when We cited the case of *Commissioner of Internal Revenue vs. Fitness By Design, Inc.*,[3] wherein the Supreme Court held as follows:

> "The prescriptive period in making an assessment depends upon whether a tax return was filed or whether the tax return filed was either false or fraudulent. When a tax return that is neither false nor fraudulent has been filed, the Bureau of Internal Revenue may assess within three (3) years, reckoned from the date of actual filing or from the last day prescribed by law for filing. However, in case of a false or fraudulent return with intent to evade tax, Section 222(a) provides:
>
> > Section 222. Exceptions as to Period of Limitation of Assessment and Collection of Taxes.—
> >
> > (a) In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at *any time within ten (10) years after the discovery of the falsity, fraud or omission: Provided,* That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof. (Emphasis supplied)
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> In *Aznar v. Court of Tax Appeals*,[4] this Court interpreted Section 332 (now Section 222[a] of the National Internal Revenue Code) by dividing it in three (3) different cases: first, in case of false return; second, in case of a fraudulent return with intent to evade; and third, in case of failure to file a return. Thus:

[3] G.R. No. 215957, November 9, 2016.
[4] 157 Phil. 510 (1974) [Per J. Esguerra, First Division].

> Our stand that the law should be interpreted to mean a separation of the three different situations of false return, fraudulent return with intent to evade tax and failure to file a return is strengthened immeasurably by the last portion of the provision which aggregates the situations into three different classes, namely 'falsity', 'fraud' and 'omission.'
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> **This Court held that there is a difference between 'false return' and a 'fraudulent return.' A false return simply involves a 'deviation from the truth, whether intentional or not' while a fraudulent return 'implies intentional or deceitful entry with intent to evade the taxes due.'"** *(Emphasis supplied)*

Having the said difference in mind, it is well to note that in the assailed Decision, this Court found that the basis for the subject assessment was the supposed **fraud** committed by petitioner, as testified upon by the clear testimony of respondent's lone witness, RO/Ms. Flordeliza B. Reyes, pertinent portions of which were quoted in the assailed Decision.

In any case, the following arguments of respondent regarding the showing of a "deviation from the truth" in this case deserve scant consideration, to wit:

> "In the case of herein petitioner BANFF, there was a clear deviation from the truth when there exists findings of substantial over-statement of deductions as evidence *(sic)* by the schedule of expenses submitted by no less than petitioner, and under Section 148(B)[5] of the NIRC, as amended, it provides that substantial under-declaration of sales, receipts or income, or over-statement of deductions shall constitute prima facie evidence of false or fraudulent return."[6]

This must be so because the said "schedule of expenses", allegedly submitted by petitioner, was not presented and formally offered as evidence. Relative thereto, it must be remembered that

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[5] This should be "Section 248(B)".
[6] Respondent's *Motion for Reconsideration*, Docket, p. 418.

evidence not formally offered during the trial cannot be used for or against a party litigant by the trial court in deciding the merits of the case.[7]

Furthermore, while it may true that where there exists findings of substantial over-statement of deductions or substantial under-declaration of sales, receipts or income, the same shall constitute *prima facie* evidence of false or fraudulent return, there is no showing that such substantial over-statement of deductions or such substantial under-declaration exists in the instant case.

For easy reference, Section 248(B) of the NIRC of 1997 provides as follows:

> "SEC. 248. *Civil Penalties.* —
>
> xxx xxx xxx
>
> (B) In case of willful neglect to file the return within the period prescribed by this Code or by rules and regulations, or in case of a false or fraudulent return is willfully made, the penalty to be imposed shall be fifty percent (50%) of the tax or of the deficiency tax, in case any payment has been made on the basis of such return before the discovery of the falsity or fraud: *Provided*, That **a substantial underdeclaration of taxable sales, receipts or income, or a substantial overstatement of deductions, as determined by the Commissioner pursuant to the rules and regulations to be promulgated by the Secretary of Finance, shall constitute *prima facie* evidence of a false or fraudulent return: *Provided, further*, That failure to report sales, receipts or income in an amount exceeding thirty percent (30%) of that declared per return, and a claim of deductions in an amount exceeding thirty percent (30%) of actual deductions, shall render the taxpayer liable for substantial underdeclaration of sales, receipts or income or for overstatement of deductions, as mentioned herein**." *(Emphasis and underscoring supplied)*

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[7] *Pilipinas Shell Petroleum Corp. vs Commissioner of Customs,* G.R. No. 195876, December 5, 2016.

Based on the foregoing provisions, what is constitutive of a *prima facie* evidence of a false or fraudulent return is either a substantial underdeclaration of sales, receipts or income, or a substantial overstatement of deductions. In turn, there is a substantial underdeclaration of sales, receipts or income, when there is failure to report sales, receipts or income exceeding 30% of that declared per return; and there is a substantial overstatement of deductions when a claim of deductions exceeds 30% of the actual deductions.

In this case, there is neither substantial underdeclaration of sales, receipts or income, nor a substantial overstatement of deductions, based on the respective 30%-threshold established by law.

And while it may be true that respondent disallowed the amount of ₱21,563,139.27 as petitioner's deductions, the same falls short of the more than 30%-threshold on the actual deductions claimed by petitioner. Evidence show that petitioner claimed a total deduction of ₱335,136,868.76 (composed of ₱278,792,183.37 as "Cost of Sales/Services", and ₱56,344.685.39 as *"Deductions"*).[8] Clearly, the amount of disallowed deductions (*i.e.*, ₱21,563,139.27)[9] is only 6.43% of the said total deductions declared by petitioner.[10]

Thus, petitioner is not guilty of a substantial overstatement of deductions, which would constitute a finding of *prima facie* evidence of a false or fraudulent return under the law.

Lastly, it is noteworthy that both parties mentioned their respective stand regarding the letter dated June 26, 2014[11] executed by RO/Ms. Flordeliza B. Reyes as to the applicability of the three-year prescriptive period to assess the subject taxes. However, it must be emphasized that contrary to the assertions and/or assumptions of both parties, this Court did not rely on the said letter in arriving at the conclusion that it is the three-year prescriptive period to assess under Section 203 of the NIRC of 1997 which is applicable in this case.

To be clear, it must stated that said letter dated June 26, 2014 has no bearing on the issuance of the subject tax assessments for the

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[8] Refer to Exhibit "P-5", Docket, p. 207.
[9] Refer to Exhibit "P-4", Docket, p. 205.
[10] ₱21,563,139.27 divided by ₱335,136,868.76 is 6.4341292409227%.
[11] Exhibit "P-7", Docket, p. 220.

simple reason that it was issued without authority; and that the said three-year prescriptive period is found to be the applicable period in the instant case simply because respondent failed to show the existence of fraud.

WHEREFORE, in light of the foregoing considerations, respondent's *Motion for Reconsideration* and petitioner's *Omnibus Motion* are hereby **DENIED** for lack of merit.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

CIELITO N. MINDARO-GRULLA
Associate Justice