REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

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SOUTHERN NEGROS DEVELOPMENT CORPORATION,
Petitioner,

-versus-

THE COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. E.B. NO. 162
(C.T.A. CASE NO. 7075)

Present:

ACOSTA, Presiding Justice,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA, and
PALANCA-ENRIQUEZ, JJ.

Promulgated:

AUG 08 2006 [signature]

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DECISION

PALANCA-ENRIQUEZ, J.:

THE CASE

This is a Petition for Review filed by Southern Negros Development Corporation (hereafter "petitioner") under *Section 11* of *Republic Act No. 9282* (An Act Expanding the Jurisdiction of the Court of Tax Appeals), in relation to Rule 43 of the 1997 Rules of Civil Procedure, as amended, which seeks the reversal of the Resolution promulgated on 6 September 2005 granting the Motion to Dismiss rendered by the Second Division of this Court in C.T.A. Case No. 7075, the dispositive portion of which reads as follows:

> "**WHEREFORE**, premises considered, respondent's Motion to Dismiss is hereby **GRANTED**. Accordingly, the present Petition for Review is hereby **DISMISSED**.
>
> SO ORDERED."

The Motion for Reconsideration was denied by the Second Division in the assailed Resolution, dated 18 January 2006, the dispositive portion of which reads as follows:

> "After a careful consideration of the grounds raised in petitioner's "Motion for Reconsideration" and petitioner's "Reply" thereto, the Court after due deliberation, resolved to DENY the Motion for Reconsideration, the basic issues raised therein having been previously considered and passed upon by the Court in the Resolution sought to be reconsidered, and We find no cogent or valid reason to reverse the said Resolution.
>
> **SO ORDERED**."

THE FACTS

The antecedent facts are uncontroverted.

Petitioner is a corporation organized and existing under the laws of the Republic of the Philippines engaged in the milling of sugarcane into raw sugar.

Respondent is the duly appointed Commissioner of Internal Revenue.

On 18 August 2003, Petitioner received amended Assessment Notices dated 2 July 2003 from Regional Director Lirio A. Cabsaba, covering fiscal years 1997 and 1999, assessing the amount of P9,099,090.79 and P49,153,577.88 (Annexes *"A"* and *"B"* of the Petition for Review, C.T.A. Case No. 7075), respectively, representing alleged deficiency Income Tax, Value Added Tax, and Documentary Stamp Tax.

Petitioner, through Mr. John Gokongwei, Jr., executed series of unnotarized Waiver of the Statute of Limitations (Annexes "*H*" and *"K"* of the Petition for Review, C.T.A. Case No. 7075) to afford the Commissioner ample time in the investigation of their pending case.

Respondent, thereafter, issued Final Notice before Seizure, Warrant of Distraint and Levy, Notice of Tax Lien, Warrant of Garnishment and Notice of Sale (Annexes *"C", "D", "E", "F"* and *"G"* of the Petition

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for Review, C.T.A. Case No. 7075), all for the satisfaction of the alleged deficiency taxes.

Thereafter, petitioner filed a Petition for Review with Urgent Motion for Issuance of a Temporary Restraining Order (docketed as C.T.A. Case No. 7075) before this Court to enjoin respondent from proceeding with the auction sale.

In his Answer filed on 16 November 2004, respondent alleged by way of Special and Affirmative Defenses:

> "11. The assessments had already become final, executory and unappealable due to the failure of the Petitioner to protest the assessments within thirty (30) days from receipt thereof, as provided in Section 228 of the Tax Code. Hence, their correctness can no longer be disputed (Protectors Services, Inc. vs. Court of Appeals, 330 SCRA 404)."

Subsequently, petitioner filed its Reply thereto on 26 November 2004.

On 21 April 2005, respondent filed his Motion to Dismiss on the ground that the assessment had become final and unappealable for failure of petitioner to protest the assessments within thirty (30) days from receipt thereof.

Petitioner thereafter filed its Comment/Opposition on 05 May 2005.

In its Resolution dated 6 September 2005, the Second Division granted the Motion to Dismiss. Dissatisfied, petitioner moved for reconsideration of the said Resolution. On 18 January 2006, the Second Division denied petitioner's "Motion for Reconsideration".

Hence, the present Petition for Review.

THE ISSUES

Petitioner raised the following assignment of errors:

I.

THE SECOND DIVISION ERRED IN DECLARING THAT ITS JURISDICTION IS LIMITED ONLY TO "DECISIONS" OF THE COMMISSIONER OF INTERNAL REVENUE.

II.

THE SECOND DIVISION ERRED IN GIVING DUE COURSE TO THE MOTION TO DISMISS FILED BY RESPONDENT.

III.

THE SECOND DIVISION ERRED IN DECLARING THAT A PRIOR ADMINISTRATIVE PROTEST IS REQUIRED EVEN IN CASES WHERE THE LEGAL

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VALIDITY OF AN ASSESSMENT AND ACTS ARISING THEREFROM ARE PUT IN ISSUE.

On 20 March 2006, We required respondent to file his Comment on the petition, within fifteen (15) days from receipt thereof.

For failure of respondent to file his comment upon the expiration of the prescribed period, the case was deemed submitted for resolution.

The principal issue for this Court's resolution is whether or not the Second Division correctly granted the Motion to Dismiss filed by respondent.

THE COURT'S RULING

The Petition has no merit.

Petitioner contends that there was no need to file a protest before the administrative body because a void assessment can never attain finality, hence, they can directly invoke the aid of the Court. There are two grounds on which petitioner stands firm that the subject assessments were void, to wit: (1) that the assessments failed to state the laws and facts on which they were based; and (2) that they were issued beyond the prescriptive period for assessment of taxes.

Respondent, on the other hand, in his Motion to Dismiss averred that petitioner did not protest the Amended Assessment Notices within the thirty (30) day period set by law, rendering them final, executory and unappealable before the courts.

Anent the first ground raised to avoid the validity of the assessment, petitioner asserts that it did not contain the facts or laws on which they were based. We disagree.

Going over the records of the case, it is evident that petitioner was already informed about its deficiency income, VAT and documentary stamp taxes and their legal basis for the calendar years 1997 and 1999 in the Audit Results/Assessment Notices attached to the Letter of Assessment (Annexes "*A*" and "*B*" of the Petition for Review, C.T.A. Case No. 7075), as well as in the Pre-Assessment Notices (Annexes "*L*" and "*O*" of the Petition for Review, C.T.A. Case No. 7075) sent by the BIR to petitioner. In fact, petitioner was given a chance to explain their side on the issue of their tax deficiencies, as acknowledged by their SVP-Corporate Controller Constante T. Santos, in his letter to Atty. Lirio A. Cabsaba which was received by the BIR on 28 November 2003, based on the BIR records submitted to the Court. Said letter states in part:

> "Thanks for accommodating Ms. Victoria Pulmones and Mr. Rodrigo de Castro, controllers of Southern Negros Development Corporation (Company) in your office last November 20, 2003.

> I was informed by Ms. Pulmones and Mr. De Castro that they have a lengthy discussion with you and your group on the various issues covering the alleged deficiency of the Company for fiscal years 1997 and 1999 xxx"(*BIR Records, p. 1054*).

In this regard, *Section 228* of the *NIRC of 1997*, as amended, provides:

> "**SEC. 228. Protesting an Assessment**. — When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: Provided, however, That a pre-assessment notice shall not be required in the following cases:
>
> xxx xxx xxx
>
> That the taxpayer shall be informed in writing of the law and the facts on which the assessment is made, otherwise, the assessment shall be void."

The reason for the requirement is obvious: to ensure that taxpayers are duly apprised of the basis of the tax assessments against them. This is in keeping with the settled doctrine that before a person can be deprived of his property, he should first be informed of the claim against him and the theory on which such claim is premised *(Ang Ping vs. Court of Appeals, 310 SCRA 343).*

In a long line of cases decided by this Court, We consistently stressed that the requirement of the law to inform the taxpayer of the basis of the assessment should not be construed as limiting to the assessment notice itself. Upon a careful study of the law, it is noteworthy to emphasize that assessment notices need not be a full narration of the facts and laws on which the assessment is based. Further, the law mandates that the notice to acquaint the taxpayer the basis of his assessment must be in writing but it does not categorically state that the assessment itself must contain such information. It is enough that petitioner be substantially informed of the law and the facts on which the assessment for a tax liability is made in any other written document presented to the taxpayer. Thus, so long as the parties are notified and were given the opportunity to explain their side, the requirements of due process are satisfactorily complied with (*Calma vs. Court of Appeals, 302 SCRA 682*).

On the second ground raised by petitioner, they interposed the defense of prescription. A perusal of the records shows that petitioner executed series of Waivers of the Statute of Limitations (*Annexes "H" and "K" of the Petition for Review, C.T.A. Case No. 7075*) for the assessment of the tax deficiency for the fiscal year ended 30 September 1997. Petitioner attempts to evade the validity of its action in waiving its right to the defense of prescription by alleging the flaws of the waiver.

The running of the prescriptive period on the making of an assessment and collection of taxes is suspended: (1) when the Commissioner of Internal Revenue is prohibited from making the assessment or beginning distraint or levy or a proceeding in court and for sixty (60) days thereafter, such as when there is a pending petition for review; (2) when the taxpayer requests for a reinvestigation/reconsideration which is granted by the Commissioner; (3) when the taxpayer cannot be located in the address given by him in the return; (4) when the warrant of distraint and levy is duly served; and (5) when the taxpayer is out of the Philippines (*Tax Principles and Remedies, by Japar B. Dimaampao, 1st edition, 2002*).

The waiver of the statute of limitations, whether on assessment or collection, should not be construed as a waiver of the right to invoke the defense of prescription but, rather, an agreement between the taxpayer and the BIR to extend the period to a date certain, within which the latter could still assess or collect taxes due. The waiver does not mean that the taxpayer relinquishes the right to invoke prescription unequivocally but he can still be estopped from raising such defense based on his actions. In the case of *Bank of the Philippine Islands vs. Commissioner of Internal Revenue* (*473 SCRA 205*), the Supreme Court held:

> "Even when the request for reconsideration or reinvestigation is not accompanied by a valid waiver or there is no request for reinvestigation that had been granted by the BIR Commissioner, the taxpayer may still be held in estoppel and be prevented from setting up the defense of prescription of the statute of limitations on collection when, by his own repeated requests or positive acts, the Government had been, for good reasons, persuaded to postpone collection to make the taxpayer feel that the demand is not unreasonable or that no harassment or injustice is meant by the Government, as laid down by this Court in the Suyoc case."

The *Suyoc case (Collector of Internal Revenue v. Suyoc Consolidated Mining Co., 104 Phil. 819)* refers to a situation where there were repeated requests or positive acts performed by the taxpayer that convinced the BIR to delay collection of the assessed tax. The Supreme Court pronounced therein that the repeated requests or positive acts of the taxpayer prevented or estopped it from setting up the defense of prescription against the Government when the latter attempted to collect the assessed tax.

Comparatively, petitioner in this case requested for reconsideration and also repeatedly executed a waiver of the statute of limitations which persuaded the BIR to delay the issuance of the final assessment and gave them a chance to explain and produce evidence to prove their side to show that no injustice was meant by the government. And when such situation comes to pass there are authorities that hold, based on weighty reasons, that such an attitude or behavior should not be countenanced if only to protect the interest of the Government.

In view of the foregoing resolution of the issues presented before Us, We are constrained to affirm the validity of the subject assessments. Settled is the rule that tax assessments by tax examiners are presumed correct and made in good faith with the taxpayer having the burden of proving otherwise (*Cagayan Robina Sugar Milling Co. vs. Court of Appeals, et al., 342 SCRA 663)*. In the absence of proof of any irregularities in the performance of official duties, an assessment will not be disturbed *(Ferdinand R. Marcos II vs. Court of Appeals, et al., 273 SCRA 47)*. Verily, failure of petitioner to present proof of any irregularity in the assessment notices will justify the judicial affirmance of said assessment notices.

This now leads Us to the propriety of the dismissal of the Petition for Review of petitioner by the Second Division after respondent having actively participated in the proceedings and had actually filed his Pre-trial Brief and joined the Pre-trial Conference.

Respondent in his above-quoted Answer alleged prescription as a Special and Affirmative Defense.

In this connection, the Second Division pointed out in its Resolution dated 6 September 2005, *Section 6* of *Rule 16* of the *Revised Rules of Court* which provides:

> "**SECTION 6. Pleading grounds as affirmative defense** – If no motion to dismiss has been filed, any of the grounds for dismissal provided for in this Rule may be pleaded as an affirmative defense in the answer and, in the discretion of the court, a preliminary hearing may be had thereon as if a motion to dismiss had been filed."

As aptly ruled by the Second Division, "Pursuant to the above provision, an affirmative defense contained in an answer, such as prescription, may be regarded as having the effect of a motion to dismiss, and the complaint may be dismissed" (*Resolution dated September 6, 2005, C.T.A. Case No. 7075*).

Moreover, such provision provides that instead of filing a motion to dismiss, the defending party may file his answer to the complaint or pleading asserting a claim and incorporate therein not only his counterclaim but also all negative as well as affirmative defenses which are grounds for a motion to dismiss. The Court, as in a motion to dismiss, has any of the three (3) courses of action: (1) to dismiss the case; (2) to deny the motion; or (3) to order the amendment of the pleading (*Handbook on Civil Procedure, 2001 Edition, Ruben Agpalo*). The Court in the exercise of its discretion may avail any of the three mentioned measures in accordance with its own judgment of the case. In this case, We concur with the findings and conclusion of the Second Division granting the Motion To Dismiss.

For all the foregoing, We see no reason to reverse the assailed Resolution dated 6 September 2005 of the Second Division.

WHEREFORE, premises considered, the instant petition is hereby **DENIED DUE COURSE**, and accordingly, **DISMISSED** for lack of merit.

SO ORDERED.

OLGA PALANCA-ENRIQUEZ
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

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