REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ATLAS CONSOLIDATED
MINING AND DEVELOPMENT
CORPORATION,
Petitioner,

- versus -

C.T.A. CASE NO. 4498

COMMISSIONER OF INTERNAL
REVENUE,
Respondent.

Promulgated:
MAY 03 1996

x - x

D E C I S I O N

This case involves a deficiency income tax and expanded withholding tax assessments, inclusive of increments; and penalties for late payment of the quarterly income tax all for the year 1979 in the total amount of P40,691,335.85.

Petitioner (Atlas for short) is a domestic corporation duly organized and existing under the laws of the Philippines. It is engaged in the business of mining gold, copper ores and concentrates.

An investigation was conducted by the Bureau of Internal Revenue on Atlas's income and business tax liabilities for the year 1979. As a result thereof the Revenue Examiners who have conducted the examination prepared a Memorandum Report (Exhs. 1, 2, 3 and 4, pp. 5-20, BIR records), dated March 25, 1985, addressed to the respondent, Commissioner of Internal Revenue. Thereafter, respondent issued an assessment letter (Exh. A), dated April 12, 1985, against the petitioner demanding for the payment of the sum of P40,691,335.85, representing alleged deficiency income and expanded withholding taxes, inclusive of increments thereon, and penalties for late payment of the quarterly income tax, computed as follows: (Exh. A-1)

Deficiency Income Tax - 1979

Net income per return		P331,662,736.00
Add: Unallowable deductions:		
Exchange earned (Capitalizeable)	P 2,004,000.00	
General overhead (prior year's expense)	360,894.89	
Adjustment of accrual of tax differential on taxable income (prior years expense)	1,602,183.00	
Management fee (No EWT)	52,289,911.92	56,256,989.81
Net income per investigation		P387,919,725.81
Tax due thereon		P155,157,890.00
Less: Amount already paid per return		132,747,312.55
Deficiency income tax		P 22,410,577.45
Add: 14% int. fr. 4/15/80 to 7/31/80		921,903.34

20% int. fr. 8/1/80 to 4/15/83	12,136,503.75
TOTAL AMOUNT DUE AND COLLECTIBLE	P 35,468,984.54

Penalties for Late Payment of Quarterly Income Tax - 1979

Income tax due for Quarter Ending 3/31/79	P39,210,973.00
Less: Amount paid for the quarter dated 5/30/79	38,945,250.72
Basic deficiency income tax - paid on 4/14/80 under O.R. #4088343	P 265,722.28
Quarterly income tax due 5/30/79	P 265,722.28
Interest for late payment - 14% int. fr. 5/30/79 to 4/14/80	P 32,577.55

Deficiency Expanded Withholding Tax

Amount of Management fees	P52,289,911.92
Tax due thereon (5%)	P 2,614,495.60
Less: Amount already paid	-
Deficiency Expanded Withholding Tax	P 2,614,495.60
Add: 25% surcharge	653,623.90
14% int. fr. 2/1/80 to 5/1/85	1,921,654.26
TOTAL AMOUNT DUE AND COLLECTIBLE	P 5,189,773.76

On May 16, 1985, a letter-protest (Exh. C), dated May 13, 1985, was filed by Atlas through the Gadioma Law Offices contesting the assessments as null and void. Pertinent portion of the protest reads as follows:

> "On behalf of our client called ACMDC for short, we file this protest under the provisions of law requiring taxpayers to protest deficiency assessments within 30 days from receipt else they become final and executory. This is not a request for reconsideration or reinvestigation or a plea for accommodation in any sense. It should not therefore be interpreted to estop our client from invoking the defense of prescription whenever this becomes available."

Atlas's representative, Mr. Zoilo Y. Castrillo, Jr., Senior Vice President and Assistant Treasurer, signed a Waiver of the Statute of Limitation (undated) valid up to December 31, 1989 (p. 76, BIR record). On December 29, 1989, another waiver was signed by the same representative valid up to March 31, 1990 (p. 79, BIR record). The last waiver signed (also undated) was valid up to June 30, 1990 (p. 140, BIR record). But in all instances, the three (3) waivers were not signed by the Commissioner of Internal Revenue.

On August 29, 1990, Atlas received the Decision of Victor A. Deoferio, Jr., then Deputy Commissioner, dated May 23, 1990, denying the request for cancellation of the assessments and reiterated the collection of the sum of P40,691,335.85 (Exh. D), portion thereof is quoted hereunder, to wit:

> "Please be informed that as per report of re-investigation conducted by Revenue Officer Rolando M. Dionisio, relative to your deficiency income and business tax liabilities for the year 1979, there was still found due and collectible from you the total amount of P40,691,335.85, inclusive of increments.

> In this connection, please be informed that our <u>decision</u> on the matter is to reiterate the collection of the aforesaid amount as originally assessed for the reason that you failed to substantiate the allegations contained in your letter-protest during the re-investigation. x x x." (Underlining Ours.)

Hence, petitioner filed an appeal with this Court on September 28, 1990.

Petitioner questioned the disallowances made by respondent, namely: (1) the exchange earned of P2,004,000.00; (2) General overhead of P360,894.89; (3) Adjustment of Accrual of Tax Differential on Net Taxable Income (1968) of P1,602,183.00; (4) Management Fee of P52,289,911.92; as well as the penalties for late payment of the Quarterly Income Tax Return ending March 31, 1979 and the collection of expanded withholding tax on the Management Fees paid to ANSCOR amounting to P52,289,911.92.

Respondent filed an answer contending that the above-mentioned disallowed deductions, totalling P56,256,989.81, are valid and legal for the reasons indicated in the Memorandum Report of the Revenue Examiners, dated March 25, 1985 (Exhs. 1-4, pp. 5-20, BIR records).

The issue raised is whether or not the deficiency tax liabilities in the total amount of P40,691,335.85 assessed by respondent against petitioner was proper.

After a thorough examination of the BIR records and the pleadings of both parties, the Court found that a discussion of each of the arguments raised by both parties would be inutile until the question of prescription is first settled. Thus, the determination of this case on the merits would be futile if prescription has set in. The primordial issue presented to this Court is whether or not the period to collect on the part of respondent has prescribed.

The pertinent provisions of the Tax Code relevant to the issue above-mentioned are Sections 318 and 319 (now 203 and 223, respectively) which read as follows:

> "SEC. 318. **Period of limitation upon assessment and collection.** - Except as provided in the succeeding section, internal revenue taxes shall be **assessed within five years** after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after expiration of such period. x x x."

> SEC. 319. **Exceptions as to period of limitation of assessment and collection of taxes.** - (a) x x x.
>
> (b) Where before the expiration of the time prescribed in the preceding section for the assessment of the tax, both the Commissioner of Internal Revenue and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.
>
> (c) Where the assessment of any internal revenue taxes has been made within the period of

> limitation above prescribed, such tax may be **collected** by distraint or levy or by a proceeding in court, but only if begun (1) **within five years after the assessment of the tax**, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner of Internal Revenue and the taxpayer before the expiration of such five-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. (Underlining ours.)

The following material facts are determinative in the resolution of the issue posed regarding the prescriptive period to collect the assailed assessments issued by the respondent:

1. The assessment letter (Exhs. A and A-1, pp. 6-7, CTA rec.), dated April 12, 1985, subject matter of this case was duly issued within the five (5) year limitation to assess pursuant to Section 318 (now 203) of the Tax Code;

2. A protest was filed by Atlas on May 16, 1985 (Exh. C, pp. 9-14, CTA rec.). The same having been admitted by respondent;

3. Three (3) Waivers of the Statute of Limitation were signed by the official representative of Atlas, namely:

   (a) First waiver (undated) was prepared by petitioner as shown in the letter head of the document and signed by Atlas's representative which is valid up to December 31, 1989 (p. 76, BIR records);

(b) Second waiver was executed by Atlas's representative on December 29, 1989, valid up to March 31, 1990 (p. 79, BIR rec.); and

(c) Third waiver (undated) was signed by Atlas's representative, valid up to June 30, 1990 (p. 140, BIR rec.);

4. The Waivers of the Statute of Limitation above-mentioned were not signed by the Commissioner of Internal Revenue;

5. On August 29, 1990, Atlas received the Decision of respondent, dated May 23, 1990, reiterating the collection of the amount of P40,691,335.85 (Exhs. D and D-1, p. 15, CTA rec.); and

6. Lastly, Atlas filed a petition for review with this Court on September 28, 1990.

While it may be true that respondent has issued an assessment within the five (5) year period to assess under Section 318 (now 203) of the Tax Code, still it cannot be denied that respondent's Decision, dated May 23, 1990, was rendered beyond the five-year period to collect counted from the date of the assessment. More than five years have elapsed when the Decision was rendered by the respondent counted from the date of the assessment (for calendar year 1979) on April 12, 1985.

Although the Waivers of the Statute of Limitation were signed by Atlas's representative, the same has no force and effect considering that the Commissioner of Internal Revenue did not sign it. The only logical conclusion that can be reached is that there were no valid waivers executed there being no agreement that will toll the running of the statute of limitation on the part of respondent. The waiver is vital for the suspension of the running of the period to collect the assessments issued by the respondent. Of sad note, the Court cannot comprehend why a simple waiver cannot be signed by the respondent Commissioner knowing fully well that it is to his advantage if the same have been properly signed and accepted.

In the case of **Collector of Internal Revenue v. Pineda, No. L-14522, May 31, 1961 (2 SCRA 401),** the Supreme Court in adopting the case of **Collector of Internal Revenue v. Solano, No. L-11475, July 31, 1958 (unreported 104 Phil. 1050),** quoted the decision therein rendered as follows:

> "x x x the petitioner Collector urges that respondent Solano is estopped from putting up the defense of prescription because he repeatedly made verbal requests for extensions of time to pay his tax obligation for 1948, as allegedly shown by the testimony of Bureau of Internal Revenue agent Benjamin S. Valenzuela. The argument is also untenable, first, because Valenzuela categorically declared that respondent Solano did not request for an extension of time within which to pay his 1948 income tax liability (t.s.n. pp. 49-50); and second, the only agreement that could have suspended the running of the prescriptive period for the collection of the tax in question is, as correctly pointed out by the Court of Tax Appeals, a *written* agreement between Solano and the Collector, entered into before the expiration of the five-year prescriptive period, extending the period of limitation prescribed by law (sec. 332[c], N.I.R.C.). The rule is in accord with the general law on prescription that requires a

written acknowledgment of the debtor to renew the cause of action or interrupt the running of the limitation period (Act 190, sec. 50; New Civil Code, Art. 1155). The Court of Tax Appeals found, and the records show, that no such written agreement was ever entered into between respondent Solano and the petitioner Collector." (Emphasis Ours.)

The above-mentioned case was also cited in the case of **Cordero v. Gonda, No. L-22369, October 15, 1966 (18 SCRA 331)**, where it was held:

"1. Our Tax Code provides for two main period of prescription. The first refers to assessment, the second to the remedies of collection. Not concerned with the first, we are with the second.

That an assessment has here been made, we do not doubt. By the very fact that, on September 18, 1953, a formal demand was made by the government upon the deceased Patricio Ponferrada for the payment of forest charges in a *definite* amount - P3,805.88 - assessment is deemed to have been made.

September 18, 1953 then is a safe *starting point* for the statutory limitation to commence collection suit. Here, the court claim was filed on July 29, 1959. From September 18, 1953 to July 29, 1959, a period of 5 years, 10 months and 11 days has passed. The five-year prescriptive period had thus elapsed. Section 322(c) of the Tax Code reads:

'(c) Where the assessment of any internal-revenue tax has been made within the period of limitation above prescribed such tax *may be collected* by distraint or levy or *by a proceeding*

> *in court*, but only if begun (1) *within five years after the assessment of the tax* or (2) *prior to the expiration of any period for collection agreed upon in writing* by the Commissioner of Internal Revenue *and* the taxpayer before the expiration of such five-year. The period so agreed upon may be extended by subsequent agreements *in writing* made before the expiration of the period previously agreed upon.'

We note the narrowly-confined restriction of time within which a proceeding in court may be brought: '*but only if begun* (1) within five years after the assessment of the tax'. Implicit in the words *but only* is that, unless otherwise authorized by statute, the 5-year period is absolute.

The Code itself recognizes but one exception: If suit is started 'prior to the expiration of any period for collection *agreed upon in writing* by the Commissioner of Internal Revenue *and* the taxpayer before the expiration of such five-year period' - which may be extended by subsequent written agreements made 'before the expiration of the period previously agreed upon'. In Collector of Internal Revenue vs. Pineda, etc., L-14522, May 31, 1961, this Court said in terms equally pertinent here, that: 'the only agreement that could have suspended the running of the prescriptive period for the collection of the tax in question is, x x x a *written* agreement between Solano (the taxpayer) and the Collector, entered into before the expiration of the five-year prescriptive period, extending the period of limitation prescribed by law (Sec. 332[c], N.I.R.C.).' No such written agreement exists here. The original five-year limit governs. (Emphasis Ours.)

2. Appellant's brief draws our attention to jurisprudence where a taxpayer may not avail of the limitations statute. These cases are inapposite. In *Arcache*, delay in tax collection was excused because of 'his [taxpayer's] own repeated request for re-investigation and similarly repeated requests of extension of time to pay'. In Sison, 'the taxpayer's petition for reconsideration or reinvestigation had stopped the running of the five-year limitation period'. In Capitol Subdivision, the pendency of a taxpayer's petition for clarification interrupted said period. None of these situations obtains here.

The government also argues that partial payment is 'acknowledgment of the tax obligation', hence, a 'waiver of the defense of prescription'. But partial payment would not prevent the government from suing the taxpayer. Because, by such act of payment, the government *is not* thereby 'persuaded to postpone collection to make him feel that the demand was not unreasonable or that no harassment or injustice is meant'. Which, as stated in Collector vs. Suyoc Consolidated Mining Co., et al., L-11527, November 25, 1958, is the underlying reason behind the rule that prescriptive period is arrested by the taxpayer's request for re-examination or reinvestigation - even if he 'has not previously waived it [prescription] in writing'. And, partial payment is no waiver 'in writing'. Particularly is this true here where, out of the claim of P3,805.88, but P262.27 were paid; and in reference to the other claim of P6,220.65, appellee made a substantial payment of P6,000.00 and *acknowledged* liability of P220.65."

In another case, the Supreme Court held that:

"The plaintiff contends that the period of prescription was suspended by the defendant's various requests for reinvestigation or reconsideration of the tax assessment. The trial court rejected this contention, saying that a <u>mere request for reinvestigation or reconsideration of an assessment does not have the effect of such suspension. The ruling is logical, otherwise there would be no point to the legal requirement that the extension of the original period be agreed upon in writing.</u>

To be sure, this legal provision, according to some decisions of this Court, does not rule out a situation where the taxpayer may be in estoppel to claim prescription. Thus we said in Commissioner of Internal Revenue vs. Consolidated Mining Co., L-11527, Nov. 25, 1958:

> 'x x x There are cases however where a taxpayer may be prevented from setting up the defense of prescription even if he has not previously waived it in writing *as when by his repeated requests or positive acts* the Government has been, *for good reasons*, persuaded to postpone collection to make him feel that the demand was not unreasonable or that no harassment or injustice is meant by the Government.' (Italics supplied.)

Likewise, when a taxpayer asks for a reinvestigation of the tax assessment issued to him and such reinvestigation is made, on the basis of which the Government makes another assessment, the five-year period within which an action for collection may be commenced should be counted from this last assessment. (Republic vs. Lopez, L-18007, March 30, 1963; Commissioner v. Sison, et al., L-13739, April 30, 1963.)

In the case at bar, the defendant, after receiving the assessment notice of September 24, 1949, asked for a reinvestigation thereof on October 11, 1949 (Exh. A). There is no evidence that this request was considered or acted upon. In fact, on October 23, 1950 the then Collector of Internal Revenue issued a warrant of distraint and levy for the full amount of the assessment (Exh. D), but there was no follow up of this warrant. Consequently, the request for reinvestigation did not suspend the running of the period for filing an action for collection.

The next communication of record is a letter signed for the defendant by one Troadio Concha and dated October 6, 1951, again, requesting a reinvestigation of his tax liability (Exh. B). Nothing came of this request either. Then on February 9, 1954, the defendant's lawyers wrote the Collector of Internal Revenue informing him that the books of their client were ready at their office for examination (Exh. C). The reply was dated more than a year later, or on October 4, 1955, when the Collector bestirred himself for the first time in connection with the reinvestigation sought, and required that the defendant specify his objections to the assessment and execute 'the enclosed forms for waiver of the statute of limitations'. (Exh. E). The last part of the letter was a warning that unless the waiver 'was accomplished and submitted within 10 days the collection of the deficiency taxes would be enforced by means of the remedies provided for by law.'

It will be noted that up to October 4, 1955 the delay in collection could not be attributed to the defendant at all. His requests in fact had been unheeded until then, and there was nothing to impede enforcement of the tax liability by any of the means provided by law. By October 4, 1955, more than five years had elapsed since the assessment in question was made, and hence prescription had already set in, making subsequent events in connection with the said assessment entirely immaterial. Even the written waiver of the statute signed by the defendant on December 17, 1959 could no longer revive the right of action, for under the law such waiver must be executed within the original five-year period within which suit could be commenced." **(Republic vs. Acebedo, L-20477, March 29, 1968, 22 SCRA 1356.)**

In all the above-cited cases, the Supreme Court ruled that the statute of limitation shall be suspended only when there is a valid written agreement between the taxpayer and the Commissioner of Internal Revenue pursuant to Section 319(c) of the Tax Code. Also in point is the provision of the New Civil Code, to wit:

> "**ART. 1155.** The prescription of actions is interrupted when they are filed before the court, when there is a written extrajudicial demand by the creditors, and when there is any written acknowledgment of the debt by the debtor."

In the case at bar, the five-year limitation to collect was not suspended there being no valid written agreement executed by the Commissioner of Internal Revenue. Only the petitioner signed the Waiver of the Statute of Limitation therefore there was no meeting of the minds by the parties to said agreement. The acceptance of the waiver of statute of limitation by the Commissioner must be indicated therein simply by affixing her signature. There was none.

As stated by the petitioner in its protest letter, dated May 13, 1985, it was not requesting for a reconsideration or a reinvestigation or a plea of accommodation indicative that the defense of prescription is not being waived (Exh. C). Nothing in the records of the case would show that by the acts of petitioner, respondent was made to believe and was persuaded for good reasons to postpone the collection of the tax. Neither was a request of reinvestigation sufficient to toll the running of the prescriptive period to collect. Otherwise there would be no need for the legal requirement that an extension of the original period can be agreed upon by the parties in writing. With more reason, like in the case at bar, if the petitioner did not even request for a reinvestigation or a reconsideration in its protest. Therefore, the assessments issued on April 12, 1985 cannot anymore be enforced by summary remedy nor by judicial action for collection of the taxes involved herein. Hence, the same cannot be given force and effect.

WHEREFORE, in view of the foregoing, the petition for review is hereby **GRANTED** on the ground of prescription pursuant to the provisions of Section 319(c) [now 223] of the Tax Code. Respondent's Decision, dated May 23, 1990, cannot be enforced by law having been issued beyond the five (5) year period to collect, therefore, the same is hereby set aside. Accordingly, the assessment letter, dated April 12, 1985, issued by the respondent against petitioner amounting to P40,691,335.85 is hereby cancelled and withdrawn. No pronouncement as to costs of suits.

SO ORDERED.

RAMON O. DE VEYRA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

MANUEL K. GRUBA
Associate Judge

CERTIFICATION

I hereby certify that this decision was reached after due consultation between the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Court of Tax Appeals
Presiding Judge