REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

FIRST PHILIPPINE HOLDINGS CORPORATION,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8991

Members:

CASTAÑEDA, JR., *Chairperson,*
CASANOVA, *and*
MANAHAN, *JJ.*

Promulgated:

MAR 09 2017 4:10 pm

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RESOLUTION

For the Court's resolution are the following:

1. respondent's **Motion for Partial Reconsideration**, filed on October 14, 2016, with petitioner's **Comment (to Respondent's Motion for Partial Reconsideration)**, filed on November 3, 2016; and

2. petitioner's **Motion for Partial Reconsideration (Re: Decision dated September 27, 2016)**, filed on October 18, 2016, without respondent's comment as per Records Verification dated November 21, 2016.

Both parties move for the reconsideration of the Court's Resolution[1] dated September 27, 2016, the dispositive portion of which reads:

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[1] Docket, (Vol. III,) pp. 1126-1144.

"**WHEREFORE**, in view of the foregoing, petitioner's **Omnibus Motion** is **PARTIALLY GRANTED**. Accordingly, respondent's right to assess the following: (1) deficiency VAT for the 1st and 2nd quarters of 2009; (2) deficiency EWT for the months of January to July 2009; (3) deficiency WT on compensation for the months of January to July 2009; and (4) deficiency FBT for the 1st and 2nd quarters of 2009 had already prescribed.

Set this case for hearing on November 7, 2016 at 9:00 a.m. for the presentation of evidence for the petitioner to determine its liability for the remaining tax deficiency assessments for the taxable year 2009.

SO ORDERED."

Respondent's Motion for Partial Reconsideration

Respondent seeks the reconsideration of the Court's Resolution insofar as it ruled that respondent's right to assess the following: (1) deficiency VAT for the 1st and 2nd quarters of 2009; (2) deficiency EWT for the months of January to July 2009; (3) deficiency WT on compensation for the months of January to July 2009; and (4) deficiency FBT for the 1st and 2nd quarters of 2009 had already prescribed, based on the following grounds: (a) petitioner's employment of a false or fraudulent return warrants respondent's assessment within ten (10) years after the discovery of the falsity, fraud or omission; and (b) the assessment for withholding taxes is not barred by prescription.

Respondent's motion has no merit.

Respondent claims that there was substantial underdeclaration of petitioner's sales, receipts or income in an amount exceeding thirty percent (30%) of that declared per return, as follows:

Per Audit	Per Return	Under declaration	Rate
VATable Income			
137,126,665.07	69,404, 812.47	67,721,852.60	49.39%
EWT			

34,385,604.86	22,715,045.89	11,634,558.97	33.84%
WTC			
65,838,758.30	0	65,838,758.30	100%
FBT			
6,883,123.55	0	6,883,123.55	100%

Respondent argues that this substantial underdeclaration warrants the application of the ten (10)-year prescriptive period under Sections 222 (a) and 248 (B) of the National Internal Revenue Code (NIRC) of 1997. The period to assess petitioner's tax liabilities should be reckoned from respondent's discovery in 2014 (the audit examination of petitioner). Hence, respondent concludes that his right to assess has not prescribed.

At the outset, it must be noted that the allegation regarding petitioner's substantial underdeclaration was raised for the first time by respondent in the present motion. Moreover, the foregoing figures/computation presented by respondent are not supported by evidence and are mere allegations. Respondent did not even bother to offer any evidence to substantiate his allegation. In the absence of any substantial evidence, the Court cannot help but entertain doubts on the truthfulness of respondent's naked assertion. "It is basic in the rule of evidence that bare allegations, unsubstantiated by evidence, are not equivalent to proof. In short, mere allegations are not evidence."[2] Hence, the Court cannot rely on these figures/computations alone in order to determine whether there was indeed substantial under declaration of petitioner's sales, receipts or income in an amount exceeding thirty percent (30%).

Moreover, in the case of *Commissioner of Internal Revenue vs. Javier, Jr., et al.*[3], citing the case of *Aznar vs. Court of Tax Appeals, et al.*[4], the Supreme Court discussed fraud in relation to the filing of tax return, as follows:

> "In *Aznar v. Court of Tax Appeals*, fraud in relation to the filing of income tax return was discussed in this manner:
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> > . . . The fraud contemplated by law is actual and not constructive. It must be intentional fraud, consisting of deception willfully and deliberately

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[2] *Real vs. Belo*, G.R. No. 146224, January 26, 2007.
[3] G.R. No. 78953, July 31, 1991.
[4] L-20569, August 23, 1974.

> done or resorted to in order to induce another to give up some legal right. Negligence, whether slight or gross, is not equivalent to the fraud with intent to evade the tax contemplated by law. It must amount to intentional wrong-doing with the sole object of avoiding the tax. It necessarily follows that a mere mistake cannot be considered as fraudulent intent, and if both petitioner and respondent Commissioner of Internal Revenue committed mistakes in making entries in the returns and in the assessment, respectively, under the inventory method of determining tax liability, it would be unfair to treat the mistakes of the petitioner as tainted with fraud and those of the respondent as made in good faith.

Fraud is never imputed and the courts never sustain findings of fraud upon circumstances which, at most, create only suspicion and the mere understatement of a tax is not itself proof of fraud for the purpose of tax evasion."

Moreover, respondent mainly argues that the assessment for withholding taxes is not barred by prescription since petitioner's liability as taxpayer is different from its liability as withholding agent.

On the other hand, petitioner counters that prescription has already set in and that the assessment for withholding taxes is barred by prescription. Petitioner states that respondent never raised the issue of a false and fraudulent return against petitioner in his Answer. In addition, Section 248(B) of the NIRC of 1997 only establishes a *prima facie* presumption of a false or fraudulent return. This presumption may be contradicted by petitioner through presentation of evidence – evidence which it could not have presented because of respondent's belated inclusion of the said defense.

Section 203 of the NIRC of 1997, as amended, mandates that internal revenue taxes must be assessed within three (3) years reckoned from the period fixed by law for the filing of the tax return or the actual date of filing, whichever is later, thus:

"SEC. 203. **Period of Limitation Upon Assessment and Collection**. - Except as provided in Section 222, **internal revenue taxes** shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: *Provided*, That in a case where a return is filed beyond the period prescribed by law, the three (3)-year period shall be counted from the day the return was filed.

For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day." (*Emphasis supplied*)

In this regard, Section 21 of the NIRC of 1997, as amended, enumerates all internal revenue taxes, as follows:

SEC. 21. *Sources of Revenue* - The following taxes, fees and charges are deemed to be **national internal revenue taxes**:

(a) **Income tax**;
(b) Estate and donor's taxes;
(c) Value-added tax;
(d) Other percentage taxes;
(e) Excise taxes;
(f) Documentary stamp taxes; and
(g) Such other taxes as are or hereafter may be imposed and collected by the Bureau of Internal Revenue.
(*Emphasis supplied*)

It must be noted that the imposition of withholding tax is found under the title on "Income Tax". Thus, the same is considered as internal revenue tax which is required to be assessed within three (3) years reckoned from the period fixed by law for the filing of the tax return or the actual date of filing, whichever is later.

Moreover, the law on assessment and prescription does not distinguish the types of taxes that must be assessed within the prescriptive period provided under Section 203 of the NIRC of 1997, as amended. In the case of *Philippine British Assurance Co., Inc. vs. Honorable Intermediate Appellate Court, et al.* [5], the Supreme Court ruled that:

[5] G.R. No. 72005, May 29, 1987.

> **"It is well recognized rule that where the law does not distinguish, courts should not distinguish.** *Ubi lex non distinguish nec nos distinguere debemos.* 'The rule, founded on logic, is a corollary of the principle that general words and phrases in a statute should ordinarily be accorded their natural and general significance. The rule requires that a general term or phrase should not be reduced into parts and one part distinguished from the other so as to justify its exclusion from the operation of the law. In other words, there should be no distinction in the application of a statute where none is indicated. For courts are not authorized to distinguish where the law makes no distinction. They should instead administer the law not as they think it ought to be but as they find it and without regard to consequences.'" (*Emphasis supplied*)

Hence, respondent cannot exclude withholding tax assessments in the application of the prescriptive period under Section 203 of the NIRC of 1997 as amended.

In the case of *Commissioner of Internal Revenue vs. Basf Coating + Inks Phils., Inc.*[6], the Supreme Court held that:

> "It bears stressing that, in a number of cases, this Court has explained that the statute of limitations on the collection of taxes primarily benefits the taxpayer. In these cases, the Court exemplified the detrimental effects that the delay in the assessment and collection of taxes inflicts upon the taxpayers. Thus, in *Commissioner of Internal Revenue v. Philippine Global Communication,* Inc., this Court echoed Justice Montemayor's disquisition in his dissenting opinion in *Collector of Internal Revenue v. Suyoc Consolidated Mining Company,* regarding the potential loss to the taxpayer if the assessment and collection of taxes are not promptly made, thus:
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>> Prescription in the assessment and in the collection of taxes is provided by the Legislature for the benefit of both the Government and the taxpayer; for the

[6] G.R. No. 198677, November 26, 2014.

> Government for the purpose of expediting the collection of taxes, so that the agency charged with the assessment and collection may not tarry too long or indefinitely to the prejudice of the interests of the Government, which needs taxes to run it; and for the taxpayer so that within a reasonable time after filing his return, he may know the amount of the assessment he is required to pay, whether or not such assessment is well founded and reasonable so that he may either pay the amount of the assessment or contest its validity in court x x x. It would surely be prejudicial to the interest of the taxpayer for the Government collecting agency to unduly delay the assessment and the collection because by the time the collecting agency finally gets around to making the assessment or making the collection, the taxpayer may then have lost his papers and books to support his claim and contest that of the Government, and what is more, the tax is in the meantime accumulating interest which the taxpayer eventually has to pay.

Likewise, in Republic of the *Philippines v. Ablaza*, this Court elucidated that the prescriptive period for the filing of actions for collection of taxes is justified by the need to protect law-abiding citizens from possible harassment. Also, in *Bank of the Philippine Islands v. Commissioner of Internal Revenue*, it was held that the statute of limitations on the assessment and collection of taxes is principally intended to afford protection to the taxpayer against unreasonable investigations as the indefinite extension of the period for assessment deprives the taxpayer of the assurance that he will no longer be subjected to further investigation for taxes after the expiration of a reasonable period of time. Thus, in *Commissioner of Internal Revenue v. B.F. Goodrich Phils., Inc.*, this Court ruled that the legal provisions on prescription should be liberally construed to protect taxpayers and that, as a corollary, the exceptions to the rule on prescription should be strictly construed."

Petitioner's Motion for Partial Reconsideration

Petitioner seeks to reverse and set aside the Court's Resolution and issue a new one declaring as null and void all the deficiency tax assessments under the Formal Letter of Demand with Final Assessment Notice (FLD-FAN) issued by the respondent for taxable year 2009 against petitioner on the ground of prescription, alleging among others that the factual antecedents surrounding petitioner's case are not on all fours with that of the *Next Mobile* case. Petitioner also contends that the Letter of Authority (LOA) was invalid because respondent violated the provision of Revenue Memorandum Order (RMO) No. 69-2010 and that investigation and audit of respondent lasted more than 120 days.

As to the allegation that the factual antecedents surrounding this case are not on all fours with that of the *Next Mobile* case, the Court reiterates the ruling in the assailed Resolution as follows:

> "We find the factual circumstances of the foregoing case to be on all fours with the instant case. Both parties in this case are at fault. Similar to the abovementioned case, petitioner executed Waivers through its Treasurer/Comptroller who allegedly had no authority to sign the Waivers. Clearly, petitioner violated RMO No. 20-90 which states that in case of a corporate taxpayer, the waiver must be signed by its responsible officials, and RDAO 05-01 which requires the presentation of a written and notarized authority to the BIR.
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> Likewise, the Bureau of Internal Revenue (BIR) defied its own rules and was remiss in performing its functions with respect to these Waivers. Under RDAO 05-01, it is the duty of the authorized revenue official to ensure that the waiver is duly accomplished and signed by the taxpayer or his authorized representative before affixing his signature to signify acceptance of the same. It also instructs that in case the authority is delegated by the taxpayer to a representative, the concerned revenue official shall see to it that such delegation is in writing and duly notarized. Furthermore, it mandates that the waiver should not be accepted by the concerned BIR office and official unless duly notarized. In this case, the BIR

failed four times to perform its duties as it miserably failed to exact from petitioner compliance with its rules.

The parties were both aware of the infirmities of the Waivers but they continued their dealings with each other on the strength of these Waivers. Even in petitioner's Reply to PAN, it did not question the validity of the Waivers. It was only on July 25, 2014, when petitioner filed its Protest to Assessments, that it initially questioned the validity of the Waivers which were already executed as early as August 17, 2012 (First Waiver), November 6, 2012 (Second Waiver), May 24, 2013 (Third Waiver), and October 3, 2013 (Fourth Waiver). Petitioner executed these four (4) Waivers and delivered them to respondent who accepted without even raising any objection as to their validity. Petitioner admitted that in entering into a transaction such as the execution of a Waiver, the person who will sign on its behalf should be duly authorized. Yet, it released the Waivers voluntarily without questioning the authority of the signatory not until respondent issued the FLD-FAN.

Thus, while the requirements of RMO No 20-90 and RDAO No. 05-01 must be strictly complied, the act of petitioner, in voluntarily executing waivers, one after the other, without raising any objection as to their validity, means that it is already estopped from questioning their validity after the assessment had already been issued." (*Emphasis supplied*)

Clearly, *Next Mobile* case is applicable to the present case since both parties in this case are *in pari delicto* or in equal fault and that petitioner was guilty of estoppel as it did not raise any objection against the validity of the four (4) waivers until it was assessed taxes and penalties by the BIR.

As to the issue regarding the validity of the Letter of Authority (LOA), petitioner claims that respondent violated the provision of RMO No. 69-2010 and that the investigation and audit of respondent lasted more than 120 days. According to petitioner, RMO No. 69-2010 requires that all LOAs shall be retrieved and replaced with new electronic letters of authority, as follows:

"6. **All LAs,** whether manual or electronic, **issued from March 1, 2010 covering cases for 2009 and other taxable years,** as well as LAs issued by the Commissioner pursuant to RMC No. 61-2010, **shall be retrieved and replaced with the new eLA form** (BIR Form No. 1966).

7. All revenue officers ordered to conduct investigation/audit through manually issued LAs prior to July 1, 2010 should continue the conduct of audit/investigation, **subject to the retrieval and replacement of LAs as mandated under Item No. III 6 of this Order.**"

RMO No. 69-2010 issued on August 11, 2010 prescribes the guidelines on the issuance of electronic Letters of Authority (eLAs), Tax Verification Notices (TVNs) and Memoranda of Assignment (MOA). However, nowhere in RMO No. 69-2010 which states that the conduct of the audit pursuant to the previously-issued manual LOA will be invalidated absent immediate compliance with the retrieval and replacement of eLAs. Also, RMO No. 69-2010 does not state that the replacement of eLAs is a precondition for the continuance of the audit investigation.

On a similar note, the non-compliance with the 120-day to conduct the audit under the Taxpayer Bill of Rights will not nullify the LA previously issued. In the case of *AFP General Insurance Corporation vs. Commissioner of Internal Revenue*[7], this Court *En Banc*, ruled that:

"xxx xxx xxx

xxx A Revenue Officer (RO) is allowed only one hundred twenty (120) days from the date of receipt of a Letter of Authority by the taxpayer to conduct the audit and submit the required report of investigation. If the RO is unable to submit his final report of investigation within the 120-day period, he must then submit a progress report to his head of office, and surrender the LA for revalidation.

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[7] CTA EB No. 1223 (CTA Case No. 8191), January 4, 2016.

However, *We* agree with the observation made by the Court in Division that there is nothing in RMO No. 38-88 and RMC No. 40-2006 that indicates that the LA will be invalidated if not revalidated within the 120-day period.

xxx xxx xxx"

Thus, the LOA issued on May 14, 2010 is valid notwithstanding respondent's non-compliance with the provision of RMO No. 69-2010 and despite the fact that the investigation and audit of respondent lasted more than 120 days.

WHEREFORE, in light of the foregoing considerations, respondent's **Motion for Partial Reconsideration** and petitioner's **Motion for Partial Reconsideration (Re: Decision dated September 27, 2016)** are both **DENIED** for lack of merit.

On the other hand, set this case on April 17, 2017 at 9:00 a.m. for the presentation of the evidence for the petitioner to determine its liability for the remaining deficiency taxes for the taxable year 2009.

SO ORDERED.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice

CAESAR A. CASANOVA
Associate Justice

Catherine T. Manahan
CATHERINE T. MANAHAN
Associate Justice