REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

CARLOS YSMAEL,
Petitioner,

- versus - C.T.A. CASE NO. 1967

THE COMMISSIONER OF
INTERNAL REVENUE,
Respondent.
x - - - - - - - - - - - - x

10/23/81

D E C I S I O N

In a letter dated November 29, 1967, respondent Commissioner of Internal Revenue advised petitioner Carlos Ysmael that, upon investigation, there has been found due from him the amount of ₱275,753.92 as deficiency income tax for the year 1955, details of which are as follows: (par. 1, amended petition for review; admitted, par. 2, answer; Exhibit "2", p. 16, CTA records.)

Net income per first investigation		₱ 91,794.97
Add: Additional income:		
Undeclared income from exchange of property, computed as follows:		
Original unspecified inheritance from estate of Magdalena Hashim de Hemady	₱259,228.73	
This inheritance was exchanged for contracts receivables valued at ...	₱527,562.49	₱268,333.76
Adjusted net income per final investigation..		₱360,128.73
Less: Personal and additional exemptions		₱ 5,400.00
Amount subject to tax		₱354,728.73
Income tax due thereon		₱179,263.00
Less: Amount already assessed		₱ 15,719.00
Balance of tax due		₱163,544.00
Add: 50% surcharge		₱ 81,772.00
½% mo. int. fr. 6-20-59 to 6-20-62		₱ 29,437.92
Compromise		₱ 1,000.00
Total amount due and collectible		₱275,753.92

The 50% surcharge was imposed pursuant to the provisions of Section 72 of the National Internal Revenue Code.

Petitioner was therefore requested to pay the aforesaid amount to respondent's collection agent concerned within the time specified in the enclosed prepared assessment notice.

The above assessment-letter was received by petitioner on or about December 5, 1967. (par. 2, amended petition for review, Exh. "3", p. 13, CTA records.)

By letter dated January 29, 1968, received by respondent on February 15, 1968, petitioner, thru counsel, protested the "above Re-assessment which was made under date of November 29, 1967" on the ground that the deficiency income tax due for the year 1955 of petitioner had already been "the subject matter of a case before the Court of Tax Appeals wherein the 1955 income tax of my client were (sic) duly fixed and the same paid as per receipts in our possession." (Exh. "8", p. 95, BIR records.) "It is therefore respectfully requested that a re-investigation of the assessment of November 29, 1967 be made to determine the basis of the claim of Internal Revenue for taxes which had already been assessed as of May 16, 1960 and duly paid." (Ibid.) Instead of rendering a decision on the request for re-investigation, respondent Commissioner of Internal Revenue, on February 23, 1968, served on petitioner Carlos Ysmael a warrant of distraint and levy dated February 8, 1968 to enforce collection of the "sum of ₱274,753.92 as deficiency income tax for the year 1955, due from him under our letter of demand dated November 29, 1967, plus increments thereto incident to delinquency from December 30, 1967." (Exhs. "9" and "9-A", p. 89, BIR records.)

After respondent had instructed on June 5, 1968 the Regional Director of Revenue Region No. 7, North Manila, to execute the warrant of distraint and levy issued against the properties of petitioner (pp. 106 and 107, BIR records), the latter in his letter dated August 26, 1968 again requested for a reinvestigation of the case on the ground, just like in his first request for reinvestigation, that the findings of respondent as to his 1955 deficiency income tax liabilities were the subject matter of a case in the Court of Tax Appeals which was withdrawn by reason of a compromise settlement of the tax involved therein and that the "assessment made thereon in your letter dated November 29, 1967, has apparently prescribed, pursuant to the provisions of section 331 of the National Internal Revenue Code." (Exh. "M", pp. 110-111, BIR records.) Petitioner also asked for the stay of the execution of the warrant of distraint and levy. (Ibid.) In his letter of September 16, 1968, respondent however denied petitioner's request for reinvestigation and informed petitioner that the execution of the issued warrant of distraint and levy against his properties could not be stayed. (Exh. "5", p. 20, CTA records.)

Hence the present recourse.

In his answer to the amended petition for review, respondent alleges, among others, by way of special and affirmative defenses:

7. That in a reinvestigation of the income tax return of petitioner for the year 1955, it was found out that he did not declare the income from the exchange of inherited property worth ₱259,228.73 with contracts receivable worth ₱527,362.49 which were later assigned to the Carmel Corporation for shares of stock, thus realizing a profit of ₱268,333.76;

8. That as a result of such exchange petitioner was assessed a deficiency income tax in

the amount of ₱275,753.92 inclusive of 50% surcharge for fraud, ½% monthly deficiency interest and compromise penalty, for the year 1955;

9. That the basis of the tax involved in this case was never the subject matter of a prior deficiency assessment;

10. That the mere fact that petitioner had been previously investigated and assessed for deficiency income tax for 1955 on the basis of the findings in said investigation does not preclude further investigation of his income tax liability for 1955 and the assessment of additional deficiency income tax for the same year on a different basis and findings of additional undeclared income;

11. That the previous assessment of deficiency income tax for 1955 was not settled by compromise;

12. That the defense of res adjudicata is not tenable in this case;

13. That the government is not estopped by the mistakes of its agents (Genato Commercial Corporation vs. Court of Tax Appeals, et al., G.R. No. L-11727, September 29, 1958);

14. That petitioner did not declare a substantial amount of his income for 1955 for which reason the 50% surcharge has been imposed pursuant

to Section 72 of the National Internal Revenue Code (Antigua vs. Collector of Internal Revenue, CTA Case No. 579, November 2, 1959; Marguerite Walfson vs. Collector of Internal Revenue, CTA Case No. 273, July 16, 1958; William Li Yao vs. Collector of Internal Revenue, CTA Case No. 30, July 31, 1956) while the ½% interest was imposed pursuant to Section 51(d) of the Tax Code as amended by Republic Act No. 2343 which took effect in 1959;

15. That in case of a false or fraudulent return with intent to evade tax or failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at anytime within ten (10) years after the discovery of the falsity, fraud, or omission (Section 332 of the National Internal Revenue Code; Balter, Fraud under Federal Income Tax Law, p. 226);

16. That the deficiency income tax assessment in the amount of ₱275,753.92 issued against petitioner is in accordance with law; and

17. That the assessment in this case had already become final, executory and demandable and, therefore, this Court has no jurisdiction

to take cognizance of the petition for review filed in the instant case.

It is not disputed that under an agreement dated September 10, 1955, petitioner exchanged his unspecified inherited share from the estate of the late Magdalena Hashim de Hemady worth ₱259,228.73 for contracts receivable valued at ₱527,562.49 (Exh. "P", pp. 23-32, BIR records); and under a deed of assignment dated December 31, 1955, petitioner assigned his contracts receivable to the Carmel Corporation for shares of stock (Exhs. "1" and "2", pp. 25-35 & 36-42, BIR records). The gain realized by petitioner from such transaction was ₱268,333.26. (Exhs. "3" and "4", pp. 10-14, BIR records.) When petitioner filed his income tax return for 1955 on May 2, 1956, he did not declare such gain as part of his gross income for said taxable year. Respondent came to know only of this substantial underdeclaration on August 31, 1963 through the legal counsel of the Carmel Corporation of which petitioner is a majority stock holder in connection with the investigation of the income tax case for the year 1955 of the said corporation. (Exh. "3", pp. 10-13, BIR records; Exhs. "4" and "5", pp. 14-15, BIR records.)

Appropriate to state here is that previous to this discovery, petitioner had already been issued a deficiency income tax assessment dated July 30, 1958 for taxable years 1951, 1952, 1954 and 1955. The deficiency income tax for the year 1955 arose from undeclared salaries, separation pay, bonus, commission earned and paid, and additional income; as well as disallowed commission expense, representation expense, transportation expense and salaries expense, all for being personal, resulting in a deficiency income tax liability of petitioner in the amount of ₱201,861.00, exclusive of surcharge, for the year 1955. This deficiency income tax assessment dated July 30, 1958 was appealed by petitioner to this Court on December 2, 1958 in CTA Case No. 602, entitled "Carlos Ysmael vs. Melecio R. Domingo, as Acting Commissioner of Internal Revenue," After the deficiency income tax liabilities of petitioner for the years 1954 and 1955 were reduced by respondent, after reinvestigation, on May 16, 1960, CTA Case No. 602 was withdrawn on account of a compromise settlement of the tax liabilities of petitioner involved therein. It is to be stressed, however, that the basis of the deficiency income tax assessm[illegible] involved in the instant case which is the unreported gain of ₱268,333.7[illegible] [illegible]d from the exchange of petitioner's unspecified inheritance for contracts receivable, was not the same subject matter as, or included in, the subject matter of the deficiency assessment covered in CTA Case No. 602.

It seems clear beyond doubt therefore that:

1. Petitioner did not declare the income derived by him from the exchange of inherited property worth ₱259,228.73 with contracts receivable worth ₱527,362.49 which were later assigned to the Carmel Corporation for shares of stock, thus realizing a profit of ₱268,333.76;

2. As a result of such exchange, petitioner was assessed a deficiency income tax in the amount of ₱275,753.92 inclusive of 50% surcharge for fraud, ½% monthly deficiency interest and compromise penalty, for the year 1955; and

3. The basis of the tax involved in this case was never the subject matter of a prior deficiency assessment.

In assailing respondent's right to impose and collect the deficiency income tax liability aforesaid, petitioner invokes prescrip of the assessment and/or compromise which has the effect of res judicata. However, since respo... raise the issue of jurisdiction, we shall first proceed to inquire whether or not this Court has jurisdiction to entertain the instant appeal on the ground that the assessment in this case had already become final, executory and demandable.

It seems well-settled that if a taxpayer files a request for reconsideration or reinvestigation of an assessment made by the Commissioner of Internal Revenue, but the latter without categorically deciding the request for reconsideration or reinvestigation instead seeks to enforce collection of the tax assessed by him against the taxpayer by means of distraint and levy, such action of the Commissioner is equivalent to a denial of the taxpayer's request for reconsideration or reinvestigation which the taxpayer must appeal therefrom to this Court within the thirty-day period provided for in Section 11 of Republic Act No. 1125. (Philippine Planters Investment Co. vs. Commissioner of Internal Revenue, CTA Case No. 1266, November 11, 1962; Hilado vs. Commissioner of Internal Revenue, CTA Case No. 1256, October 20, 1962; Algue Inc. vs. Commissioner of Internal Revenue, CTA Case No. 1620, January 16, 1968; Frederich L. Hahn vs. Commissioner of Internal Revenue, CTA Case No. 1937, April 20, 1969; Gepte vs. Commissioner of Internal Revenue, CTA Case No. 1151, October 29, 1970, Certiorari denied in G.R. No. L-33674, June 29, 1971; Advertising Associates, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 3017, June 17, 1981.) A warrant of distrant and levy, which is the most drastic action of all media of enforcing the collection of tax and renders hopeless a request for reconsideration or reinvestigation, is tantamount to an outright denial thereof, and makes the said request deemed rejected. (Hilado vs. Commissioner of Internal Revenue, CTA Case No. 1256, October 20, 1956; Algue Inc. vs. Commissioner of Internal Revenue, CTA Case No. 1620, January 16, 1968; Advertising Associates, Inc. vs Commissioner of Internal Revenue, CTA Case No. 3017, June 12, 1981.)

Here in the case at bar, as stated in the amended petition for review, in a letter-assessment dated November 29, 1967, and received by petitioner on or about December 5, 1967, respondent assessed and demanded from petitioner the payment of ₱275,753.92 as deficiency income tax, surcharge, interest and penalty, for the year 1955. (par. 2, amended petition for review.) It was disputed by petitioner, through counsel, in a letter dated January 29, 1968, where he questioned the legality of the assessment and asked that the same be reinvestigated. (Exh. "8", p. 95, BIR records.) Without categorically deciding the request of petitioner for reinvestigation, respondent instead served on February 23, 1968 a warrant of distraint and levy on petitioner to enforce collection of the deficiency income tax assessed by him. (Exh. "9", p. 89, BIR records.) Since such action of respondent is an implied outright denial of petitioner's request for reinvestigation, petitioner should have appealed to this Court within thirty days from February 23, 1968, pursuant to Section 11 of Republic Act No. 1125. His failure to do so within the prescribed period barred his appeal and rendered the disputed [illegible] final, executory and demandable. (Republic [illegible] ppines vs. Lim Tian Teng Sons Co., Inc., L-21[illegible] March 31, 1966, 16 SCRA 584; see also Advertising Associates, Inc. vs. Commissioner of Internal Revenue, supra.)

Petitioner's subsequent request for reinvestigation and for stay of the execution of the warrant of distraint and levy in his letter of August 26, 1968 (Exh. "M", p. 110-111, BIR records) filed with respondent six months thereafter, after the disputed assessment had become conclusive and binding on him, did not revive his right to appeal. Once the right to contest the validity of the assessment had been lost by the failure to appeal within the reglementary period provided for under Section 11 of Republic Act No. 1125 and the assessment had reached the stage of finality in view of such failure to appeal, it logically follows that the assessment could no longer be reopened through the expedient of an appeal from the denial of petitioner's subsequent request for the stay of the execution of the warrant of distraint and levy pending another reinvestigation of the assessment. Otherwise, the period of thirty days for appeal to this Court would make little sense. (See Commissioner of Internal Revenue vs. Jose Concepcion, L-23912, March 15, 1968, 22 SCRA 1058.) We cannot have the running of the period of appeal left entirely at the discretion of the taxpaye[illegible] [illegible]a. del Rosario vs. Court of Tax Appeals, L-17991, October 31, 1972, 6 SCRA 541; D[illegible] [illegible] Co., Inc. vs. Court of Tax Appeals & Commi[illegible]ner of Internal Revenue, L-31369, October 18, 1977, 70 SCRA 448; cited in Advertising Associates, Inc. vs. Commissioner of Internal Revenue, supra.)

Clearly, therefore, petitioner's failure to appeal to this Court in due time made the assessment in question final, executory and demandable. The liability of petitioner Carlos Ysmael for the amount of ₱275,753.92 as deficiency income tax for the year 1955, plus the surcharges and interest which have accrued thereon incident to delinquency, is thus beyond question. With this conclusion, it would seem unnecessary to pass upon the defense of petitioner that the assessment had prescribed and/or had been extinguished by prior compromise with the authority and effect of *res adjudicata*.

Nonetheless, on the assumption that this Court can take cognizance of the defense of prescription invoked by petitioner, it is already settled that the ordinary period of prescription of five (5) years within which to assess under

Section 331 (now Section 318) of the National Internal Revenue Code is applicable to normal circumstances, but whenever the Government is placed at a disadvantage so as to prevent its lawful agents from proper assessments of tax liabilities due to false returns, fraudulent returns intended to evade payment of tax or failure to file returns, the period of ten (10) years as provided in Section 332 (now Section 319) of the Code should apply. (Aznar vs. Court of Tax Appeals, L-20569, August 23, 1974, 58 SCRA 519.) Since in this case petitioner did not declare his gain of ₱268,333.76 as part of his gross income for taxable year 1955, preventing the agents of the Bureau of Internal Revenue from proper assessment of his tax liability for said year due to the false, if not fraudulent, return filed by him, the period of ten (10) years as provided in Section 319 should apply. As stated earlier, respondent came to know only of this substantial underdeclaration on August 31, 1963 through the legal counsel of the Carmel Corporation of which petitioner is a majority stockholder. Considering that the deficiency income tax involved herein was assessed on November 29, 1967, the assessment in question was made well within the prescribed period of ten (10) years from August 31, 1963.

Where assessment was made, the tax may be collected within five years from the date of assessment. (Section 332(c), now Section 319(c), National Internal Revenue Code; Collector of Internal Revenue vs. Pineda, L-1411, May 31, 1961, 2 SCRA 401; Codiñera vs. Blaquera, 102 Phil. 1165.) Since the warrant of distraint and levy to enforce collection of the tax assessed by respondent was served on petitioner on February 23, 1968, which is again well within the five-year period counted from November 29, 1967, respondent's right to collect petitioner's deficiency income tax liability for 1955 has not prescribed.

Finally, the situation here presented would not create res adjudicata. A judgment is res adjudicata if it is on the merits of the case. (Manila Electric Co. vs. Artiaga, 50 Phil. 144; S. Diego vs. Carmona, 70 Phil. 281, 283.) If it is not, it cannot be considered as a conclusive adjudication of the controversy. The resolution dated August 7, 1961 in CTA Case No. 602, Carlos Ysmael vs. Melecio R. Domingo, as Acting Commissioner of Internal Revenue, granting, without objection of respondent, the motion of petitioner for the withdrawal of its petition for review, cannot therefore operate as res adjudicata on the merits. Even more, the subject-matter in the subsequent case must be the same as, or included in, the subject-matter of the first action. (Tan-Suyco vs. Javier, 21 Phil. 39.) Since the subject-matter in this case, i.e., ₱275,753.92 as deficiency income tax for the year 1955 for failure of petitioner Carlos Ysmael to declare the gain realized by him from the exchange of his unspecified inherited share from the estate of the late Magdalena Hashim de Hemady for contracts receivable, is not the same as, or included in, the subject-matter of CTA Case No. 602, the resolution granting the withdrawal of said case is not res adjudicata against respondent Commissioner of Internal Revenue in the instant case.

On the assumption that this Court can take cognizance of the instant appeal and/or petitioner is not estopped from raising the defenses of prescription and res adjudicata, the net result is that the right of respondent to assess and collect the deficiency income tax involved herein has not prescribed; and the resolution of this

Court in CTA Case No. 602 granting the withdrawal of the petition for review filed in said case does not operate as <u>res adjudicata</u> in the instant case. Accordingly, the liability of petitioner Carlos Ysmael for the amount of ₱275,753.92 as deficiency income tax for the year 1955, plus the surcharges and interest which have accrued thereon incident to delinquency, must be sustained.

WHEREFORE, the petition for review is hereby dismissed with costs against petitioner.

SO ORDERED.

Quezon City, Metro Manila, October 23, 1981.

AMANTE FILLER
Presiding Judge

WE CONCUR.

CONSTANTE C. ROAQUIN
Associate Judge

ALEX Z. REYES
Associate Judge