21B

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

CENTRAL CEMENT
CORPORATION,
Petitioner,

- versus -

C.T.A. CASE NO. 5024

LIWAYWAY VINZONS-CHATO,
in her capacity as the
Commissioner of
Internal Revenue,
Respondent.

Promulgated:
JUN 13 1997

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DECISION

Petitioner comes before Us praying for the declaration of nullity of an assessment for alleged deficiency income tax for 1989 issued by the respondent against the petitioner in the total amount of P7,604,149.47, inclusive of penalties and interests.

The antecedent facts of the case are as follows.

Petitioner is a corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines.

On October 16, 1989, petitioner filed its annual income tax return for fiscal year ending June 30, 1989 (Exh. "T"). Thereafter, on August 17, 1992, petitioner executed a "Waiver of the Defense of Prescription under the Statute of Limitations of the National Internal Revenue Code" (Exhs. "X" and "Y", pp. 99 and 100, BIR Records).

On June 30, 1993, petitioner received Assessment Notice No. FAS-2-89-93-002482 (Exh. "A-1") from the respondent, for alleged deficiency income tax for the fiscal year ending June 30, 1989 in the amount of P7,604,149.47 computed as follows:

Net Loss Per Return	(P 8,599,552.00)
Add: Disallowance	
Interest Expense on back to back loans	18,645,552.78
Net Income Per Investigation	P10,046,000.78
Tax Due Thereon	P 3,516,100.27
Add: 25% Surcharge	879,025.07
Interest	3,184,024.13
Compromise	25,000.00
Total Amount Due	P 7,604,149.47

On July 15, 1993, petitioner filed a protest letter (Exh. "B") with the respondent seeking for the reconsideration, reinvestigation and recall of the assessment for lack of legal basis.

On August 6, 1993, petitioner received from the respondent a letter dated July 23, 1993 (Exh. "C") denying petitioner's protest against the disputed assessment. Hence, on August 31, 1993. the instant Petition for Review was filed.

The petitioner claimed that the disallowed interest expense deduction have been legitimately incurred and obtained in connection with petitioner's business conformably to Section 29 (2)(b)(1) of the Tax Code, to wit:

> "(b) Interest. - (1) In general. - The amount of interest paid or accrued within a taxable year on indebtedness in connection with the taxpayer's profession. trade or business, except on indebtedness incurred or continued to purchase or carry obligation the interest of which is exempt from taxation as income under this Title."

Understandably, therefore, since petitioner incurred that interest in question on an obligation the income of which was subjected to 20% final tax (not exempt), the said interest is clearly deductible.

Petitioner further maintained that the legislative history of Section 29 (2)(b)(1) of the Tax Code showed that the change in the law was aimed at not allowing the deduction of interest on loans the proceeds from which are used by nonbusiness taxpayers for personal purposes or for personal affairs, in view of the retention of the original exception in the law on the non-deductibility of interest expense when interest income is tax exempt. Thus, inasmuch as the interest expense in question did not arise from loan the proceeds of which were used for personal purposes or personal affairs of a nonbusiness taxpayer, the disallowance thereof is without legal basis.

As a defense, respondent in her Answer dated October 13, 1993 (pp. 14-16, CTA recs.), alleged that all presumptions are in favor of the correctness of tax assessments, that they are made in good faith, and that the taxpayer has the burden to prove otherwise.

On February 16, 1996, petitioner filed a Motion to Allow Petitioner to Adduce Additional Rebuttal Evidence (pp. 118-121, CTA recs.) to prove that the assessment notice dated June 15, 1993 (Exh. "A") has been issued beyond the three-year limitation provided in Section 203 of the Tax Code. It contends that the assessment was issued by the respondent based on the Annual Income Tax Return filed by the petitioner on October 16, 1989 (Exh. "T") for the fiscal year ending June 30, 1989, hence, respondent had only up to October 14, 1992 (1992 was a leap year), or three years from the date of filing, to make a valid assessment.

In its Comment, dated June 14, 1996 (pp. 260-261, CTA recs.), respondent averred that the issue of prescription was never raised by the petitioner in its letter-protest dated July 15, 1993, thereby precluding the latter from invoking the same for the first time before this Court. Respondent cited the cases of ***Commissioner of Internal Revenue vs. C.T. Braun & Co., et al., CA-G.R. 24609, August 20, 1994, citing PNB vs. Parina, 22 SCRA 912 and Commissioner of Internal Revenue vs. Villa and the Court of Appeals, 22 SCRA 3*** to prove her point.

We must first settle the preliminary and prejudicial issue of prescription raised by the petitioner, for if found to be meritorious, all other issues involved in this case will be moot and academic and necessarily, the corollary issue on the validity of the Waiver of the Defense of Prescription (Waiver, for short) executed by the petitioner should also be resolved.

The requirements for a valid waiver are expressly provided under Section 223(b) of the Tax Code, to wit:

> "Sec. 223. ***Exceptions as to a period of limitation of assessment and collection of taxes.*** - (b) If 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 agreed 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 written agreement made before the expiration of the period previously agreed upon." (underscoring supplied)

In the instant case, the Waiver executed by the petitioner, was signed by one Bernardo A. Frianeza who is the Assistant Revenue Service Chief of Special Operations Service of the Bureau of Internal Revenue. Apparently, the subject Waiver lacks the required consent of the Commissioner of Internal Revenue. Moreover, under Revenue Memorandum Order No. 20-90, only the Commissioner of Internal Revenue is authorized to sign a waiver for tax cases involving more than P1,000,000.00 and in the present case, the petitioner is disputing an assessment amounting to P7,604,149.47.

A portion of RMO No. 20-90, issued on April 4, 1990, is quoted hereunder for emphasis, to wit:

"3. The following revenue officials are authorized to sign the waiver.

A. In the National Office

1.	ACIRs for Collection, Special Operations,	For tax cases involving not more than

	National Assessment, Excise and Legal on tax cases pending before their respective offices.	P500,000.00.
	In the absence of the ACIR, the Head Executive Assistant may sign the waiver.	
2.	Deputy Commissioner	For tax cases involving more than P500,000.00 but not more than P1M.
3.	Commissioner	For tax cases involving more than P1M."

Furthermore, a close scrutiny of the Waiver revealed that no period was agreed upon within which the respondent may validly assess the petitioner after the regular three-year period of prescription provided by law.

This Court, therefore, holds that the said Waiver is invalid and without any binding effect on the petitioner for the reason that there was no consent by the respondent (Commissioner of Internal Revenue) and no period was set or agreed upon for subsequent assessment ***(Carnation Phils., Inc. etc. vs. Commissioner of Internal Revenue, Cta Case No. 4263, January 26, 1993).***

The contention of the respondent that failure of the petitioner to raise the issue of prescription in its letter-protest, precluded it from invoking the same for the first time before this Court is untenable.

In the first place, the petitioner cannot raise the issue of prescription in its letter-protest filed on July 15, 1993 because of its prior execution of a supposedly valid "Waiver of the Defense of Prescription" on August 17, 1992. It was only after a careful perusal of the records of the Bureau of Internal Revenue where the Waiver (Exhs. "X" and "Y", BIR records, pp. 99-100) was filed and during the pendency of the case before this Court, that the petitioner discovered the invalidity of the Waiver signed by its representative. Such knowledge prompted the petitioner to file a Motion to Allow Petitioner to Adduce Additional Rebuttal Evidence where it invoked the defense of prescription.

Secondly, the case of Commissioner of Internal Revenue vs. C.T. Braun & Co., et al., CA-G.R. 24609, August 20, 1994, citing PNB vs. Parina, 22 SCRA 912 and Commissioner of Internal Revenue vs. Villa and the Court of Appeals, 22 SCRA 3 cited by the respondent is not applicable in the case at bar. The PNB vs. Parina case involved the failure to plead the defense of prescription in an answer to a complaint which constitutes a waiver of the defense. In the instant case, the respondent is questioning the failure of the petitioner to invoke the defense of prescription in its letter-protest and not in an answer to a complaint.

In the same vein, the case of Commissioner of Internal Revenue vs. Villa and the Court of Appeals involved the filing of a petition for review before this Court without contesting the assessment before the Bureau of Internal Revenue. It was ruled that the case was premature and the Court of Tax Appeals had no jurisdiction to entertain said appeal. For as stated, the jurisdiction of the Tax Court is to review by appeal *decisions* of the Commissioner of Internal Revenue on disputed assessments. The Tax Court is a court of special jurisdiction. As such, it can take cognizance only of such matters as are clearly within its jurisdiction. Note that the law uses the word "decisions', thus, further indicating the legislative intention to subject to judicial review the decision of the Commissioner on the protest against an assessment but not the assessment itself.

On account of the foregoing cases, the Court of Appeals in the case of Commissioner of Internal Revenue vs. C.T. Braun & Co., et al., inadvertently held that failure to raise the defense of prescription in the protest against the assessment precludes the petitioner to raise said defense before this Court, unmindful of the inapplicability of the rulings in said cases over the case at hand due to difference in facts and issues involved.

And lastly, an appeal to this Court has the effect of reopening the assessment entirely, tackling all the issues raised before it for resolution. In the case of ***J.G. McCrory Co. v. Commissioner of Corporations and Taxation, 182 N.E. 481, 483, 280 Mass. 273***, this matter was explicitly elucidated as follows:

> "Board of Tax Appeals, on taxpayer's appeal from commissioner's denial of abatement of taxes, held authorized to retry every issue raised by petition and answer. Board of Tax Appeals could retry every issue raised by petition and answer as against contention that function of Board was limited to a review of commissioner's action and that it was not empowered to try the whole matter anew; the word "appeal" under G.L. c. 63, 51,71, giving the board jurisdiction to "decide appeals," being assumed to have been employed advisedly and required to be construed according to the common and approved usage of the language, and the word "appeal" meaning a whole new trial or an entire rehearing upon all matters of fact and questions of law in contrast with the word "review" which signifies a re-examination of proceedings already had." (underscoring supplied)

In fact, the issue of prescription may still be invoked by the petitioner in his appeal from the decision of this Court as held in the case of ***Celestino C. Juan vs. Commissioner of Internal Revenue, Et. Al, G. R. No. L-18383, May 30, 1966***, thus:

> "On the other hand, the issue of prescription raised by petitioner in his motion for reconsideration before the Tax Court may and should properly be taken up in an appeal from the final decision which said Court may render on the main petition." (underscoring supplied)

Finding that the petitioner may still validly raise the issue of prescription before this Court, We now come to the factual basis of petitioner in alleging the said defense. The applicable provision of law is Section 203 of the Tax Code, as quoted:

> "**Sec. 203. Period of limitation upon assessment and collection.** - Except as provided in the succeeding section, internal revenue taxes shall be assessed within three 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 year period shall be counted from the day the return was filed. For the 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." (underscoring supplied)

Evidence showed that petitioner's Annual Income Tax Return was filed on October 16, 1989 (Exh. "T"), while the Notice of Assessment, dated June 15, 1993, was received by the petitioner on June 30, 1993 (Exh. "A") or after three years and eight months counted from the day the return was filed. Clearly then, the right of the respondent to assess and collect from the petitioner had already prescribed.

Inasmuch as the assessment for alleged deficiency income tax for 1989 was issued beyond the three-year period allowed by the Tax Code, the Court finds no need to delve into the other issues involved in this case.

WHEREFORE, in view of all the foregoing, the assessment issued by the respondent against the petitioner for alleged deficiency income tax for 1989 in the amount of P7,604,149.47 is hereby declared as null and void, and set aside. No pronouncements as to costs.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

I CONCUR:

(On leave)
RAMON O. DE VEYRA
Associate Judge

AMANCIO Q. SAGA
Associate Judge

CERTIFICATION

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

ERNESTO D. ACOSTA
Presiding Judge
Court of Tax Appeals