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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ANDREW D. GRUBER,
Petitioner,

- versus -

C.T.A. CASE NO. 2278

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

x - - - - - - - - - - - - x

3/5/82

D E C I S I O N

Sometime in December 1958, petitioner acquired by purchase from Hacienda Benito ten (10) hectares of land situated in the vicinity of Antipolo, Cainta, Rizal, at the fair market value of one peso (₱1.00) and other valuable considerations, the latter of which as per disposition is in money, so that the actual cost, considering the other valuable considerations, in money value, is ₱4.00 per square meter, as evidenced by a deed of sale dated December 4, 1958, executed by and between petitioner Andrew D. Gruber and said Hacienda Benito. (Pp. 48-49, BIR rec.)

On January 15, 1959, petitioner sold four (4) hectares, out of the said ten hectares of land, covered by T.C.T. No. 63958 - Rizal, to Faith Academy, Inc., a non-profit educational institution for a consideration of One Peso and fifty centavos (₱1.50) per square meter. (Exh. "C-3", pp. 38-39, 40 and 41, BIR rec.)

Petitioner also executed a deed of conditional sale of five (5) hectares of land, covered by T.C.T. No. 84252 - Rizal, also, out of the said ten (10) hectares of land, for One Hundred Ninety Thousand (₱190,000.00) Pesos to Robert O. Philip and Sons Inc. and another deed of absolute sale was executed by and between the petitioner Andrew D. Gruber and Robert O. Philip and Sons Inc. covering an area of two thousand five hundred (2,500) square meters of land, also a portion of a land covered by T.C.T. No. 77388, office of the Register of Deeds of Rizal, also at ₱4,00 per square meters.

On the basis of the information submitted by one Jose P. Macalinao of 1524 Alcantara Street, Sampaloc, Manila, and the investigation conducted by special agent Jose de la Peña of the Finance Investigation Division, Bureau of Internal Revenue, respondent on December 28, 1970, assessed petitioner and received by the latter on January 25, 1971, finding him liable for deficiency income tax in the respective amounts for the years 1959 and 1961 (exclusive), or in the total amount of ₱167,504.00

(Pp. 106-107, BIR rec.), details of which are as follows:

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Net income per return	₱ 3,986.50
Undeclared Income	43,600.00
Net income per investigation	₱47,269.25
Less: Personal Exemption	3,000.00
Amount subject to tax	₱44,269.25
Tax Due thereon	₱11,788.00
Less: Amount already paid	20.00
Balance	₱11,768.00
Add: 50% Surcharge	5,884.00
4-19-60 to 4-19-62	2,118.24
Total Amount Due and Collectible	₱19,776.24

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Net income per return	₱ 3,986.50
Undeclared Income	193,500.00
Net Income per Investigation	₱197,486.50
Less: Personal Exemption	3,000.00
Amount subject to tax	₱194,486.00
Tax Due thereon	₱ 87,848.00
Less: Amount already Assessed	30.00
Balance	₱ 87,818.00
Add: 50% surcharge	43,909.00
1/2% monthly int from 4-17-62 to 4-17-65	15,807.24
Total Amount Due and Collectible	₱147,534.24

Petitioner, through counsel, in his letter dated February 28, 1971 and received by respondent on February 23, 1971, disputed the assessment of ₱167,304.48 and asked its cancellation and withdrawal on the ground that the right of the government to assess has already prescribed as more than five (5) years have elapsed when the assessment was made and which 5-year period is counted from the dates petitioner filed his 1959 and 1961 income tax returns, respectively.

Petitioner, in his letter, pointed out that respondent was in error in imposing the 50% surcharge, when he invoked the application of the ten (10) year prescriptive period under Section 332 within which to assess, instead of five (5) year prescriptive period, the tax code provided for in Section 331 of the National Internal Revenue Code.

Petitioner, likewise, asserted the fact that when a fraud case was filed against him in the Fiscal's Office of the City of Manila (I.S. No. 69-28370) based on alleged underdeclaration or non-declaration of income, the said criminal case was dismissed by the City Fiscal for want of sufficient proof of fraud. (Exh. D-15, p. 212, Deposition, Separate envelope.) Copy of this decision dismissing the case by the City Fiscal's Office had been furnished the respondent Commissioner of Internal Revenue. Petitioner is with the view that the five (5) year period within which to issue deficiency income tax assessment pursuant to Section 331 of the Tax Code applies instead of Section 332 which speaks of fraud. Petitioner concludes that the assessment which was issued on December 28, 1970, was issued beyond the five-year period from the filing of his income tax returns for the years 1959 and 1961, which were on March 8, 1960 and March 8, 1962. (Pp. 25-28; 21-24, BIR rec.). It is urged by petitioner that the assessment should be cancelled and withdrawn. (P. 112, BIR rec.)

In order to enforce collection of the alleged deficiency income tax liabilities which were apparently not paid by petitioner, warrant of distraint and levy was served against petitioner on March 3, 1971. Petitioner attacked the validity of the issuance of the warrant as being irregular since this summary method was resorted to without exerting reasonable efforts to collect the assessment by ordinary method. (Pp. 124-125, BIR rec.)

In a memorandum dated April 1, 1971, Julian Tiongco, Assistant ROH for Operations (Collection), stated that the seeming haste in the issuance of the warrant of distraint and levy is due to the memorandum issued by Deputy Commissioner of Internal Revenue Conrado Diaz dated November 11, 1970, and addressed to the Chief, Prosecution Division, stating therein that "in view of the confidential information reaching this (his) office,Mr. Andrew D. Gruber is retiring from business and intends to leave the Philippines and has been disposing his properties. And that the Revenue Seizure Agent assigned to served and execute the warrants has been instructed to proceed unless the order to the contrary be subsequently received by him. (p. 127, BIR rec.). It is also stated in the said memorandum that counsel for petitioner alleged that an initiated action for criminal fraud by the Bureau of Internal Revenue filed with the City Fiscal's Office was dismissed, and if true, the contention of the petitioner that this case does not fall under Section 332 of the National Internal Revenue Code and that the assessment has prescribed may be tenable.

On April 23, 1971, petitioner filed the instant petition for review.

After filing by respondent on September 1, 1971 of his answer to the petition for review, the case was set for trial on the merits. However, the trial was postponed no less than seven (7) times since the original setting on July 12, 1971 upon request of counsel for petitioner, and based on a variety of grounds.

On August 1, 1965, Atty. Grace Rivera, counsel for petitioner, moved to withdraw as counsel as the client-counsel relationship ceased at the time of the death of Andrew D. Gruber, petitioner herein. (p. 50, CTA rec.). In a resolution dated September

5, 1977, the motion and manifestation of Atty. Grace Rivera, withdrawing as counsel of the deceased petitioner was granted. (p. 63, CTA rec.)

Again, on June 28, 1978, a motion to reset the case for hearing, by the new counsel for petitioner, counsel/administrator Crisanto Cornejo, was filed with this Court. After the appearance of the new counsel, the hearing of this case was postponed no less than five (5) times. And at the hearing of this case on March 16, 1979, due to the failure of counsel/administrator to appear, respondent submitted the case for decision. (Minutes of the Hearing, March 16, 1979, p. 87, CTA rec.) This Court, however, in fairness to the petitioner, issued the following resolution:

> In the interest of justice and it appearing that there is a pending written offer of petitioner's exhibits which has not yet been acted upon, the verbal order given in open court on March 16, 1979, submitting the case for decision is hereby set aside.
>
> Upon the Court's own motion, this case is hereby reopened and the parties ordered to appear before the court on September 15, 1980, at 9:00 A.M. for further proceedings. (p. 88, CTA rec.).

Meanwhile, during the proceedings of this case petitioner, on July 3, 1975 submitted to the court a written offer of exhibits (pp. 43-44-45, 46-47-48

& 49, CTA rec.) for admission, which the court now admits as there was, in the records, no objection on the part of respondent.

In the meantime, the case was set for trial on the merits on September 15, 1980. Again, on that date counsel for petitioner failed to appear, which prompted counsel for respondent, in open court, to again request for the dismissal of the case citing lack of interest on the part of the petitioner to prosecute its appeal. At the adjournment of the hearing, a representative of the petitioner arrived and filed with this Court a motion to reset the scheduled hearing. The Court denied the respondent's motion for dismissal. At this point the hearing was set for October 21, 1980, with both parties notified in open court. On that scheduled date of hearing, petitioner prayed for a thirty (30) day period wherein to file a memorandum, or to present additional witnesses before he will submit the case for decision. And if after that period, he is unable to submit his memorandum or to present his witnesses, the case will be deemed submitted for decision. (Minutes of the hearing, October 21, 1980, p. 93, CTA rec.)

Finally, for petitioner's failure to file his memorandum, the Court issued an order and received by petitioner on December 12, 1980 (p. 94, CTA rec.) considering the case submitted for decision.

The decisive questions are whether or not:

1. The right of the government to assess deficiency income tax against the estate of Andrew D. Gruber for the years 1959 and 1961 has prescribed; and

2. Assuming that the government has the right to assess the deficiency income tax, whether or not the estate of petitioner is liable for deficiency income tax for said years.

At the outset, it must be stated that tax assessments are presumed to be correct, unless the contrary is shown, and the burden of proof to show otherwise or to overcome the presumption of correctness rests upon the taxpayer. As a matter of fact, the burden of the taxpayer contesting the validity or correctness of an assessment is to prove not only that the Commissioner of Internal Revenue is wrong, but that the taxpayer is right. (Lino Gutierrez vs. Collector of Internal

Revenue, CTA Case No. 504, January 28, 1962; Esso Standard Fertilizer and Agricultural Chemical Co., Inc. (Philippines) v. Commissioner of Internal Revenue, CTA Cases Nos. 1862, 1879, 1888, 1892 & 1896, May 30, 1980; Augusto L. Guanzon v. Efren I. Plana, Commissioner of Internal Revenue, CTA Case No. 2821, August 27, 1980; Tan Guan v. Court of Tax Appeals, L-23676, April 27, 1967, 19 SCRA 903.)

We shall now consider the first issue.

The provisions of law involved in this case are Sections 318 and 319 of the National Internal Revenue Code, which we quote for ready reference, to wit:

> SEC. 318. Period of Limitation Upon Assessment and Collection - Except as provided in the succeeding Sections, 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 the expiration of such period. For the purpose of this section a return filed before the last day prescribed by the law for the filing thereof shall be considered as filed on such last day: Provided, That this limitation shall not apply to cases already investigated prior to the approval of this Code. (331).
>
> SEC. 319. Exception As to Period of Limitation of Assessment and Collection of Taxes. - (a) In the case of a false and fraudulent returns with intent to evade tax or of failure to file a return, the tax may be assessed, or a proceeding in court for thecollection of such tax may be begun without assessment, at any

> time within ten years after the discovery of the falsity, fraud, or omission: Provided, That in fraud assessment which has become final and executory, the fact of fraud shall be individually taken cognizance of in a civil or criminal action for the collection thereof.
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> xxx xxx xxx

The records show that petitioner thru his agent filed his income tax returns for 1959 on March 8, 1960; and petitioner personally filed his income tax return for 1961 on March 8, 1962. The assessment was issued on March 28, 1970, and was received by the petitioner on January 25, 1971. (Petition for Review, p. 1, CTA rec.) Since respondent had only up to March 8, 1964 and March 8, 1967, within which to issue the deficiency assessment for the years 1959 and 1961, respectively, it is obviously clear that without the existence of fraud the assessment in question was issued beyond the five year period prescribed in the aforequoted provisions of law.

Respondent however alleges in his answer to the petition for review that petitioner deliberately failed to declare his true and correct income in his return, and, consequently, said returns were false and fraudulent, and invokes the 10-year period of limitation within which to assess as provided in Section 332 (now Sec. 319) of the Revenue Code.

We cannot subscribed to the position taken by the respondent. It is a cardinal rule in taxation that fraud is a question of fact and the circumstances constituting it must be alleged and proved. Fraud is a serious charge and to be sustained, it must be supported by clear and convincing proof which is lacking in this case. (The Collector of Customs "now Commissioner" vs. Alberto D. Benipayo, G.R. No. L-13656, January 31, 1962, 4 SCRA, 182.) Whether the taxpayer has been guilty of fraud with intent to evade tax the burden of proof with respect to such issue shall be upon the Commissioner of Internal Revenue (Jacob Mertens Jr., Law of Federal Income Taxation, Vol. 10, Chapter 55.18, 1958 Ed., pp. 71-72.)

In the case at bar, the existence of fraud with intent to evade the payment of tax has not been clearly shown by respondent. It is only alleged by respondent that petitioner deliberately intended to defraud the government by failing to report his true and correct income in his income tax return. To Us this is not enough. Where a taxpayer honestly believed that the method employed by him in determining his tax liability is correct, he does not incur fraud. It is then incumbent upon the Commissioner of Internal Revenue to show the specific act or omission which pictures fraud, the absence of which no fraud penalty attaches under Section 72 of the National Internal Revenue Code. (Yutivo & Sons Hardware Co. vs. Commissioner of Internal Revenue, G.R. No. L-13203, January 28, 1961, 110 Phil. 751, cited in the case of Commissioner of Internal Revenue vs. Visayan Electric Co. and the CTA, G.R. No. L-22611, May 27, 1968, 23 SCRA, 715.)

From the evidence of record in the case at bar, it appears that petitioner acquired from Hacienda Benito ten (10) hectares of land at an acquisition cost of ₱1.00 and other valuable considerations per square meter. Petitioner had testified that in this transaction, he had acquired the said Hacienda, per his deposition, and paid ₱4.00 per square meter to Julien Wilson who was authorized to receive the payment.

Petitioner had sold four (4) hectares, out of the said portion of land, to Faith Academy Inc. a non-profit educational and protestant institution, for ₱1.50 per square meter. Petitioner also executed two (2) deeds of sale, one covering an area of 47,500 square meters to Robert Q. Philipps, and sold at ₱4.00 per square meter. Petitioner had succinctly testified in his deposition that the selling price merely equalled the acquisition cost.

Petitioner, in answer to the query of counsel for petitioner, regarding the meaning of "other goods and valuable considerations" as part of the acquisition cost of the Hacienda, petitioner, testifying in his own behalf stated that the phrase "other goods and valuable considerations" was actually to make the consideration at ₱4.00 per square meter for the whole 10 hectares of land belonging to Hacienda Benito. According to the petitioner, Hacienda Benito had an arrangement with certain Julien Wilson wherein Hacienda Benito agreed to give Julien Wilson, two (2) pieces of land containing an area of 100,000 square meters each. But in this arrangement, however, Andrew Gruber was never mentioned. Petitioner in his testimony also stated that, on December 8, 1958, he paid Julien Wilson the amount of ₱4.00 per square meter for the other piece of land with an area of 100,000 square meters, and he further stated that Julien Wilson drew up the deed of sale which caused Hacienda Benito to finally transfer the 10 hectares of land to petitioner. (Petitioner's testimony, pp. 44-53, Deposition, Exh. B.)

While it is true that the acquisition cost appearing in the deed of sale, executed by and between Hacienda Benito and petitioner Andrew D. Gruber, was at ₱1.00 and other goods and valuable considerations, the actual amount involved was ₱4.00 per square meter as testified and explained by petitioner in his deposition. Petitioner had testified that he paid the amount of ₱4.00 to Julien Wilson and not to Hacienda Benito, as appearing in the deed of sale. (Pp. 52-53, Deposition.)

There being no counter availing evidence pre--sented by the government to refute the testimony of the petitioner that the actual acquisition cost of the 10 hectares of land, which was ₱4.00 paid to Julien Wilson in 1958, and there being no showing that the petitioner was induced with malice or his tes-timony being merely an afterthought or his testimony destroyed by cross-examination, this court will accept the testimony of petitioner as true.

It is worth mentioning that petitioner, at the time of his deposition, was suffering from arteriosclerotic heart disease; myocardial infraction, arteriolateral vessel; congestive heart failure; diabetis musitus. (P. 153, Petitioner's Deposition) This physical debility of petitioner may certainly negate any notion that he will speak falsehead and to turn his back on the truth.

Consequently, we strongly think that respondent failed to refute the validity of the petitioner's claim. The reliance by respondent on the single information furnished by one Jose R. Macalinao, did not overcome the genuineness and validity of the three (3) deeds of sale (Exh. "D", "F", and "G", Deposition.). The testimonial evidence of petitioner which established the fact that he did not realize, in his honest belief, any profit or income from the sales made, destroyed the claim of respondent of non-recognition of income in petitioner's income tax returns for 1959 and 1961. There being no evidence on the part of the respondent to prove that petitioner's income tax returns were false and fraudulent by the apparent failure of petitioner to include incomes of the sales of his land during those years with intent to avoid payment of income tax, the issuance of the assessment beyond the period of five (5) years from the filing of the returns makes the assessment null and void under the provisions of Section 331 (now Sec. 319) of the National Internal Revenue Code.

IN VIEW OF THE FOREGOING, we find that Section 332 (now 319) of the Internal Revenue Code is not applicable in the instant case. The right of respondent to assess deficiency income tax for the years 1960 and 1961 having prescribed under Section 331 of the National Internal Revenue Code, we hold the deficiency assessment of 1959 and 1961 against petitioner null and void and with no legal force and effect and hereby declared as set aside.

The consideration of the second issue therefore becomes moot and academic.

SO ORDERED.

Quezon City, March 5, 1982.

CONSTANTE C. ROAQUIN
Associate Judge

I CONCUR:

AMANTE FILLER
Presiding Judge

Took no part

ALEX Z. REYES
Associate Judge