REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

ATTY. KIM S. JACINTO-HENARES, in her capacity as the COMMISSIONER OF INTERNAL REVENUE and MELQUIADES A. CANCELA, in his capacity as the OIC-REVENUE DISTRICT OFFICER OF REVENUE DISTRICT NO. 70, MASBATE CITY,
Petitioners,

- versus -

ATLAS CONSOLIDATED MINING AND DEVELOPMENT CORPORATION,
Respondent.

C.T.A. EB NO. 1101
(C.T.A. Case No.8150)

Present:
DEL ROSARIO, *PJ*
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
COTANGCO-MANALASTAS, *and*
RINGPIS-LIBAN, *JJ.*

Promulgated:

AUG 14 2015

11:35 a.m.

x- -x

DECISION

Fabon-Victorino, J.:

This *Petition for Review*[1] filed by the Commissioner of Internal Revenue (CIR) and Melquiades A. Cancela, in his capacity as the OIC-Revenue District Office of Revenue district No. 70, Masbate City, seeks to reverse and set aside the Decision[2] dated October 1, 2013 of the Court in Division in CTA Case No. 8150, entitled "*Atlas Consolidated Mining and Development Corporation vs. Atty. Kim S. Jacinto-Henares, in her capacity as the Commissioner of Internal Revenue, and Melquiades A. Cancela, in his capacity as the OIC-Revenue District Officer of Revenue District No. 70,*

[1] *En Banc* docket, pp. 10-39.
[2] *En Banc* docket, pp. 43-61.

Masbate City", the dispositive portion of the assailed Decision reads:

> **WHEREFORE**, premises considered, the Petition for Review is hereby **GRANTED**.
>
> The Assessment Notices dated February 29, 2000 for deficiency excise taxes for taxable years 1991, 1992 and 1993 are hereby CANCELLED and WITHDRAWN for failure of respondents to enforce collection thereof within the period allowed by law.
>
> Consequently, the Warrant of Distraint and/or Levy issued on August 19, 2010 is hereby declared NULL and VOID and of no legal effect. Respondents and all persons acting under their direction or authority are now precluded from collecting the amount of P197,595,158.77, representing petitioner's excise tax liabilities for taxable years 1991, 1992 and 1993.
>
> The CAP General Insurance Corporation Surety Bond [Bond No. JCL(8) 00078] in the amount of P296,392,738.06 posted by the petitioner shall be cancelled upon the finality of this decision.
>
> **SO ORDERED.**

Unconvinced, petitioners moved for a reconsideration of the adverse decision but the same was denied in the similarly assailed Resolution of November 26, 2013, [3] hence, this Petition for Review, before the Court *En Banc*.

THE FACTS

The undisputed facts as found by the Court in Division:

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[3] *En Banc* docket, pp. 62-70.

"On February 29, 2000, BIR Revenue Region No. 10 issued Assessment Notices directing petitioner (herein respondent) to pay on or before March 29, 2000 alleged deficiency excise taxes for taxable years 1991, 1992 and 1993. The Assessments were broken down as follows:

	1991	1992	1993	Total
Basic Tax	P19,625,697.63	P33,734,557.57	P28,971,060.96	P82,331,316.16
50% Surcharge	9,812,848.81	16,867,278.79	14,485,530.48	41,165,658.08
20% Interest (per annum)	17,663,127.86	30,361,101.81	26,073,954.86	74,098,184.53
	P47,101,674.30	P80,962,938.17	P69,530,546.30	P197,595,158.77

On May 24, 2000, petitioner received a Formal Letter of Demand, attached to which are the Assessment Notices, from BIR Revenue Region No. 10 requesting petitioner to settle its alleged deficiency excise tax liabilities.

Petitioner failed to file an administrative protest within the period prescribed under Section 228 of the NIRC of 1997, as amended.

On November 21, 2006, petitioner wrote the BIR requesting for the issuance of a ruling confirming that it is no longer subject to assessment and collection by the BIR with respect to excise tax due from respondent for taxable years 1991 to 1993.

On December 15, 2006, the BIR issued BIR Ruling No. DA-722-2006 confirming, among others, that the period to collect on the Assessments has already prescribed. The ruling, in part, provides:

> 'In the instant case, since the enumerated exceptions mentioned above are not present, the period within which to assess and collect is three (3) years. Thus, since the returns are no longer available for examination, the timeliness of the assessment prescribed in Section 203 of the said Code cannot be ascertained. On the other hand, even if it were to be assumed that the assessment notice dated February 29, 2000 was issued within the prescriptive period, Atlas' liability for the

subject excise taxes would still have been extinguished as the period within which to collect has likewise prescribed as more than six years have lapsed from the time of the issuance of the notice.'

On November 24, 2008, the Regional Director of BIR Revenue Region Office No. 10 wrote the BIR requesting the reversal/revocation of the above ruling on the ground of alleged misrepresentation of the facts presented by petitioner. According to the Regional Director, petitioner, contrary to its representations in the Request for Confirmatory Ruling, "willfully neglected to file the required excise tax returns and failed to pay the excise tax due within the prescribed period."

On December 17, 2008, the Revenue District Officer of Revenue District No. 70 of Masbate City demanded the payment of the alleged deficiency excise taxes from petitioner.

On January 13, 2009, petitioner received the above Demand Letter.

On January 15, 2009, in response to the above Demand Letter, petitioner wrote the respondent RDO (herein petitioner RDO) stating that the BIR has issued BIR Ruling No. DA-722-2006 which confirmed that the period within which an action may be instituted for the collection of the assessed excise taxes had already prescribed.

On July 13, 2010, Respondent CIR issued the Memorandum Letter addressed to the Regional Director declaring BIR Ruling No. DA-722-2006 dated December 15, 2006 null and void.

Subsequently, RMC No. 67-2010 was issued on August 10, 2010 circularizing the full text of the Memorandum Letter.

Pursuant to RMC No. 67-2010, Respondent RDO sent to petitioner another letter dated August 11, 2010 demanding payment of the Assessments within ten (10) days after receipt of the letter by petitioner. The letter states that if full settlement will not be received, the letter shall serve as formal notice of

Warrant of Distraint and/or Levy and Garnishment with Notices of Tax Lien on all existing properties of petitioner.

On August 17, 2010, petitioner filed the instant Petition for Review (With Application for Temporary Restraining Order and/or Writ of Preliminary Injunction and Motion for Suspension of Collection of Tax).

On August 19, 2010, Respondent CIR, through Respondent RDO, issued a Warrant of Distraint and/or Levy against petitioner. The Warrant was served by the BIR on September 24, 2010.

On August 31, 2010, respondents filed their Opposition to petitioner's Application for Temporary Restraining Order (TRO) and/or Writ of Preliminary Injunction and Motion for Suspension of Collection of Tax. Respondents based its opposition on the following grounds: (1) The Honorable Court of Tax Appeals (CTA) has no jurisdiction over petitioner's case; (2) petitioner's causes of action are not proper issues that may be elevated before the Honorable CTA; and (3) petitioner did not present any valid ground for its application for TRO to be granted.

Petitioner filed its Reply to respondents' Opposition on September 13, 2010. Petitioner countered, among others, that the Honorable Court has jurisdiction over the petition; that the rule on exhaustion of administrative remedies is not applicable; that the revocation of the Ruling was an exercise of quasi-judicial power under the second paragraph of Section 4 of the NIRC of 1997, as amended; and that petitioner is entitled to the issuance of the TRO.

On October 13, 2010, respondents filed their Answer and averred the following special and affirmative defenses: (1) the Honorable CTA has no jurisdiction to entertain the petition; (2) respondents' right to assess petitioner had not yet prescribed; (3) respondents' right to collect taxes from petitioner is within the prescribed period; and (4) respondent CIR has a legal basis in revoking BIR Ruling No. DA-722-2006." (*Citations omitted*)

On October 1, 2013, the Court in Division rendered the assailed Decision, ordering the cancellation and withdrawal of the Assessment Notices dated February 29, 2000. It ruled that it has jurisdiction over the case as the issue therein falls under "other matters", cognizable by the Court pursuant to Section 7(a)(1) of Republic Act (RA) No. 1125,[4] as amended by RA No. 9282. Contrary to petitioners' claim, the period to collect the deficiency excise taxes was not suspended simply because Fernando S. Verde, then President of respondent cannot be located. The Court in Division explained that the third instance under Section 223 of the NIRC of 1997, as amended, applies only if the whereabouts of the taxpayer cannot be ascertained. Granting that it was so, petitioner was well aware of the corporate address of respondent, where the Warrant of Distraint and/or Levy could be served either upon Jesus C. Valledor, Jr., who was connected with respondent since January 1988, or to any responsible officers or authorized representative of respondent after the assessments had become final and executory.

The foregoing ruling was effectively affirmed when petitioners' *Motion for Reconsideration* dated October 18, 2013 was denied in the Resolution of November 26, 2013. The Court in Division emphasized that although an institution of criminal action, as a form of collection of tax under Section 205 of the 1997 NIRC, had the effect of suspending the running of the prescriptive period for collection of assessed deficiency taxes, it could not be determined with certainty if the criminal case was instituted within the five-year collection period. Petitioner CIR neither alleged nor offered any evidence to show the date of filing of the criminal case with the Regional Trial Court against then president of respondent Fernando S. Verde. Besides, it was only the latter who was impleaded in the Information. In fine, any judgment for the payment of deficiency tax could not be rendered against respondent who was never impleaded in the criminal case.

Hence, the instant *Petition for Review* with the following arguments:

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[4] *An Act Creating the Court of Tax Appeals.*

I. The Honorable Court is bereft of jurisdiction, for respondent's causes of action are not proper issues which may be elevated before the Court.

II. Assuming without admitting that the Honorable Court has jurisdiction in the case at bar, petitioners' right to collect the assessed deficiency excise taxes is within the period prescribed by law.

III. Assuming without admitting that the Honorable Court has jurisdiction in the case at bar, the criminal action instituted by petitioners against respondent's President and Treasurer suspended the period to collect the assessed deficiency excise taxes.

IV. Assuming without admitting that the Honorable Court has jurisdiction in the case at bar, it is the position of petitioners that Revenue Memorandum Circular No. 67-2010 effectively revoked BIR Ruling No. DA-722-2006.

In its *Comment*, respondent maintains that the Court has jurisdiction over the instant case. Pursuant to Section 7(a)(1) of Republic Act (RA) No. 1125, as amended by RA No. 9282, the Court has the power to hear and decide tax disputes, including "other matters" arising under the Tax Code and other laws administered by the BIR. Review of rulings of petitioner is within the jurisdiction of the Court as it falls within "other matters" arising under the Tax Code or other laws administered by the BIR.[5] Further, an issue in the original Petition for Review relates to the right of petitioners to legally collect the assessed taxes from respondent over which the Court has jurisdiction as held in the case of *Commissioner of Internal Revenue v. Hambrecht & Quist Philippines, Inc.*[6]

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[5] *Philippine Journalist, Inc. v. Commissioner of Internal Revenue*, G.R. No. 162852, December 16, 2004.
[6] G.R. No. 169225, November 17, 2010.

More importantly, petitioners' right to collect on the assessments had prescribed. Petitioners cannot insist that the prescriptive period to collect was suspended by virtue of the filing of a criminal case against respondent's former president Fernando S. Verde. *Sans* any proof authorizing the BIR Regional Director to prosecute and conduct the said criminal proceeding, the same should be deemed not filed. There was also no showing when it was filed. Further, only Fernando S. Verde was charged therein. Respondent was not indicted which could have the effect of suspending the running of the prescriptive period.

Petitioners' contention that the failure to serve the warrant of arrest against Fernando S. Verde caused the suspension of the prescriptive period under Section 223 of the Tax Code is as well flawed. Respondent agrees with the Court in Division that Section 223 of the Tax Code applies only if the whereabouts of the taxpayer cannot be ascertained which is not obtaining in the present case since the BIR knew respondent's address where court processes could be duly served. In addition, at the time the BIR failed to locate any property of respondent, no warrant of distraint or levy had been duly served upon respondent.

Finally, petitioner CIR erred in revoking BIR Ruling No. DA-722-2006. For one, no basis exists for such revocation as she failed to substantiate the alleged misrepresentation. Second, granting that respondent did not file an excise tax return for taxable year 1991, any representation to the contrary should not result in the assailed revocation as such non-filing of excise tax return is immaterial to the issue pertaining to the prescription of the BIR's right to collect the excise taxes covered by the Assessments. It is different had the Ruling confirmed that the Assessments were issued beyond the period prescribed under the Tax Code. Here, BIR Ruling No. DA-722-2006 confirmed the prescription of BIR's right to collect the tax previously assessed.

On August 15, 2014, the instant *petition* was deemed submitted for decision with the parties filing of their respective memoranda.

RULING OF THE COURT *EN BANC*

The Petition for Review is without merit.

To be sure, the arguments raised by petitioners in this appeal have already been passed upon and amply resolved by the Court in Division in the assailed Decision and Resolution dated October 1, 2013 and November 26, 2013, respectively. In fine, there is no reason to reinvent the wheel. But if only to put petitioners' mind to rest, Court *En Banc* will discuss anew the salient points of the ruling of the Court in Division.

The Court of Tax Appeals has jurisdiction over the original Petition for Review:

Basic is the rule that the allegations in the complaint and the character of the relief sought determine the nature of the action and jurisdiction of the court.[7] Undeniably, one of the issues raised in the *Petition for Review*[8] filed before the Court in Division relates to the right of petitioners to legally collect the assessed taxes which is within the Court's competence. In fact, the parties themselves stipulated to submit the issue of "*Whether or not the BIR's right to collect on the Assessments has prescribed*".

Precisely the Court in Division, after considering the parties' allegations and the obtaining circumstances established after the presentation of evidence ruled that "the main issue in this case boils down on the prescription of the BIR's right to collect on the assessments." Pursuant to Section 7 (a) (1) of RA 1125, as amended by RA No. 9282, the issue on the prescription of the BIR's right to collect taxes is covered by the term "other matters" arising under the NIRC over which the Court in Division has jurisdiction.

Petitioners' position is too frail a thread to overcome the tenet laid down in the case of *CIR v. Hambrecht & Quist Philippines, Inc.* cited in the assailed Decision, to wit:

[7] *Vide Fernando v. Spouses Lim,* G.R. No. 176282, August 22, 2008, 563 SCRA 147.
[8] Division docket, pp. 1-20.

'... the issue of prescription of the BIR's right to collect taxes may be considered as covered by the term "other matters" over which the CTA has appellate jurisdiction.

Furthermore, the phraseology of Section 7, number (1), denotes an intent to view the CTA's jurisdiction over disputed assessments and over "other matters" arising under the NIRC or other laws administered by the BIR as separate and independent of each other. This runs counter to petitioner's theory that the latter is qualified by the status of the former, i.e., an "other matter" must not be a final and unappealable tax assessment or, alternatively, must be a disputed assessment.

Likewise, the first paragraph of Section 11 of Republic Act No. 1125, as amended by Republic Act No. 9282, belies petitioner's assertion as the provision is explicit that, for as long as a party is adversely affected by any decision, ruling or inaction of petitioner, said party may file an appeal with the CTA within 30 days from receipt of such decision or ruling. The wording of the provision does not take into account the CIR's restrictive interpretation as it clearly provides that the mere existence of an adverse decision, ruling or inaction along with the timely filing of an appeal operates to validate the exercise of jurisdiction by the CTA.

To be sure, the fact that an assessment has become final for failure of the taxpayer to file a protest within the time allowed only means that the validity or correctness of the assessment may no longer be questioned on appeal. However, the validity of the assessment itself is a separate and distinct issue from the issue of whether the right of the CIR to

> **collect the validly assessed tax has prescribed. This issue of prescription, being a matter provided for by the NIRC, is well within the jurisdiction of the CTA to decide.**'

The BIR's right to collect on the subject assessment has prescribed:

Clear is the fact that the Formal Letter of Demand (FLD) and the Assessment Notices dated February 29, 2000 were received by respondent on May 24, 2000. As there was no record of when the FLD and Assessment Notices were released, mailed or sent by the BIR, it is presumed that the same were released, mailed or sent on the same date they were received by respondent.

Section 222 (c) of the NIRC of 1997, as amended, provides that "[a]ny internal revenue tax which has been assessed within the period of limitation, *i.e.*, within the three-year or ten-year period whichever is appropriate, **may be collected by distraint or levy or by proceeding in court within five (5) years following the assessment of the tax.**"

There is no dispute on the validity of the issuance and finality of the subject assessment. However, prescription had set in barring petitioner from collecting the deficiency excise taxes subject of the assessment she issued. Counting the five-year prescriptive period from May 24, 2000, the date the subject assessment was issued, the BIR had until May 24, 2005, within which to collect the assessed deficiency excise taxes.

Evidence shows that petitioner RDO issued the Warrant of Distraint and/or Levy against respondent only on August 19, 2010 and served upon respondent on September 24, 2010, or way beyond the prescriptive period for collection of the deficiency excise taxes, the last day of which was on May 24, 2005.

To shake off the lapses committed, petitioners invoke Section 205, in relation to Section 222(c), of the NIRC of 1997, as amended, arguing that they already availed of one of the remedies for the collection of deficiency taxes when they filed on November 9, 2000 a criminal case with the Regional Trial Court (RTC), Branch 45 of Masbate City against Fernando S. Verde, then President of respondent, for non-payment of excise tax. This already constitute effort to collect the subject delinquent taxes, which effectively suspended the five-year prescriptive period.

The Court *En Banc* is not presuaded.

Indeed, a criminal action, as a collection remedy, is authorized under Section 205 of the NIRC of 1997, as amended. By virtue of the said provision, petitioner may pursue the collection of delinquent taxes through the summary remedies of distraint and levy and the institution of a civil or criminal action. Significantly, petitioners, as the taxing authority, have the discretion to pursue either of the remedies or both simultaneously.[9]

Thus, the institution of a criminal action has the effect of suspending the running of the prescriptive period for collection of the assessed deficiency taxes.

However, in this particular case, the filing of the alleged criminal action against the then President of respondent before the RTC for violation of the provision of the Tax Code did not toll the running of the prescriptive period to collect since respondent was not impleaded nor was it, at the very least, afforded due process.

In the case of *Ching vs. Secretary of Justice,*[10] the Supreme Court explained why a corporation or a juridical entity must be impleaded in a criminal case for it to be bound by the proceedings therein, to wit:

> If the crime is committed by a corporation or other juridical entity, the

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[9] *City of Makati vs. CIR, CTA* EB Case No. 641, September 16, 2011.
[10] G.R. No. 164317, February 6, 2006.

> directors, officers, employees or other officers thereof responsible for the offense shall be charged and penalized for the crime, precisely because of the nature of the crime and the penalty therefor. A corporation cannot be arrested and imprisoned; hence, cannot be penalized for a crime punishable by imprisonment. However, a corporation may be charged and prosecuted for a crime if the imposable penalty is fine. Even if the statute prescribes both fine and imprisonment as penalty, **a corporation may be prosecuted and, if found guilty, may be fined**. (*Boldfacing supplied*)

It is therefore indispensable to implead the corporation as a party in a criminal case for violation of the provision of the Tax Code for the government to enforce collection of tax against such entity by way of a criminal action pursuant to Section 205(b) of the NIRC of 1997, as amended.

Record indicates that the Information filed before the RTC only charged respondent's then President Fernando S. Verde for violation of Section 126 and 127(a) in relation to Sections 254, 255 and 256 of the NIRC of 1997, as amended, and that respondent was not at all impleaded.

Petitioners' contention that the period to collect the deficiency excise taxes from respondent was suspended since neither accused Fernando S. Verde nor any property of respondent could not be located, per negative reply of some government agencies, deserves scant consideration.

Section 223 of the NIRC of 1997, as amended, enumerates the instances when the running of the prescriptive periods under Sections 203 and 222 of the same Code is suspended, to wit:

1. for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or levy or a proceeding in court and for sixty (60) days thereafter;

2. when the taxpayer's request for a reinvestigation is granted by the Commissioner;

3. when the taxpayer cannot be located in his given address in the return filed upon which a tax is being assessed or collected: however, if the taxpayer informs the Commissioner of such change in address, the running of the Statute of Limitations is not suspended;

4. when the warrant of distraint or levy is duly served upon the taxpayer, his authorized representative, or a member of his household with sufficient discretion, and no property could be located; and

5. when the taxpayer is out of the Philippines.

As observed by the Court in Division, none of the above instances is obtaining in this case to suspend the running of the period to collect the assessed deficiency excise taxes. In the assailed Decision, the Court in Division turned down all the grounds cited by petitioners relative to their claimed suspension of the running of Statute of Limitations, in the following fashion.

> "This Court does not agree with respondents' claim that the period to collect the deficiency excise taxes was suspended considering that accused Fernando S. Verde could not be located and it seems that there is no property of petitioner that can be located.
>
> The third instance under Section 223 of the NIRC of 1997, as amended, applies only if the whereabouts of the taxpayer cannot be ascertained.
>
> In this case, even though the whereabouts of petitioner's then President, Fernando S. Verde, was unknown, still the corporate address of petitioner was known to respondents. There is nothing in the

records that would show that respondents cannot locate any officer or employee of petitioner at its corporate address. Respondents could have served the Warrant of Distraint and/or Levy upon Mr. Jesus C. Valledor, Jr., who is connected with petitioner since January 1988, 63 or any responsible officers or authorized representative of petitioner after the assessments became final and executory. However, it failed to do so and resorted only to the filing of a criminal complaint against Fernando S. Verde as then President of petitioner.

There is likewise nothing in the records that would show the other efforts made by respondents to collect on the deficiency tax from May 24, 2000 to May 24, 2005, or the period within which the BIR can collect on the deficiency excise taxes. The BIR records show that respondent RDO inquired with the Municipal Assessor of Aroroy, Masbate, the City Assessor of Masbate City, Provincial Assessor of Masbate City, the Registry of Deeds of Masbate and the Department of Environment and Natural Resources-Mines and Geosciences Bureau, if petitioner has any leviable property, and all government agencies replied in the negative. However, making inquiries into any leviable property of petitioner is not one of the instances that will suspend the running of the period to collect on the deficiency tax. Moreover, all of these communications were made only in 2008, long after the period to collect on the deficiency tax has prescribed. Also, these communications were not offered in evidence.

Respondents should have served the Warrant of Distraint and/or Levy upon petitioner first notwithstanding the fact that no property can be located. It is not essential that the Warrant of Distraint and/or Levy be fully executed so that it can suspend the running of the statute of

> limitations on the collection of the tax. It is enough that the proceedings have validly begun or commenced and that their execution has not been suspended by reason of the voluntary desistance of the respondent BIR Commissioner. It is only logical to require that the Warrant of Distraint and/or Levy be, at the very least, served upon the taxpayer in order to suspend the running of the prescriptive period for collection of an assessed tax, because it may only be upon the service of the Warrant that the taxpayer is informed of the denial by the BIR of any pending protest of the said taxpayer, and the resolute intention of the BIR to collect the tax assessed." (*Citations omitted*)

WHEREFORE, the instant *Petition for Review* dated December 23, 2013 is **DENIED**, for lack of merit. Accordingly, the assailed Decision and Resolution dated October 1, 2013 and November 26, 2013, respectively, are hereby **AFFIRMED**.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We Concur:

ROMAN G. DEL ROSARIO
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

With concurring and dissenting opinion:
Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

Ma. Belen
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

ATTY. KIM S. JACINTO-HENARES, in her capacity as the COMMISSIONER OF INTERNAL REVENUE and MELQUIADES A. CANCELA in his capacity as the OIC-REVENUE DISTRICT OFFICER OF REVENUE DISTRICT NO. 70, MASBATE CITY *Petitioners,* -versus- ATLAS CONSOLIDATED MINING AND DEVELOPMENT CORPORATION, *Respondent.*	CTA EB CASE No. 1101 (CTA CASE No. 8150) *Present*: DEL ROSARIO, P.J, CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, COTANGCO-MANALASTAS, and RINGPIS-LIBAN, *JJ.* Promulgated: AUG 14 2015 11:35 a.m.

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CONCURRING and DISSENTING OPINION

MINDARO-GRULLA, J.:

I concur with the *ponente* that this Court has jurisdiction over the subject matter as the issued Ruling and Memorandum Circular is in connection with her duty to collect taxes under Section 2[1] of the 1997 NIRC specifically against Atlas, thus, within the ambit of "other matters"

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[1] SEC. 2. Powers and Duties of the Bureau of Internal Revenue - The Bureau of Internal Revenue shall be under the supervision and control of the Department of Finance and its powers and duties shall comprehend the assessment and collection of all national internal revenue taxes, fees, and charges, and the enforcement of all forfeitures, penalties, and fines connected therewith, including the execution of judgments in all cases decided in its favor by the Court of Tax Appeals and the ordinary courts. The Bureau shall give effect to and administer the supervisory and police powers conferred to it by this Code or other laws; Section 3 of the 1977 NIRC.

under Section 4, second paragraph[2] thereof, as well as Section 7(a)(1) of Republic Act (RA) 1125, as amended.[3]

However, I rule to dissent with the *ponente* that BIR's right to collect in this instant case has already prescribed.

It must be noted that the taxable years involved in this case are 1991, 1992 and 1993, hence the applicable law is the 1977 NIRC. The amendment of the 1977 NIRC by Batas Pambansa (BP) 700[4] in 1984 reduced the five-year period for both assessment and collection to three years. Section 223 of the 1977 NIRC, as amended, provides:

> "Sec. 223. Exceptions as to period of limitation of assessment and collection of taxes. —
>
> (a) In the case of a false or fraudulent return with intent to evade tax or of 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 any time within ten years after the discovery of the falsity, fraud, or omission: Provided, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the city or criminal action for the collection thereof.
>
> xxx xxx xxx
>
> (c) Any internal revenue tax which has been assessed within the period of limitation above- ℒ

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[2] Section 4. Power of the Commissioner to Interpret Tax Laws and to Decide Tax Cases.—

xxx xxx xxx

> The power to decide disputed assessments, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto, **or other matters arising under this Code or other laws or portions thereof administered by the Bureau of Internal Revenue** is vested in the Commissioner, **subject to the exclusive appellate jurisdiction of the Court of Tax Appeals**."[emphasis supplied]

[3] An Act Creating the Court of Tax Appeals

[4] An Act Amending Sections 318 and 319 of the National Internal Revenue Code, as Amended, so as to Reduce the Period of Limitation for Assessment of Internal Revenue Taxes from Five to Three Years.

> prescribed **may be collected by distraint or levy or by a proceeding in court within three years following the assessment of the tax.**" (emphasis supplied)

The assessment in this case having been made on February 29, 2000, CIR had until February 29, 2003 to collect against Atlas.

Based from the records, the only modes for collection that were made by the government are: 1) issuance of warrant of distraint and levy, and; 2) the institution of the criminal action against Atlas' president and treasurer.

The warrant of distraint and levy was issued on August 19, 2010, which was obviously beyond the three-year prescriptive period to collect. On the other hand, the criminal complaint was filed on July 28, 2000, which was within the prescriptive period to collect.

As correctly observed by the Special Second Division in Its Resolution, pursuant to Section 205[5] of the 1997 NIRC, the filing of a criminal complaint, which is a mode of collection of taxes, has the effect of suspending the running of the prescriptive period.

The conflict now arises as to Atlas' contention that it was not charged in the Information filed before the Regional Trial Court (RTC), thus, such criminal action cannot suspend the running of the prescriptive period to collect as far as the corporation is concerned. Moreover, any judgment rendered in the said criminal charge cannot be imposed upon Atlas Corporation as it was not impleaded as an accused in the first place.

On the other hand, CIR argues that while the Information only indicates Atlas' president as accused, the criminal complaint before the prosecutor's office clearly charges both Atlas Corporation and its officers. In addition, contrary to the Special Second Division's finding that the

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[5] Section 205 of the 1977 NIRC.

date of filing of the criminal charge cannot be ascertained as no evidence was produced before the court to prove such, BIR Records admitted during her formal offer of evidence clearly indicates that as early as July 28, 2000, the complaint was already filed before the prosecutor's office, and Information was filed before the RTC on November 09, 2000.

As correctly argued by CIR, Exhibits show that the criminal complaint was filed on July 28, 2000. Such date is very well within the three-year prescriptive period to collect. The fact that CIR did not mark specifically the date of filing of the criminal complaint is of no moment as the document must be appreciated as a whole.

The same ruling is adopted as to the date of filing of the Information before the RTC. The Order of Judge Manuel L. Sese, which was admitted as evidence and part of the BIR Records presented before the Court, specifically states that the case has been filed since November 09, 2000, well within the three-year prescriptive period. Thus, at the latest, the government was able to collect deficiency taxes against Atlas on November 09, 2000, which was within the prescriptive period to collect as provided for by the applicable law.

It must be noted that the documents were offered as a whole and formed part of the records of this case. Even if it is the contention that the dates *per se* were not marked during the formal offer of evidence, the Revised Rules of Court of Tax Appeals is explicit that this Court is not bound strictly by technical rules on evidence.[6] This Court has held time and again that technicalities should not be used to

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[6] Section 8 of Republic Act 1125 states:

> Section 8. Court of record; seal; proceedings. - The Court of Tax Appeals shall be a court of record and shall have a seal which shall be judicially noticed. It shall prescribe the form of its writs and other processes. It shall have the power to promulgate rules and regulations for the conduct of the business of the Court, and as may be needful for the uniformity of decisions within its jurisdiction as conferred by law, **but such proceedings shall not be governed strictly by technical rules of evidence.** [emphasis supplied]

defeat substantive rights, especially those that have been established as a matter of fact.[7]

Atlas argues in its Comment[8] that the criminal case should be deemed to not have been filed in absence of any proof authorizing the Regional Director by the CIR to prosecute and conduct the criminal proceeding,[9] and that the corporation was not impleaded in the Information.[10]

It must be noted that the case subject herein is a criminal action, and the question on whether the Court acquired jurisdiction over the corporation with respect to the criminal action was not an issue in *People vs. Wong Yan Tak.*[11] The said case refers to the civil liability of accused vis-à-vis corporation's civil liability to pay deficiency taxes, *viz:*

> "In the instant petition for review, petitioner prays that the above-stated Amended Decision dated January 8, 2013,"insofar as the civil liability of P3,552,716.81 plus 20% delinquency interest per annum, be set aside, and that the Decision dated October 17, 2012 on the subject civil liability be reinstated".
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> xxx xxx xxx"

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[7] Filinvest Development Corporation v. Commissioner of Internal Revenue, G.R. No. 146941, August 9, 2007.
[8] Par. 54, *En Banc Docket,* pp. 77-103.
[9] The 1977 NIRC provides for the requirement for the CIR's approval before any action civil or criminal action is filed, to wit:

> "Section 221. Form and Mode of Proceeding in Actions Arising under this Code. - Civil and criminal actions and proceedings instituted in behalf of the Government under the authority of this Code or other law enforced by the Bureau of Internal Revenue shall be brought in the name of the Government of the Philippines and shall be conducted by the provincial or city fiscal, or the Solicitor-General, or by the legal officers of the Bureau of Internal Revenue deputized by the Secretary but no civil or criminal action for the recovery of taxes or the enforcement of any fine, penalty or forfeiture under this Code shall be begun without the approval of the Commissioner. (Underscoring supplied)
>
> Section 222. Remedy for Enforcement of Statutory Penal Provisions. - The remedy for enforcement of statutory penalties of all sorts shall be by criminal or civil action, as the particular situation may require, subject to the approval of the Commissioner."

[10] BIR Records, p. 176.
[11] CTA EB Criminal Case No. 024 (CTA CRIM CASE No. O-090), December 18, 2013.

(Underlining supplied)

In other words, the issue raised in Wong Yan Tak is who will shoulder the burden of paying the deficiency tax, i.e., the accused officer or the corporation itself. The Court pointed out that as far as civil liability is concerned, It had not acquired jurisdiction over the corporation to pierce the doctrine of corporate veil as it was not impleaded in the first place. Atlas on the other hand tries to rely on Wong Yan Tak as to whether the criminal charge against its officer, without impleading the corporation itself, would suffice to toll the prescriptive period to collect. Thus, relying on the ruling in Wong Yan Tak is misplaced.

The issues raised above as to the CIR's authority to prosecute and RTC's jurisdiction over the corporation itself cannot be resolved by this Court as It has limited jurisdiction.

Records presented before this Court only shows an Order[12] from the RTC Branch 45 of Masbate City that the criminal case has been archived as the accused has not yet been arrested. No records would show that Atlas raised the issue of absence of authority from the CIR and its jurisdiction over the corporation during the RTC level, much more any resolution from the RTC deciding on the said issues.

This Court's reception of evidence to prove absence of authority from the CIR in the criminal prosecution, as well as to resolve the RTC's jurisdiction over Atlas corporation is not a mere procedural technicality which may be disregarded considering that these are the very bases for the contention that such criminal action did not toll the running of the government's prescriptive period to collect tax liability.

While this Court is not governed strictly by technical rules of evidence on the principle that rules of procedure are not ends in themselves but are primarily intended as tools in

[12] BIR Records, p. 170.

the administration of justice,[13] it is a rule of thumb that no evidence which has not been formally offered shall be considered. Thus, where there is no Order or Decision from the RTC that indeed no authority from the CIR has been presented to prosecute the criminal action, and that it had not acquired jurisdiction over Atlas, this Court evidently cannot rule on such. It is the duty of the court to rest its findings of fact and its judgment only and strictly upon the evidence offered by the parties.[14] Mere allegation on the part of Atlas without it being resolved before the RTC does not confer any evidentiary weight unless finally decided upon by the lower court.

Thus, without encroaching on the jurisdiction of the RTC to decide on the merits of the criminal case, including its jurisdiction over the corporation, as well as the authority from the CIR to prosecute such, this Court is merely constrained on its reception of evidence from both parties, and this Court cannot decide for the RTC.

For the reasons stated above, the criminal action filed before the RTC of Masbate, as a mode for collection of deficiency tax against Atlas, tolled the running of the prescriptive period to collect. As the running of the prescriptive period was suspended upon the filing of the criminal action before the court, the subsequent issuance of Warrant of Distraint and Levy on August 19, 2010 is still in force and effect.

IN VIEW OF THE FOREGOING, I vote to grant the Petition for Review.

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

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[13] Petron Corporation vs. Commissioner of Internal Revenue, G.R. No. 180385, July 28, 2010.

[14] Commissioner of Internal Revenue vs. Gregorio Villamar Araño, CTA EB Case No. 594, June 8, 2011, citing Heirs of the Deceased Carmen Cruz-Zamora vs. Multiwood International, Inc., G.R. No. 146428, January 19, 2009.