REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

PELICAN, INC.,
Petitioner,

- versus -

C.T.A. CASE NO. 5997

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
MAY 16 2003

x - x

DECISION

This is a judicial appeal from the inaction of the respondent on petitioner's administrative protest against the assessments for deficiency income tax and deficiency value-added tax in the aggregate amount of P72,817,215.67 for the taxable year 1990.

Based on the records of the case, the antecedent facts are as follows:

Pelican Incorporated is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal office address at 74 EDSA, Mandaluyong City *(par. 1, Joint Stipulation of Facts and Issues)*. It is primarily engaged in the general mercantile and commercial business of importing, buying, acquiring, holding, repacking, selling at wholesale or othewise disposing of and dealing at wholesale of goods such as but not limited to dyes, dyestuffs, colourings, and other merchandise and commodities as permitted by the laws of the Philippines to be handled in the Philippines or other countries *(BIR Records, p. 18)*.

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On April 15, 1991, petitioner filed its Corporate Annual Income Tax Return for the taxable year 1990 *(Exhibit A)*. Also, petitioner filed simultaneously its Quarterly Value-Added Tax (VAT) Returns for the first, second and third quarters of 1990 on October 22, 1990 *(BIR Records, pp. 32, 27 and 24)*, and on January 21, 1991, its fourth quarter VAT Return *(BIR Records, p.22)*.

On January 30, 1992, Letter of Authority No. 009564 was issued by the Assistant Commissioner for Special Operations Services, Pedro C. Aguillon, authorizing Revenue Officer Leo Manlapaz and Melinda Lim of the Withholding Tax Audit Division, to be supervised by the Section Chief, Guillermo Gabarda, to examine petitioner's books of accounts and other accounting records for income tax purposes for the taxable year 1990 *(Exhibit 1)*.

On the same date, Assistant Commissioner for Special Operations Services, Pedro C. Aguillon, issued Letter of Authority No. 009565 to Revenue Officer Ma. Teresa Buen of the Withholding Tax Audit Division, to be supervised by the Section Chief, Guillermo Gabarda, to examine petitioner's books of accounts and other accounting records for business tax (VAT/ Percentage/ Documentary Stamp Tax) purposes for the taxable year 1990. Both letters of authority were revalidated on March 11, 1992 *(BIR Records, pp. 3 and 368)*.

On March 22, 1999, respondent issued formal assessment notices and demand letters to petitioner for the latter's deficiency income tax and deficiency value-added tax liabilities for the taxable year 1990 in the amounts of P65,860,231.05 and P6,956,984.62, respectively *(pars. 3 and 4, Joint Stipulation of Facts and Issues)*, computed as follows:

A. Income Tax	
Net Business Income	P75,690,798.00

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Add: Disallowances		
Undeclared Sales	P20,956,797.35	
Agency fee(Unsupported)	24,496,083.00	
Advertising exp (do)	6,434,635.00	
Misc. Expense (do)	4,408,378.00	
Rental Expense (do)	1,608,232.00	P57,877,125.35
Adjusted Taxable Income		133,567,923.35
Tax Due		46,748,773.17
Less: Tax Paid		26,491,779.00
Deficiency Tax		P 20,256,994.17
Add: 25 % Surcharge		5,064,248.54
Interest		40,513,988.34
Compromise		25,000.00
Total Amount Due		P65,860,231.05

B. Value-Added Tax	
Undeclared Sales	P20,956,797.35
Deficiency Tax Due	2,095,679.73
Add: 25 % Surcharge	523,919.93
Interest	4,312,384.96
Compromise	25,000.00
Total Amount Due	P6,956,984.62

Petitioner did not agree with the proposed deficiency assessments. Hence, on April 23, 1999, it sent a letter to the Chief of the Assessment Division of the Bureau of Internal Revenue explaining its opposition thereto *(Annex C, Petition for Review; BIR Records, pp. 845-850)*.

On June 22, 1999, petitioner again wrote the Chief of the Assessment Division of the Bureau of Internal Revenue reiterating its request for reconsideration of the aforementioned assessment. Petitioner submitted the relevant documents to support its protest on the alleged deficiency assessment, which include the schedule showing the details of the reversal/adjustment amounting to P16,171,955.00, schedule showing the reconciliation between the sales figure per BIR investigation and sales figure per financial statements and the audited Financial Statements for the year ended December 31, 1990 *(Annex D, Petition for Review; BIR Records, pp. 851-861).*

Due to inaction of the respondent on the protest, petitioner, on January 18, 2000, elevated the case to this court through a Petition for Review.

On February 24, 2000, respondent filed his Answer and raised the following Special and Affirmative Defenses, to wit:

4. Petitioner failed to submit all relevant documents in support of its protest. For instance, it did not submit the corresponding documents to justify the alleged under declaration of sales, agency fees, advertising expense, miscellaneous expense and rental expense. For its failure to submit all relevant supporting documents, the assessment has become final (Section 22, 1997 National Internal Revenue Code);

5. For an expense to be deductible, the following requisites must be satisfied (1) it must be ordinary and necessary expense; (2) it must be paid or incurred during the taxable year in carrying on the trade or business; (3) the amount must be reasonable; (4) it must be substantiated by adequate (sic); (5) it must not be against the law or public policy. The agency fee, advertising expense, miscellaneous expense and rental expense were not sustained by adequate proof. The corporation must not only meet the business test (Nos. 1 and 2). It must substantially prove by evidence or records, the deductions claimed under the law, otherwise, the same will be disallowed. The mere allegation of the taxpayer that an item of expense is ordinary and necessary does not justify its deduction. (Esso Standard Eastern, Inc. vs. Commissioner of Internal Revenue, 175 SCRA 149, July 07, 1989);

6. The government's right to issue the value-added tax and income tax assessment against the petitioner has not yet prescribed. As a general rule, all the internal revenue taxes should be assessed within a period of three (3) years after the last day prescribed by law for the filing of the return. Section 203 of the 1997 National Internal Revenue Code thus provides:

> "Section 203. Period of limitation upon assessment and collection- <u>Except as provided in Section 222,</u> internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, and no proceeding

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> in court without assessment for the collection of such taxes shall be begun after the expiration of such period: Provided, That in case a return is filed beyond the period prescribed by law, the three (3) year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day." (Underscoring supplied).

Clearly, the above-cited provision merely provides the general rule and Section 222 of the National Revenue Internal Code provides for the exceptions (sic) to which Petitioner falls. Section 222 of the NIRC provides:

> Section 222. Exception as to Period of Limitation of Assessment and Collection of Taxes-
>
> (a) In the case of a false and 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 filed without assessment, at any time within ten (10) 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 hall be judicially taken cognizance of in the civil or criminal action for the collection thereof. xxx (Underscoring supplied)

7. The assessment was issued in accordance with law and regulations;

8. All presumptions are in favor of the correctness of tax assessments *(Commissioner of Internal Revenue vs. Avelino, 8 SCRA 572)*.

After trial on the merits, the case was submitted for decision on October 23, 2002 sans Memorandum from respondent.

In their Joint Stipulation of Facts and Issues, the parties submitted the following issues for this court's resolution:

1. Whether or not the subject income and VAT assessments in the total amount of P72,817,215.67 are void for having been issued beyond the

three(3) year period of limitation as provided under Section 203 of the NIRC;

2. Whether or not the subject income and VAT assessments in the total amount of P72,817,215.67 are void for failure on the part of the respondent to state in detail the facts and the law on which the assessments are made provided under Section 228 of the NIRC;

3. Whether or not the alleged undeclared sales in the amount of P20,956,797.35 for taxable year 1990 represents valid adjustments in the books of petitioner and should not be considered as part of petitioner's taxable income;

4. Whether or not the disallowed agency fees for taxable year 1990 in the amount of P24,469,083.00 are duly supported in petitioner's books and accounting records in conformity with the substantiation requirements laid down in the appropriate tax rules and regulations;

5. Whether or not the disallowed advertising expenses for taxable year 1990 in the amount of P6,434,635.00 are duly supported in petitioner's books and accounting records in conformity with the substantiation requirements laid down in the appropriate tax rules and regulations;

6. Whether or not the disallowed miscellaneous expenses for taxable year 1990 in the amount of P4,408,378.00 are duly supported in petitioner's books and accounting records in conformity with the substantiation requirements laid down in the appropriate tax rules and regulations;

7. Whether or not the disallowed rental expense for taxable year 1990 in the amount of P1,608,232.00 are duly supported in petitioner's books and accounting records in conformity with the substantiation requirements laid down in the appropriate tax rules and regulations;

8. Whether or not the adjustment in petitioner's books in the amount of P20,956,797.35 which respondent alleged as undeclared sales is not subject to the ten percent (10%) value-added tax.

Petitioner argues that the subject income and value-added tax assessments are void for having been issued beyond the three (3)-year period as provided for in Section 203 of the National Internal Revenue Code. According to petitioner, the three-year period to assess its

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income tax liabilities for the taxable year 1990 ended on April 14, 1994, to be reckoned from April 15, 1991, the date it filed its 1990 Annual Income Tax Return. Since the deficiency income tax assessment was issued only on March 22, 1999, long after the lapse of the three-year period, the same is, therefore, void. Likewise, as regards the value-added tax assessment, petitioner claims that respondent only had three years from October 22, 1990, or until October 21, 1993 within which to assess any deficiency value-added taxes against the petitioner for the first, second and third quarters of 1990. Similarly, respondent had until January 20, 1994 within which to issue the deficiency value-added taxes assessment for the fourth quarter of 1990. The deficiency VAT assessment having been issued only on March 22, 1999, then the same is void.

Moreover, petitioner claims that while it executed several Waivers of the Defense of Prescription under the Statute of Limitations of the National Internal Revenue Code *(Exhibits B, C, D, E, F, G, H, I, J, K, and L),* such waivers did not suspend the running of the prescriptive period. All the waivers were not signed by the Commissioner of Internal Revenue. Thus, according to petitioner, they do not constitute a valid agreement between respondent and petitioner to extend the prescriptive period. To buttress its claim, petitioner cited Revenue Memorandum Order No. 20-90, which prescribes the requirements for a valid waiver of the statute of limitations under the National Internal Revenue Code.

Finally, petitioner claims that even though it changed its address, such did not suspend the running of the prescriptive period because respondent failed to prove that petitioner cannot be located.

On the other hand, respondent maintains that the assessments he issued are valid. As stated in his Answer, the three-year period to assess internal revenue taxes is the general rule as provided in Section 203 of the National Internal Revenue Code. However, respondent argues that petitioner's case falls under the exception as stated in the same provision and with reference to Section 222 of the National Internal Revenue Code. Again, they are hereunder quoted for easy reference, thus:

> **Section 203.** *Period of limitation upon assessment and collection-* Except as provided in Section 222, internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: Provided, That in case a return is filed beyond the period prescribed by law, the three (3) year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered a filed on such last day." (Underscoring supplied).

> **Section 222.** *Exception as to period of limitation of assessment and collection of taxes-*
>
> (a.) In the case of a false and 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 filed without assessment, at any time within ten (10) 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 hall be judicially taken cognizance of in the civil or criminal action for the collection thereof.

We find for the petitioner.

After a careful evaluation of the arguments of the parties, evidence presented and the applicable laws and jurisprudence, this court rules against the assessments issued by respondent against the petitioner for deficiency income tax and value-added tax liabilities for the taxable year 1990.

The court agrees with the contention of the respondent that as a general rule, internal revenue taxes shall be assessed within three years after the last day prescribed by law for the

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filing of the return or in a case where a return is filed beyond the prescribed period, the three-year period shall be counted from the day the return was filed. But, in case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed at any time within ten years after the discovery of the falsity, fraud or omission *(Section 203 in relation to Section 223 (now Section 222) of the National Internal Revenue Code, supra)*

It is undisputed that petitioner filed its Annual Income Tax Return for the taxable year 1990 on April 15, 1991 *(Exhibit A),* its Quarterly Value-Added Tax (VAT) Returns for the first, second and third quarters of 1990 on October 22, 1990 *(BIR Records, pp. 32, 27 and 24)*, and on January 21, 1991, its fourth quarter VAT Return *(BIR Records, p.22)*. Applying the provisions of Section 203 and Section 223 of the Tax Code, the respondent should have assessed petitioner's deficiency income tax liabilities not later than April 14, 1994. As regards petitioner's deficiency value-added tax, respondent had until October 21, 1993 and January 20, 1994, for the first up to the third quarter and fourth quarter of 1990, respectively. Therefore, when respondent issued the assessment notices and demand letters to petitioner on March 22, 1999 *(Exhibit M and N),* the issuance was obviously beyond the three-year period required by law.

We do not find merit in respondent's claim that the assessments he issued within ten years are valid, since they fall under the exceptions above-stated. We believe that to warrant a ten-year period to assess taxpayer's tax deficiency liabilities, respondent must not only state with clarity the grounds therefor, but must also prove it. Mere allegation in the pleading, that is in respondent's Answer, that the case falls under the exception is not sufficient. It should be emphasized that there are only three instances when the ten-year prescriptive period will apply. They are, in case petitioner files a fraudulent return or a false return and in case of

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failure to file a return. In the case at bar, other than failure to file a return, we cannot determine with certainty which ground was relied upon by respondent to validate its assessments. The court in the past had made a pronouncement that fraud must be proved to exist by clear and convincing evidence amounting to more than mere preponderance and cannot be justified by a mere speculation because fraud is never lightly to be presumed *(Philippine Commercial International Bank vs. Commissioner of Internal Revenue, CTA Case No. 5003, February 4, 1997, citing Vitelli and Sons vs. U.S., 250 U.S. 355; Duffin vs. Lucas, 55 F (2d) 786; Budd vs. Comm., 43 F(2d) 509; Arroyo vs. Granada, et al., 18 Phil 484).*

However, as to whether or not the Waivers of the Statute of Limitations executed by the petitioner are valid and binding is another question. Since the subject assessments were issued beyond the three-year prescriptive period, it becomes imperative on our part to rule first on the validity of the waivers, for if this court finds the same to be ineffective, then the assessments must necessarily fail.

For easy reference, the provisions of RMO No. 20-90 are hereby reproduced:

"In the execution of said waiver, the following procedures should be followed:

1. The waiver must be in the form identified hereof. **This form may be reproduced by the Office concerned but there should be no deviation from such form. The phrase "but not after _____ 19 ____" should be filled up.** This indicates the expiry date of the period agreed upon to assess/collect the tax after the regular three-year period of prescription. The period agreed upon shall constitute the time within which to effect the assessment/collection of the tax in addition to the ordinary prescriptive period.

2. The waiver shall be signed by the taxpayer himself or his duly authorized representative**.** In the case of a corporation, the waiver must be signed by any of its responsible officials.

   Soon after the waiver is signed by the taxpayer, the Commissioner of Internal Revenue or the revenue official authorized by him, as hereinafter provided,

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shall sign the waiver indicating that the Bureau has accepted and agreed to the waiver. **The date of such acceptance by the Bureau should be indicated.** Both the date of execution by the taxpayer and date of acceptance by the Bureau should be before the expiration of the period of prescription or before the lapse of the period agreed upon in case a subsequent agreement is executed.

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

A. **In the National Office**

1.	ACIRs for Collection, Special Operations, National Assessment, Excise and Legal on tax cases pending before their respective offices. In the absence of the ACIR, the Head Executive Assistant may sign the waiver	For tax cases involving not more than P500,000.00
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**

B. In the Regional Offices

1. The Revenue District Officer with respect to tax cases still pending investigation and the period to assess is about to prescribe regardless of amount.

2. The Regional Director, the Assistant Regional Director, the Chief, Assessment Branch or the Chief, Legal Branch with respect to cases still pending review and the period to assess/collect is about to prescribe, regardless of amount.

3. The Regional Director, the Assistant Regional Director, the Chief Collection Branch or the Chief, Legal Branch with respect to cases still pending collection and the period to assess/collect is about to prescribe regardless of amount.

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4. **The waiver must be executed in three (3) copies, the original copy to be attached to the docket of the case, the second copy for the taxpayer and the third copy for the Office accepting the waiver. The fact of receipt by the taxpayer of his/her file copy shall be indicated in the original copy.**

5. **The foregoing procedures shall be strictly followed**. Any revenue official found not to have complied with this Order resulting in prescription of the right to assess/collect shall be administratively dealt with." (Emphasis Supplied)

After carefully examining the questioned Waiver of the Statute of Limitations, this court considers the same to be without any binding effect on the petitioner for the following reasons:

The first waiver executed by petitioner pertaining to the VAT assessment is an unlimited waiver (*Exhibit B; p. 137, BIR Records*). It does not contain a definite expiration date. Under RMO No. 20-90, the phrase indicating the expiry date of the period agreed upon to assess/collect the tax after the regular three-year period of prescription should be filled up. In this case, the waiver failed to fill up the phrase "but not later than ________". Moreover, Section 223 of the NIRC provides that if before the expiration of the time prescribed for the assessment of the tax, both the Commissioner and the taxpayer have agreed in writing to its assessment after such time, the tax may be assessed <u>within the period agreed upon</u>. Verily, even under the NIRC, there has to be an agreement as to the expiry date of the period to assess or collect. Secondly, it failed to state the date of acceptance by the Bureau which under the aforequoted RMO should likewise be indicated. We, therefore, cannot determine with certainty if the waiver was actually accepted before the expiration of the three-year assessment period.

With reference to the waiver pertaining to the income tax assessment (*Exhibit C; p. 141, BIR Records*), records show that the earliest waiver executed by the petitioner was on March

16, 1994, about a month before April 14, 1994, the last day for the respondent to issue the assessment. However, the records clearly show that the waiver was unsigned by the respondent or any of his authorized revenue official. It bears stressing that a waiver must be signed by both the taxpayer and the Commissioner of Internal Revenue. The signing is not a mere formality. The waiver to be binding necessitates the concurrence of the Commissioner of Internal Revenue. Without the signature of the Commissioner, the waiver is not valid ***(Commissioner of Internal Revenue vs. Court of Appeals, Court of Tax Appeals and Carnation Philippines (now merged with Nestle Philippines)**, G.R. No. 115712, February 25, 1999).* Although it is sufficient that it be signed by the revenue officer as opposed to petitioner's contention that it is only the Commissioner of Internal Revenue who is authorized to do so, the records show the absence of acceptance by the respondent or his authorized revenue official, rendering the same void and ineffective. Consequently, as there was no valid waiver executed by the petitioner before the expiration of the time prescribed by law for the assessments of the VAT and income taxes, the subsequent waivers executed by the petitioner after the prescribed period would have no effect as there would be nothing more to extend.

It bears stressing that RMO No. 20-90 is directed to all concerned internal revenue officers. The said RMO even provides that the procedures found therein should be strictly followed, under pain of being administratively dealt with should non-compliance result to prescription of the right to assess/collect. RMO No. 20-90 was promulgated pursuant to Section 223 of the Tax Code ***(Philippine Journalists, Inc. vs. Commissioner of Internal Revenue**, CTA Case No. 6108, May 14, 2002).* In the case of **Victorias Milling Co., Inc. vs. Social Security Commission, 4 SCRA 627**, the Supreme Court ruled on the nature of administrative rules and regulations, thus:

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> "When an administrative agency promulgates rules and regulations, it 'makes' a new law with the force and effect of a valid law, while when it renders an opinion or gives a statement of policy, it merely interprets a pre-existing law (*Parker, Administrative Law, p. 197; Davis Administrative Law, p. 194*). Rules and regulations when promulgated in pursuance of the procedure or authority conferred upon the administrative agency by law, partakes of the nature of a statute, and compliance therewith may be enforced by a penal sanction provided in the law. This is so because statutes are usually couched in general terms, after expressing the policy, purposes, objectives, remedies and sanctions intended by the legislature. The details and the manner of carrying out the law are often time left to the administrative agency entrusted with its enforcement."

Lastly, on the argument that petitioner's change of address suspended the running of the prescriptive period, the court does not agree. While it is true that petitioner changed its address from 5th Floor Peninsula Court Building, Paseo de Roxas, Makati, City as stated in its Annual Income Tax Return for 1990 to its present address at 74 EDSA, Mandaluyong City, respondent was not prohibited in making the assessments as it did. In ***Dominador Menguito vs. Commissioner of Internal Revenue***, *CTA Case No. 5886, promulgated on April 2, 2002,* we emphasized that an incorrect address will not nullify a notice of deficiency if the taxpayer actually receives the notice without delay *(Mertens, Law on Federal Income Taxation)*. Thus, it is implied that even though the petitioner changed it address, it will not result to the suspension of the prescriptive period because the letters of authority *(Exhibit 1; BIR Records, p.3)* and the assessment notices and demand letters *(Exhibits M and N; CTA Records, pp. 131 and 136)* were actually received by petitioner in the address although different from the one stated in its Annual Income Tax Return.

Considering that the assessments issued by respondent regarding petitioner's deficiency income and value-added tax liabilities were made beyond the prescriptive period, such assessments are void and ineffective.

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Thus, the court finds it unnecessary to dwell on the merits of the assessments.

WHEREFORE, the petition is **GRANTED**. Accordingly, the assessments for deficiency income tax and deficiency value-added tax in the aggregate amount of P72,817,215.67 for the taxable year 1990 are hereby **CANCELLED and SET ASIDE.**

SO ORDERED.

Ernesto D. Acosta

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

Juanito C. Castañeda, Jr.

JUANITO C. CASTAÑEDA, JR.
Associate Judge

LOVELL R. BAUTISTA
Associate Judge

CERTIFICATION

I hereby certify that the above 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

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