Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

FIRST DIVISION

PEOPLE OF THE PHILIPPINES, Plaintiff,	**CTA Crim. Case No. O-382** For: Violation of Section 255, in relation to Section 253(d) and Section 256, National Internal Revenue Code.
-versus-	
	Members: DEL ROSARIO, P.J., Chairperson UY, and MINDARO-GRULLA, JJ.
SOCORRO Z. NIRO, OLIVIA F. DE LA CRUZ, and JOSE PETRONIO D. ESPANOL, Accused.	Promulgated: JUL 10 2014 ; 2:10 p.m.

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R E S O L U T I O N

In the Resolution dated May 23, 2014, the Court directed Senior Assistant City Prosecutor Romeo S. Poso to specify the relevant dates of receipt of the Final Assessment Notice and Final Letter of Demand and present additional evidence such as the proof of service showing date of receipt by the accused of the Final Assessment Notice and Final Letter of Demand pursuant to Section 6(a) Rule 112 of the Rules of Court and Rule 9 of the Revised Rules of the Court of Tax Appeals.

Section 6(a) Rule 112 of the Rules of Court provides that:

> *"Sec. 6. When warrant of arrest may issue. - (a) By the Regional Trial Court.- xxx, the judge shall personally evaluate the resolution of the prosecutor and its supporting evidence.* ***He may immediately dismiss the case if the evidence on record clearly fails to establish probable cause.*** *If he finds probable cause, he shall issue a warrant of arrest, or a commitment order if the accused has already been arrested pursuant to a warrant of arrest issued by a judge who conducted the preliminary investigation or when the complaint or information was filed pursuant to section 7 of this Rule.* ***In case of doubt on the existence of probable cause,***

> ***the judge may order the prosecutor to present additional evidence within five (5) days from notice*** *xxx.* "

Likewise, Rule 9 of the Revised Rules of the Court of Tax Appeals reads:

> "SEC.4. Warrant of arrest.- Within ten days from the filing of the information, the Division of the Court to which the case was raffled shall evaluate the resolution of the public prosecutor and its supporting evidence. **The Division may immediately dismiss the case if it finds that the evidence on record clearly fails to establish probable cause.** If the Division finds probable cause, it shall issue a warrant of arrest signed by the Chairman of the Division. **In case of doubt on the existence of probable cause, the Division may order the prosecutor to present additional evidence, ex parte, within five days from notice**". (Emphasis supplied)

On June 17, 2014 the Court received a "Compliance" from the Senior Assistant City Prosecutor and BIR Special Prosecutor claiming that the Final Assessment Notice and the Final Letter of Demand were served on January 14, 2005, and in support thereof, they attached a certified true copy of a "Document Locator".

After evaluating the Information together with its supporting documents, including the "document locator" filed on June 17, 2014, the Court finds that there is no probable cause to issue a warrant of arrest.

After more than eight (8) years from the recommendation for criminal prosecution by the Regional Director Alfredo V. Misajon[1], an "Information" was filed by Romeo S. Poso, Senior Assistant City Prosecutor of Manila[2] against the accused, SOCORRO Z. NIRO, OLIVIA F. DE LA CRUZ and JOSE PETRONIO D. ESPANOL, for **wilful failure**

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[1] Dated March 9, 2006
[2] Filed on April 14, 2014

to pay internal revenue taxes in the aggregate amount of ₱30,695,562.58, which reads as follows:

> "The undersigned SOCORRO Z. NIRO, OLIVIA F. DE LA CRUZ and JOSE PETRONIO D. ESPANOL for Violation of Section 255, in relation to Section 253 (d) and Section 256 of the National Internal Revenue Code, as amended, committed as follows:
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> That on or about January 14, 2005, and for sometime prior or subsequent thereto, in the City of Manila, Philippines. Accused SOCORRO Z. NIRO, OLIVIA F. DE LA CRUZ and JOSE PETRONIO D. ESPANOL, being then the Treasurer, General Manager and Chief Accountant , respectively, of PIZZA VEST TRANSNATIONAL CORPORATION with business address at Unit No. 3, Rizal Memorial Stadium, M. Adriatico Street, Malate, this city, did then and there wilfully and unlawfully refused to pay tax the following taxes, to wit:

Kind of Tax	Assessment No./ Demand Letter	Year	Date	Amount
Def. Income tax	32-2001	2001	01/14/05	P17,934,856.13
Compromise Penalty on Income				25,000.00
Value Added Tax	-do-	-do-	-do-	10,411,766.56
Compromise Penalty on VAT				25,000.00
W/tax on Compensation	-do-	-do-	-do-	326,572.82
Compromise Penalty on EWT				16,0000.00
Final Withholding Tax	-do-	-do-	-do-	1,901,367.07
Compromise Penalty on Final Tax				25,000.00
Compromise Penalty	-do-	-do-	-do-	30,000.00

> In violation of Section 255, in relation to Section 253 (d) of the National Internal Revenue Code, as amended. "

Attached to the Information are the following supporting documents.

1. Resolution dated January 30, 2014 of Romeo S. Poso, Senior Assistant City Prosecutor, with recommending Approval of Rector E. Macapagal, Senior Assistant City Prosecutor and approval of Edward M. Togonon, City Prosecutor.
2. Recommendation for criminal prosecution by the Regional Director Alfredo V. Misajon;
3. Affidavit of Arthur C. Carandang, Atttorney III at the Legal Division Revenue Region 6 BIR. Manila, with the following attachments:
   "A" – Assessment Notice No. 33-2001 on income tax;
   "A-1" – Final Letter of Demand on income tax;

"A-2"	-	Demand for Compromise Penalty on income tax;
"B"	-	Assessment Notice No. 33-2001 on VAT;
"B-1"	-	Final Letter of Demand on VAT;
"B-2"	-	Demand for Compromise Penalty on VAT;
"C"	-	Assessment Notice No. 33-2001 on withholding tax;
"C-1"	-	Final Letter of Demand on withholding tax;
"C-2"	-	Demand for Compromise Penalty withholding tax;
"D"	-	Assessment Notice No. 33-2001 on final tax;
"D-1"	-	Final Letter of Demand on final tax;
"D-2"	-	Demand for Compromise Penalty final tax;
"E"	-	Demand for Compromise Penalty taxes;

In sum, the accused, SOCORRO Z. NIRO, OLIVIA F. DE LA CRUZ and JOSE PETRONIO D. ESPANOL as Treasurer, General Manager and Chief Accountant of Pizza Vest Transnational Corporation were charged for violation of Section 255[3] of the National Internal Revenue Code (NIRC) brought about by the company's alleged wilful failure and refusal to pay taxes for the year 2001, in the total amount of ₱30,695,562.58.

In determining probable cause to issue a warrant of arrest, the Supreme Court in the case of *Chester de Joya vs. Judge Placido Marquez*[4], held as follows:

> *"Probable cause to issue a warrant of arrest pertains to facts and circumstances which would lead a reasonably discreet and prudent person to believe that an offense has been committed by the person sought to be arrested. It*

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[3] SEC. 255. Failure to File Return, Supply Correct and Accurate Information, Pay Tax, Withhold and Remit Tax and Refund Excess Taxes Withheld on Compensation. — **Any person required under this Code** or by rules and regulations promulgated thereunder to pay any tax, make a return, keep any record, or supply correct and accurate information, **who willfully fails to pay such tax**, make such return, keep such record, or supply such correct and accurate information, or withhold or remit taxes withheld, or refund excess taxes withheld on compensation, **at the time or times required by law or rules and regulations** shall, in addition to other penalties provided by law, upon conviction thereof, be punished by a fine of not less than Ten thousand pesos (P10,000) and suffer imprisonment of not less than one (1) year but not more than ten (10) years. (Emphasis supplied)

[4] G.R. No. 162416, January 31, 2006.

> *bears remembering that "in determining probable cause, the average man weighs facts and circumstances without resorting to the calibrations of our technical rules of evidence of which his knowledge is nil. Rather, he relies on the calculus of common sense of which all reasonable men have an abundance."5[9] Thus, the standard used for the issuance of a warrant of arrest is less stringent than that used for establishing the guilt of the accused. As long as the evidence presented shows a prima facie case against the accused, the trial court judge has sufficient ground to issue a warrant of arrest against him.*

In other words, probable cause to issue warrant of arrest is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that there are lawful grounds to arrest the accused[6].

It should be noted that the crime of failure to pay tax under Section 255[7] of the NIRC is defined by the element of "willfullness" of not paying the tax, which in turn, requires the showing of "knowledge" and "voluntariness". Simply stated, the offender is aware or knows the existence of and obligation to pay a tax liability but voluntarily and intentionally failed to pay it.[8]

What the law makes criminal is the willful intent of non-payment of taxes and non-payment per se, does not warrant the institution of a criminal case against a taxpayer[9]. Thus, in the case of Emilio E. Lim, Sr. and Antonia Sun Lim vs. Court of Appeals[10], the crime of failure to pay tax was committed only after receipt of the final notice and demand for payment was coupled with the wilful refusal to pay the taxes due within the allotted period. The Supreme Court ruled as follows:

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[6] Allado vs. Diokno, 232 SCRA 192
[7] See Note 3.
[8] People of the Philippines vs. Katherine Lim and Edelyn Coronacion, et. al., CTA CRIM. CASE NO. O-113. December 12, 2011; People of the Philippines vs. Victorio A. Ocampo, CTA Crim. Case No. 0-260, August 05, 2013.
[9] People vs. Bibis, CTA CRIM. CASE No. 0-072, January 18, 2008
[10] G.R. Nos. 48134-37, October 18, 1990.

> **"Inasmuch as the final notice and demand for payment of the deficiency taxes was served on petitioners on July 3, 1968, it was only then that the cause of action on the part of the BIR accrued. This is so because prior to the receipt of the letter-assessment, no violation has yet been committed by the taxpayers. The offense was committed only after receipt was coupled with the willful refusal to pay the taxes due within the alloted period."**

Evidently, absent of any showing that the final notice and demand for payment was received by the taxpayer, it cannot be said that an offense has been committed because prior to the receipt of the letter-assessment, no violation has yet been committed.

In the instant case, while it was claimed that the Final Assessment Notice and Final Letter of Demand were served on January 14, 2005, records will show that there was no evidence that the Final Assessment Notice and the Final Letter of Demand both dated January 14, 2005 were received by the accused on January 14, 2005 or on another date.

The "document locator" submitted on June 17, 2014 does not show that the Final Assessment Notice and the Final Letter of Demand were received by the accused on January 14, 2005 or on another date. For notice by mail, it must appear that the same was served to the addressee or to a duly authorized agent of the addressee. In fact, the registry return receipt itself provides that "[a] registered article must not be delivered to anyone but the addressee, or upon the addressee's written order, in which case the authorized agent must write the addressee's name on the proper space and then affix legibly his own signature below it.[11]"

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[11] Ting and Chan-Azajar vs. Court of Appeals, et al., G.R. No. 140665, November 13, 2000, 344 SCRA 551.

Hence, the allegations in the Recommendation for criminal prosecution by the Regional Director Alfredo V. Misajon dated March 9, 2006 that "despite several demands made" and the "service of Warrant of Distraint and/ or Levy" the accused failed and refused to pay the assessed deficiency taxes are without basis. Absent of proof of receipt, these assessments could not have attained finality, there is no willful failure to pay tax and there is insufficiency to show that the accused sought to be arrested probably committed the crime charged.

Concomitantly, after the Information is filed, the determination of the presence or absence of probable cause for the issuance of a warrant of arrest against the accused, or for the withdrawal of the Information, or for the dismissal of the case, is addressed to the sound discretion of the Court[12].

Accordingly, this case is hereby **DISMISSED** for clear failure of the evidence on record to establish probable cause, as provided for in Section 6(a) Rule 112 of the Rules of Court and Rule 9 of the Revised Rules of the Court of Tax Appeals.

SO ORDERED.

(with Concurring Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

ERLINDA P. UY
Associate Justice

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

[12] Sarigumba , et. al. vs. Sandiganbayan, 451 SCRA 533

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CTA CRIM. CASE NO. O-382
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Members:
Del Rosario, P.J., Chairperson
Uy, and
Mindaro-Grulla, JJ.

Promulgated:

JUL 10 2014 2:10 p.m.

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CONCURRING OPINION

DEL ROSARIO, P.J.:

I concur in the dismissal of the subject case.

It is my humble opinion that the case should be dismissed on the ground that the Information was filed beyond the five-year prescriptive period provided under Section 281 of the National Internal Revenue Code (NIRC) of 1997, as amended.

Section 281 of the NIRC of 1997, as amended, states:

> "SECTION 281. *Prescription for Violations of any Provision of this Code.* — All violations of any provision of this Code shall prescribe after Five (5) years.
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> Prescription shall begin to run from the day of the commission of the violation of the law, and if the same be not known at the time,

> from the discovery thereof and the institution of judicial proceedings for its investigation and punishment.
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> The prescription shall be interrupted when proceedings are instituted against the guilty persons and shall begin to run again if the proceedings are dismissed for reasons not constituting jeopardy.
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> The term of prescription shall not run when the offender is absent from the Philippines."

In **Emilio E. Lim, Sr. and Antonia Sun Lim vs. Court of Appeals and People of the Philippines,**[1] the Supreme Court discussed the manner of computing the five-year prescriptive period provided under Section 354 (now Section 281) of the National Internal Revenue Code, *viz.*:

> "Preliminarily, it must be made clear that what we are dealing here are *criminal prosecutions* for filing fraudulent income tax returns and for refusing to pay deficiency taxes. The governing penal provision of the National Internal Revenue Codes is Section 73 in conjunction with Section 354 [now Section 281]. The dispute centers on the interpretation of Section 354 because in an effort to exculpate themselves, petitioners have raised the defense of prescription. On the five-year prescriptive period, both parties are in agreement. They differ however in the manner of computation, specifically as to when the period should commence.
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> xxx xxx xxx.
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> **Relative to Criminal Cases Nos. 1788 and 1789 which involved petitioners' refusal to pay the deficiency income taxes due, again both parties are in accord that by their nature, the violations as charged could only be committed after service of notice and demand for payment of the deficiency taxes upon the taxpayers.** Petitioners maintain that the five-year period of limitation under Section 354 should be reckoned from April 7, 1965, the date of the original assessment while the Government insists that it should be counted from July 3, 1968 when the final notice and demand was served on petitioners' daughter-in-law.
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> We hold for the Government. Section 51 (b) of the Tax Code provides:
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>> (b) Assessment and payment of deficiency tax. — After the return is filed, the Commissioner of internal Revenue shall examine it and assess the correct amount of the tax. *The tax or deficiency in tax so discovered shall be paid upon notice and demand from the Commissioner of Internal Revenue.* (Emphasis supplied)

[1] G.R. Nos. L-48134-37, October 18, 1990

> **Inasmuch as the final notice and demand for payment of the deficiency taxes was served on petitioners on July 3, 1968, it was only then that the cause of action on the part of the BIR accrued. This is so because prior to the receipt of the letter-assessment, no violation has yet been committed by the taxpayers. The offense was committed only after receipt was coupled with the wilful refusal to pay the taxes due within the alloted period. The two criminal informations, having been filed on June 23, 1970, are well-within the five-year prescriptive period and are not time-barred.** (Emphases supplied)

In the present case, the Information states that the crime of willful and unlawful failure to pay taxes was allegedly committed *"on or about January 14, 2005, and for sometime prior or subsequent thereto"*. Furthermore, the **document locator** submitted by the prosecution shows that the Final Assessment Notices and Formal Letters of Demand, both dated January 14, 2005, were served on January 14, 2005.

Considering that the subject Information was filed before this Court on April 15, 2014 or more than nine (9) years from the alleged date of the commission of the crime and/or the date of the service of the Final Assessment Notices and Formal Letters of Demand, it is clear that the subject Information was filed beyond the five-year prescriptive period provided under Section 281 of the NIRC of 1997, as amended. Hence, I concur in the dismissal of CTA Crim. Case No. O-382.

ROMAN G. DEL ROSARIO
Presiding Justice