REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

NEXT MOBILE, INC,
Petitioner,

CTA EB No. 1059
(CTA Case No.7970)

Present:

- versus -

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

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

MAR 16 2015
4:10 p.m.

x - x

DECISION

UY, J.:

This is a Petition for Review filed on September 2, 2013 by petitioner Next Mobile, Inc. against respondent Commissioner of Internal Revenue praying for the annulment and setting aside of the Decision dated March 25, 2013[1] of the Third Division and Resolution dated August 12, 2013[2] of the Special Third Division in CTA Case No. 7970. The dispositive portions thereof respectively read as follows:

[1] Penned by Associate Justice Amelia R. Cotangco-Manalastas, concurred in by Associate Justice Lovell R. Bautista. Associate Justice Olga Palanca-Enriquez has already retired on the date of promulgation, *En Banc* Docket, pp. 32-48.
[2] Penned by Associate Justice Amelia R. Cotangco-Manalastas, concurred in by Associate Justice Lovell R. Bautista, *En Banc* Docket, pp. 21-30.

Decision dated March 25, 2013:

"**WHEREFORE**, premises considered, the Petition for Review filed by Next Mobile Inc. is hereby **DENIED**.

Accordingly, the assessment for deficiency VAT issued by respondent Commissioner of Internal Revenue against petitioner for taxable year 2005 is hereby **AFFIRMED**. Petitioner is **ORDERED to PAY** respondent the amount of ONE MILLION FIVE HUNDRED NINETY THOUSAND THREE HUNDRED NINETY AND 97/100 PESOS (P1,590,390.97) representing deficiency value-added tax for taxable year 2005.

In addition, petitioner is liable to pay deficiency interest at the rate of twenty percent (20%) per annum on the basic deficiency VAT in the amount of P1,590,390.97 computed from January 26, 2006, until full payment thereof pursuant to Section 249 (B) of the NIRC of 1997.

The compromise penalty of P25,000.00, originally imposed by respondent is hereby excluded there being no compromise agreement between the parties.

SO ORDERED."

Resolution dated August 12, 2013:

"**WHEREFORE**, premises considered, petitioner's Motion for Reconsideration is hereby **DENIED** for lack of merit.

SO ORDERED."

THE FACTS

The facts of this case as recited by the Court in Division in its assailed Decision, are as follows:

Petitioner Next Mobile, Inc. is a domestic corporation organized under Republic Act Nos. 7301 and 7940, with principal office address at Next Mobile Building, 2244 España Avenue, Sampaloc, Manila.

On the other hand, respondent is the head of the Bureau of

Internal Revenue, holding office at the BIR National Office Building, BIR Road, Diliman, Quezon City.

On January 14, 2009, respondent issued a Formal Letter of Demand with Final Assessment Notices (FAN) for deficiency VAT and expanded withholding tax against petitioner for taxable year 2005.

In a letter dated March 5, 2009, petitioner formally protested the assessment.

After the BIR's review of the report of re-investigation covering all internal revenue taxes for taxable year 2005, on August 11, 2009, petitioner received the decision of the BIR on its protest which reduced the deficiency VAT payable to P2,785,754.67. Thus, on September 10, 2009, petitioner filed this Petition for Review (CTA Case No. 7970).

In her Answer (in CTA Case No. 7970) filed on October 19, 2009, respondent interposed the following special and affirmative defenses:

> "6. The subject assessments are valid and correct and the petitioner has the burden of proof to impugn their validity (Behn Meyer & Co. vs. Collector of Internal Revenue, 27 Phil. 647). Thus, similarly held, tax assessments by examiners are presumed correct and made in good faith and the taxpayer has the duty to prove otherwise (Commissioner of Internal Revenue vs. Construction Resources of Asia, Inc., 145 SCRA 671); and assessments duly made by a BIR examiner and approved by her superior officers will not be disturbed (Gutierrez vs. Villegas, 8 SCRA 547).
>
> 7. The burden of proof is on the taxpayer contesting the validity or correctness of an assessment to prove not only that the Commissioner of Internal Revenue is wrong but also that the taxpayer is right (Tan Guan vs. Court of Appeals, et al., 19 SCRA 903 [1967]); Collector of Internal Revenue vs. Bohol Land Transportation, Co., 107 Phil. 967 [1960]).
>
> 8. All presumptions are in favor of the correctness of the assessment made by the Commissioner of Internal Revenue; the taxpayer must prove the contrary (Commissioner of Internal Revenue v. Antonio Tuason,

Inc., 173 SCRA 397; Commissioner of Internal Revenue v. Construction Resources of Asia, Inc., 145 SCRA 671).

9. Petitioner filed false VAT returns, hence, respondent's right to assess is within ten (10) years from the date of the discovery of falsity pursuant to Section 222 (a) of the 1997 Tax Code, thus;

'Section 222. Exceptions as to Period of Limitation of Assessment and Collection of Taxes. —In the case of a false ... return with intent to evade tax ..., the tax may be assesses (sic) 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 falsity xxx xxx'

10. The assessments were issued in the regular course and within the reglementary period to assess provided by law." [3]

On October 21, 2009, the Court issued a Notice of Pre-Trial Conference setting the case for pre-trial conference on November 19, 2009.

Meanwhile, petitioner filed its Reply on November 3, 2009, alleging that it did not file false VAT returns, contrary to respondent's allegation and that this Court has jurisdiction over the case pursuant to Republic Act No. 1125, as amended.

On December 9, 2009, the parties filed their Joint Stipulation of Facts and Issues, which was later approved in a Resolution dated December 29, 2009. In the same Resolution, the pre-trial conference was considered terminated.

Thereafter, trial proceeded, giving both parties the opportunity to present their respective documentary and testimonial evidence.

On August 16, 2012, CTA Case No. 7970 was submitted for decision, after petitioner submitted its Memorandum on July 30, 2012 and respondent filed her Memorandum on August 10, 2012. [4]

In the assailed Decision dated March 25, 2013, the Special Third Division ruled in favor of respondent CIR and held that there

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[3] CTA Case No. 7970, Division Docket, pp. 264-265
[4] Assailed Decision, Docket, pp. 32-35

was an understatement of Next Mobile's VAT sales collections in 2005 as a result of undeclared gross receipts in the amount of ₱15,903,910.69, as Next Mobile failed to present evidence to refute the said under declaration. The Court *a quo* further ruled that even if Next Mobile has enough input VAT to which the alleged deficiency VAT may be credited against, said input VAT cannot be utilized because Next Mobile failed to present and offer in evidence any VAT invoice or official receipt to support the claimed excess input VAT pursuant to Section 110[5] of the 1997 NIRC and Section 4.110-8[6] of Revenue Regulation (RR) No. 16-2005.

As recourse, petitioner filed a Motion for Reconsideration on April 23, 2013. In the assailed Resolution dated August 12, 2013, the Third Division denied petitioner's motion for lack of merit.

Hence, this Petition for Review before the Court *En Banc.*

THE ISSUES

Petitioner summarizes the issues for the resolution of the Court *En Banc,* as follows:

" I.

WHETHER THE CTA DIVISION ERRED IN RULING THAT THE DEFICIENCY VAT ASSESSMENT AGAINST NEXT MOBILE WAS ISSUED WITHIN THE PRESCRIPTIVE PERIOD ON THE GROUND THAT THE VAT RETURNS FILED BY NEXT MOBILE ARE FALSE.

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[5] Section 110. Tax Credits. –

A. Creditable Input Tax. –

(1) Any **input tax evidenced by** a **VAT invoice or official receipt** issued in accordance with Section 113 hereof on the following transactions **shall be creditable against the output tax**: xxx (Emphasis supplied)

[6] Sec. 4.110-8 *Substantiation of Input Tax Credits.*

(a) **Input taxes** for the importation of goods or the **domestic purchase of goods, properties or services** is made in the course of trade or business, whether such input taxes shall be credited against zero-rated sale, non-zero-rated sales, or subjected to the 5% Final Withholding VAT, **must be substantiated and supported by the following documents, and must be reported in the information returns required to be submitted to the Bureau:**

(1) xxx

(2) For the domestic purchase of goods and properties – **invoice showing the information required under Secs. 113 and 237 of the Tax Code.**

(3) For the purchase of real property – public instrument i.e., deed of absolute sale, deed of conditional sale, contract/agreement to sell, etc., together with VAT invoice issued by the seller.

(4) For the purchase of services – **official receipt showing the information required under Secs. 113 and 237 of the Tax Code.**

xxx xxx xxx

II.

WHETHER THE CTA DIVISION ERRED IN RULING THAT NEXT MOBILE CANNOT USE ITS SUFFICIENT UNDISPUTED UNUTILIZED INPUT TAX TO OFFSET AGAINST ITS ALLEGED VAT PAYABLE."[7]

Petitioner's arguments

Petitioner claims that the deficiency VAT assessment was issued beyond the three-year prescriptive period under Section 203 of the NIRC. The alleged underdeclaration of gross receipts does not render its VAT returns false, hence, the exceptional ten-year period under Section 222 does not apply. The amount of the alleged underdeclaration merely constitutes 5.32% of the gross receipts declared per VAT return, hence, pursuant to Section 248(B),[8] there is no *prima facie* evidence that the VAT returns are false. It further contends that CIR failed to allege during the administrative level and during trial that Next Mobile had the intention to evade payment of tax and that the alleged underdeclaration is substantial, thus, the Court in Division erred in applying the ten-year prescriptive period.

Moreover, petitioner contends that even assuming that it has deficiency output VAT, it has nonetheless sufficient unutilized input VAT to offset against any VAT payable. Petitioner asserts that it should not be faulted if it cannot anymore present the required VAT invoice or official receipt as it has no longer the obligation to preserve such documents beyond the three-year period under Section 235,[9] in relation to Section 203[10] of the NIRC.

[7] Petitioner's Memorandum, Docket, p. 70.
[8] Section 248. Civil Penalties. –

xxx xxx xxx

(B) In case of willful neglect to file the return within the period prescribed by this Code or by rules and regulations, or in case a false or fraudulent return is willfully made, the penalty to be imposed shall be fifty percent (50%) of the tax or of the deficiency tax, in case, any payment has been made on the basis of such return before the discovery of the falsity or fraud: Provided, That **a substantial underdeclaration of taxable sales, receipts or income, or a substantial overstatement of deductions, as determined by the Commissioner pursuant to the rules and regulations to be promulgated by the Secretary of Finance, shall constitute prima facie evidence of a false or fraudulent return**: Provided, further, That **failure to report sales, receipts or income in an amount exceeding thirty percent (30%) of that declared per return**, and a claim of deductions in an amount exceeding (30%) of actual deductions, **shall render the taxpayer liable for substantial underdeclaration of sales, receipts or income or for overstatement of deductions, as mentioned herein.** *(Emphasis supplied)*

[9] Section 235. *Preservation of Books and Accounts and Other Accounting Records.* - All the books of accounts, including the subsidiary books and other accounting records of corporations, partnerships, or persons, shall be preserved by them for a period beginning from the last entry in each book until the last day prescribed by Section 203 within which the Commissioner is authorized to make an assessment. xxx
[10] *Supra* note 9.

Respondent's counter-arguments

Respondent counter-argues that petitioner filed false VAT returns, hence Respondent's right to assess VAT deficiency is within ten (10) years from date of discovery of the falsity pursuant to Section 222 (a) of the 1997 National Internal Revenue Code. Thus, the right to assess deficiency VAT for taxable year has not yet prescribed.

Furthermore, respondent asserts that the assessment of the BIR for deficiency VAT and increments for the late remittance of taxes against petitioner were issued with legal and factual bases.

THE COURT EN BANC'S RULING

We find the instant Petition for Review unmeritorious.

***The Court in Division did not err in its appreciation of the ruling of the Supreme Court in the case of* Aznar vs. Court of Tax Appeals.**[11]

Petitioner asserts that it did not file false returns that would entail the application of the ten-year prescriptive period in issuing assessments, as there was a misplaced reliance in the ruling in the *Aznar* case, and the interpretation of falsity was taken out of context.[12]

We disagree.

At the outset, it bears noting that the assessment for deficiency VAT for the fourth (4^{th}) quarter of taxable year 2005 is not an issue in this case, as petitioner itself admitted that it was issued within the three-year prescriptive period of assessment.[13] Thus, what will be discussed below is the deficiency VAT assessment that covers the first (1^{st}), second (2^{nd}), and third (3^{rd}) quarters of taxable year 2005, which was issued beyond the 3-year prescriptive period, as stated in Section 203 of the NIRC of 1997, as amended.

Section 203 of the NIRC of 1997, as amended, provides:

> "**SEC. 203.** ***Period of Limitation Upon Assessment and Collection***. – Except as provided in

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[11] *Aznar vs. Court of Tax Appeals,* G.R. No. L-20569, August 23, 1974.
[12] Docket, p. 72.
[13] Docket, p. 73.

> 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 a case where a return is filed beyond the period prescribed by law, the three-year period shall be counted from the day the return was filed. For 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."

As specified in the foregoing provision, Section 222 (a) provides one of the exceptions to the said rule, to wit:

> "**SEC. 222.** ***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 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 shall be judicially taken cognizance of in the civil or criminal action for the collection thereof.
>
> xxx xxx xxx."

In applying the foregoing provisions, reference must be made to the case of *Aznar vs. Court of Tax Appeals,*[14] where the Supreme Court had occasion to discuss what constitutes a false return, which would entail the application of the extraordinary prescriptive period of ten (10) years, to wit:

> "We believe that the proper and reasonable interpretation of said provision should be that in the three different cases of (1) false return, (2) fraudulent return with intent to evade tax, (3) 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 (1) falsity, (2) fraud, (3) omission. Our stand that the law

[14] G.R. No. L-20569, August 23, 1974.

> should be interpreted to mean a separation of the three different situations of false return, fraudulent return with intent to evade tax, and failure to file a return is strengthened immeasurably by the last portion of the provision which aggregates the situations into three different classes, namely "falsity", "fraud" and "omission". **That there is a difference between "false return" and "fraudulent return" cannot be denied. While the first merely implies deviation from the truth, whether intentional or not, the second implies intentional or deceitful entry with intent to evade the taxes due.**
>
> **The ordinary period of prescription of 5 years within which to assess tax liabilities under Sec. 331 of the NIRC should be applicable to normal circumstances, but whenever the government is placed at a disadvantage so as to prevent its lawful agents from proper assessment of tax liabilities due to false returns, fraudulent return intended to evade payment of tax or failure to file returns, the period of ten years provided for in Sec. 332 (a) NIRC, from the time of the discovery of the falsity, fraud or omission even seems to be inadequate and should be the one enforced.**
>
> There being undoubtedly false tax returns in this case, We affirm the conclusion of the respondent Court of Tax Appeals that Sec. 332 (a) of the NIRC should apply and that the period of ten years within which to assess petitioner's tax liability had not expired at the time said assessment was made." *(Emphasis supplied.)*

Based on the foregoing, it is clear that as long as there is a deviation from the truth, whether intentional or not, the return filed is to be considered a false one, and the ten (10) year prescriptive period under Section 222 (a) of the NIRC of 1997, as amended, applies.

This long-standing pronouncement of the Supreme Court, apart from being clear and direct, has the significance of being upheld by the High Court as being instructive on the issue. In fact, as recent as December 10, 2014, the Supreme Court upheld the said ruling in the case of *Samar-I Electric Cooperative vs. Commissioner of Internal Revenue.*[15] Thus, this Court is constrained to rule in accordance with settled jurisprudence on the issue and apply the said ruling in the case at bench.

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[15] G.R. No. 193100, December 10, 2014.

Consequently, a finding that there is an understatement in petitioner's returns, would make the said return false, and the ten (10) year prescriptive period within which the BIR can issue an assessment, applies.

Only Decisions of the Supreme Court constitute binding precedents.

In its vain attempt to refute the foregoing disquisition, petitioner cites numerous Decisions of this Court, both sitting in Division and *En Banc.* However, petitioner fails to appreciate that this reasoning is rendered futile by the fact that only decisions of the Supreme Court are considered as precedent.

The Supreme Court, in no uncertain words, has declared that CTA decisions do not constitute as precedents, to wit:

> "Suffice it to state that CTA decisions do not constitute as precedents, and do not bind this Court <u>or the public</u>. That is why CTA decisions are appealable to this Court, which may affirm, reverse or modify CTA decisions as the facts and the law may warrant. <u>Only decisions of this Court constitute binding precedents, forming part of the Philippine legal system.</u>"[16] *(Underscoring supplied.)*

Considering that only decisions of the Supreme Court can be cited as binding precedents, petitioner's reliance on the Decisions promulgated by this Court, is clearly misguided.

Finally, it is worth noting that petitioner cites the case of *Commissioner of Internal Revenue vs. B.F. Goodrich Phils., Inc.,*[17] stating that "the Supreme Court held that the fact alone that a return filed by the taxpayer contains a *(sic)* wrong information does not automatically constitute such return as a false return that will render the application of the ten-year period under Section 222 of the Tax Code."[18]

Petitioner appears to have misinterpreted the disquisition of the Supreme Court in the said case.

[16] *Commissioner of Internal Revenue vs. San Roque Power Corporation,* G.R. Nos. 187485, 196113 & 197156, February 12, 2013.
[17] G.R. No. 104171, February 24, 1999.
[18] Docket, p. 77.

In the *B.F. Goodrich Phils., Inc.* case, there was no falsity in the return, as the taxpayer sold the property for a price lesser than its declared fair market value, and the alleged deficient income is the outcome of the sale of the real property that was actually declared in the return submitted, but for less than the value of the fair market value of the said property.

That fact alone did not constitute a false return as it contains wrong information due to mistake, carelessness, or ignorance. It was held therein that "it was possible that the real property was sold for less than adequate consideration for a *bona fide* business purpose; in such event, the sale remained an arm's length transaction."

Hence, in said case, the information contained in the taxpayer's return was actually correct, and the lesser income was actually allowed by law, which did not make the return false.

However, nowhere in the said case did it counter the ruling in the *Aznar* case, that the filing of a false return is sufficient to warrant assessment of ten (10) years from date of discovery of falsity.

In stark contrast to the *B.F. Goodrich Phils., Inc.* case, petitioner had undeclared vatable revenues in the amount of Php15,903,910.69, based on the discrepancies arising from the comparison of its financial statements and its VAT returns.

Any deviation from the truth renders the return filed as false although the underdeclaration does not amount to thirty (30%) percent of the gross sales, receipts, or income.

Petitioner argues, citing Section 248 (b)[19] of the Tax Code, that the alleged underdeclared vatable gross receipts per VAT returns does not even constitute a *prima facie* evidence of false returns, as it merely constitutes 5.32% of the gross receipts declared per VAT return.[20]

We are not convinced.

Section 248 (b) of the National Internal Revenue Code of 1997, as amended, found under "Title X" of the said Code, pertaining to "Statutory Offenses and Penalties", reads as follows:

[19] *Supra* note 8.
[20] Docket, pp. 78 to 79.

"TITLE X – STATUTORY OFFENSES AND PENALTIES
'Chapter I – Additions to the Tax'

xxx xxx xxx

Sec. 248. Civil Penalties. -

xxx xxx xxx

(B). In case of willful neglect to file the return within the period prescribed by this Code or by rules and regulations, or in case of false or fraudulent return is willfully made, the penalty to be imposed shall be fifty percent (50%) of the tax or of the deficiency tax, in case any payment has been made on the basis of such return before the discovery of the falsity or fraud: *Provided,* **That a substantial underdeclaration of taxable sales, receipts or income, or a substantial overstatement of deductions, as determined by the Commissioner** pursuant to the rules and regulations to be promulgated by the Secretary of Finance, **shall constitute prima facie evidence of a false or fraudulent return**: Provided, further, **That failure to report sales, receipts or income in an amount exceeding thirty percent (30%) of that declared per return, and a claim of deductions in an amount exceeding (30%) of actual deductions, shall render the taxpayer liable for substantial underdeclaration of sales, receipts or income or for overstatement of deductions, as mentioned herein** (*Emphasis and underscoring supplied).*"

Clearly from the foregoing, Section 248 (b) of the NIRC of 1997, as amended, speaks of false or fraudulent return willfully made, and the imposition of the penalty of fifty percent (50%) of the tax or deficiency tax. It also states that a substantial underdeclaration of taxable sales, receipts or income, or a substantial overstatement of deductions, as determined by the Commissioner, shall constitute prima facie evidence of a false or fraudulent return.

Further, said Section defines "substantial underdeclaration of taxable sales, receipts or income, or substantial overstatement of deductions", and its effect on the taxpayer, as follows: failure to report sales, receipts or income in an amount exceeding thirty percent (30%) of that declared per return, and a claim of deductions in an amount exceeding (30%) of actual deductions, shall render the taxpayer liable for substantial underdeclaration of sales, receipts or income or for overstatement of deductions.

However, nowhere is it stated therein that in the event that the underdeclaration or overstatement in a return is below 30%, the taxpayer will not be liable for filing of a false return.

To the mind of the Court, for as long as there is deviation from the truth, without need of considering the percentage of underdeclaration or overstatement, a taxpayer can still be considered as having filed a false return, following the doctrine laid down in the *Aznar* case. As earlier discussed, the *Aznar* case states that **any** deviation from the truth or fact, whether intentional or not, renders the return filed as false. Additionally, the non-imposition of the civil penalty under the said provision does not merit a conclusion that the return filed was correct.

With regard to the decisions of this Court cited by the petitioner in support of its arguments, suffice it to say that as earlier discussed, these do not constitute binding precedents, as only decisions of the Supreme Court form part of the law the land.

Finally, it bears stressing that petitioner cannot rely on decisions of the Court of Appeals as well, as the Supreme Court has had occasion to rule in the case of *Systra Phils., Inc. vs. Commissioner of Internal Revenue*[21] that, *"a decision of the CA in an action* in personam *binds only the parties in that case. A third party in an* action in personam *cannot claim any right arising from a decision therein."*

Petitioner failed to discharge its burden of refuting the presumption of correctness of the BIR assessment.

Petitioner contends that a mere computation of the alleged underdeclared vatable gross receipts of does not make the deficiency VAT assessment valid.[22] In relation thereto, petitioner stresses that the Commissioner issued the VAT assessment against Next Mobile on the basis that there was an underdeclaration of its gross receipts after comparing the amounts reflected in the VAT returns filed and the amounts of the selected accounts presented in its financial statements. The Commissioner assumed, without taking into consideration other factors that may have an effect on the said

[21] G.R. No. 176290, September 21, 2007.

[22] Docket, p. 81

accounts.[23]

We disagree.

As found by the Court in Division, the BIR computed the deficiency VAT assessment for taxable year 2005 in the amount of Php2,785,754.67. The basic deficiency VAT of Php1,590,390.97 arose from the finding that petitioner's vatable revenues amounted to Php314,751,647.19, instead of the amount of Php298,847,736.50 as reflected in petitioner's VAT returns; hence, an underdeclaration in the amount of Php15,903,910.69.

To put the above-stated findings more simply, what was underdeclared are gross receipts which constitute part of the taxpayer's income. The very proof that there were underdeclared gross receipts is the financial statement itself, which the taxpayer prepared. The taxpayer's financial statement is the best evidence; if not, sufficient to prove income on the part of the taxpayer. At the end of a business year, proof of total income and expenses is reflected in the financial statement.

Thus, it cannot be said that the computation of the BIR was merely based on presumption, as it is founded on the discrepancy between the taxpayer's financial statement and returns. The computation of the taxpayer's sales collection, net of VAT, is based on Sales and Accounts Receivable Balances reflected in petitioner's audited Financial Statements.

Moreover, the fact that the deficiency assessment was based only on the discrepancies between the Financial Statement and returns filed by the taxpayer, does not necessarily make it void. The fact that the encoded amount in the Financial Statement is more than the amount indicated in the taxpayer's returns readily shows the discrepancy. And considering that the BIR was able to show such discrepancy, the burden is now shifted to Next Mobile to refute BIR's allegation of underdeclaration.

As a general rule, tax assessments issued by tax examiners are presumed correct and made in good faith. The taxpayer has the duty to prove otherwise. In the absence of proof of any irregularities in the performance of duties, an assessment duly made by a Bureau of Internal Revenue examiner and approved by his superior officers will not be disturbed. All presumptions are in favor of the correctness of tax assessments.[24] In fact, even an assessment based on estimates,

[23] Docket, p. 82.
[24] *Commissioner of Internal Revenue vs. Bank of the Philippine Islands,* G.R. No. 134062, April 17, 2007.

is prima facie valid and lawful where it does not appear to have been arrived at arbitrarily or capriciously. The burden of proof is upon the complaining party to show clearly that the assessment is erroneous. Failure to present proof of error in the assessment will justify the judicial affirmance of said assessment.[25]

Unfortunately for petitioner, the records are bereft of any evidence which could explain the discrepancy of Php15,903,910.69, found by the BIR. In fact, this was admitted by petitioner's Director for Finance, Mr. Patricio S. Carlos, in his Supplemental Judicial Affidavit[26]:

> "Q.5: How can you explain then the remaining difference in revenue in the amount of Php15,903,910.69?
>
> A: As I mentioned in the Affidavit, the Final Assessment Notice ('FAN') was received by Next Mobile only on 6 February 2009. At that time, since more than three (3) years have lapsed from the filing of the quarterly VAT returns of Next Mobile for 2005, Next Mobile did not anymore retain records pertinent to VAT. Thus, **Next Mobile cannot now substantiate with sufficient documents the reason why the remaining Php15,903,910.69 should not be included in the gross receipts subject to VAT.**
>
> Furthermore, when Next Mobile was preparing its Protest against the FAN, Next Mobile cannot anymore access a segment of its information technology ('IT') system and retrieve therefrom the relevant documents that could have sufficiently explained the foregoing discrepancy.
>
> In any case, even if the amount of the alleged undeclared revenue is correct, Next Mobile is still not liable for any deficiency VAT for the year 2005." *(Emphasis supplied.)*

Considering therefore that petitioner was not able to present any evidence, to justify the discrepancy found between its Financial Statements and its VAT returns, this Court has no other recourse, but to uphold the presumption of correctness of the deficiency tax assessment.

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[25] *Ferdinand R. Marcos II vs. Court of Appeals*, G.R. No. 120880, June 5, 1997.
[26] Formal Offer of Evidence, Exhibit "UU," Docket, pp. 515 to 520, 516.

The rule against raising new issues on appeal is a procedural rule that the Court may relax when compelling reasons so warrant, or when justice requires it.

Petitioner argues that the allegation that its VAT Returns are false was a mere afterthought, which the Commissioner did not raise in the administrative level.[27]

We are not convinced.

This Court notes that in its Protest Letter[28] dated March 5, 2009, petitioner never raised the issue of prescription. In fact, in its Protest Letter, petitioner stated that the assessment notices and formal letter of demand were in fact, "premature," to wit:

> "We **hereby request for a reinvestigation of the said assessments because (1) these were premature**, and (2) the assessments are not in accordance with the facts and applicable laws.
>
> The issuance of the assessment notices and formal letter of demand were premature since these were issued and delivered to us during the requested extended grace period for the related preliminary assessment, which we in turn received on January 6, 2009. The requested grace period would have ended on March 4, 2009 as per our letter request received by the BIR on January 20, 2009. However, the formal letter of demand and assessment notices were dated January 14, 2009 and received by us on February 6, 2009. x x x."[29] *(Emphasis supplied.)*

It was only in its Petition for Review filed before this Court in Division, that it raised the defense of prescription against the deficiency VAT assessment, which in turn, prompted respondent to counter the said argument in her Answer.

It appearing that both parties never raised the defense/argument of prescription in the administrative level, and it was petitioner who brought it up before this Court in Division, We find that it is only fair that respondent should not be barred from

[27] Docket, p. 84
[28] Formal Offer of Evidence, Exhibit "B," Docket, p. 427.
[29] Division Docket (CTA Case No. 7970), pp. 427 to 433, 427.

addressing the issue on prescription, as it was petitioner who raised the matter in the first place.

The rule against raising new issues on appeal is not without exceptions; it is a procedural rule that the Court may relax when compelling reasons so warrant or when justice requires it. What constitutes good and sufficient cause that would merit suspension of the rules is discretionary upon the courts.[30]

The amount of taxpayer's unutilized input tax is irrelevant to the issue of the validity of the deficiency tax assessment.

Petitioner states that the amount of the unutilized input tax of Next Mobile was never disputed.[31]

We are not swayed.

First, Section 110 (A) (1) of the NIRC of 1997, as amended, specifically states that input tax shall be creditable against the output tax, only if it is evidenced by a VAT invoice or official receipt, issued in accordance with Section 113, to wit:

> "SEC. 110. Tax Credits. –
>
> (A) Creditable Input Tax. -
>
> (1) Any input tax evidenced by a VAT invoice or official receipt issued in accordance with Section 113 hereof on the following transactions shall be creditable against the output tax: x x x."

In this case, petitioner failed to present any VAT invoice or official receipts to support the claimed excess and unutilized input VAT. Therefore, without any documentary evidence to support its allegations, any claim of the existence of unutilized input tax is futile.

Second, whether or not petitioner has sufficient unutilized input VAT is irrelevant to the resolution of the issue in this case. The presence or absence of unutilized input VAT is not a ground for the

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[30] *Commissioner of Internal Revenue vs. Eastern Telecommunications Philippines, Inc.*, G.R. No. 163835, July 7, 2010.
[31] Docket, pp. 85 to 86.

nullification of the subject deficiency tax assessment.

It is irrelevant because a record of excess and unutilized input VAT in petitioner's books does not bar respondent from issuing deficiency VAT assessments. The presence of unutilized input VAT does not change the fact that petitioner had undeclared vatable sales/collections in the amount of Php15,903,910.69.

Petitioner cannot, in good faith, claim that it was not obligated to preserve the documents required to support its case.

Finally, petitioner contends that Section 235 of the Tax Code limited Next Mobile's obligation to preserve the documents supporting its unutilized input tax to the period provided under Section 203 of the Tax Code.

We are not convinced.

Petitioner cannot, in good faith, claim that it was not obligated to preserve the documents it needed to support its claims.

First, petitioner filed a false return, based on the discrepancy found between its Financial Statements and VAT returns, which triggered the application of the ten (10) year prescriptive period, as stated in Section 222 (a) of the Tax Code.

There being a glaring discrepancy between its Financial Statements and the VAT returns it filed, it became incumbent upon petitioner to preserve its necessary documents that would enable it to explain the discrepancy found by the BIR.

Second, it should be noted that petitioner was aware that it was being investigated as early as 2007, as evidenced by Letter of Authority No. 2007-00000548[32] dated September 18, 2007, as well as the First Request for Presentation of Records[33] dated September 20, 2007, the Second Request for Presentation of Records[34] dated September 28, 2007, and the Final Notice[35] dated October 9, 2007.

Petitioner should have preserved the documents it needed, pertaining to taxable year 2005, until the investigation was over.

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[32] Formal Offer of Evidence, Exhibit "1;" BIR Records, p. 1.
[33] Formal Offer of Evidence, Exhibit "2;" BIR Records, p. 2.
[34] Formal Offer of Evidence, Exhibit "3;" BIR Records, p. 3.
[35] Formal Offer of Evidence, Exhibit "4;" BIR Records, p. 4.

WHEREFORE, in light of the foregoing considerations, the instant Petition for Review is hereby **DENIED** for lack of merit.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

with concurring opinion
ROMAN G. DEL ROSARIO
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

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

(On Leave)
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 conclusions in the above decision were reached in consultation before the case was assigned to the writer of the opinion of the Court *En Banc*.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

NEXT MOBILE, INC.,
Petitioner,

-versus-

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA EB CASE NO. 1059
(CTA Case No. 7970)

Present:

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

Promulgated:

MAR 16 2015
4:10 p.m.

x --- x

CONCURRING OPINION

DEL ROSARIO, PJ.:

I concur with the *ponencia* of my esteemed colleague, the Honorable Associate Justice Erlinda P. Uy, which affirms the denial of petitioner's protest on the ground that the assessment was issued within the ten (10) year prescriptive period as the VAT returns filed were found to be falsified.

The Court *En Banc*, in sustaining the findings of the CTA Third Division, applied the case of *Aznar vs. Court of Tax Appeals*,[1] wherein the Supreme Court interpreted Section 332[2] of the National Internal Revenue Code (NIRC) of 1939, as follows:

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[1] G.R. No. L-20569, August 23, 1974.
[2] Now Section 222 of the NIRC of 1997, as amended.

> "We believe that the proper and reasonable interpretation of said provision should be that in the three different cases of (1) false return, (2) fraudulent return with intent to evade tax, (3) 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 (1) falsity, (2) fraud, (3) omission. Our stand that the law should be interpreted to mean a separation of the three different situations of false return, fraudulent return with intent to evade tax, and failure to file a return is strengthened immeasurably by the last portion of the provision which segregates the situations into three different classes, namely "falsity", "fraud" and "omission". That there is a difference between "false return" and "fraudulent return" cannot be denied. While the first merely implies deviation from the truth, whether intentional or not, the second implies intentional or deceitful entry with intent to evade the taxes due."

Pursuant to the *Aznar Case*, the ten (10) year prescriptive period to assess would apply for all false returns, whether done intentionally or not. In other words, as long as the returns indicate any false entry, the BIR can assess the taxpayer within ten (10) years from the discovery of the said falsification.

It is, however, my humble view that in cases of false returns with no intent to evade tax, but due only to plain oversight, negligence or mistake, the three (3) year prescriptive period under Section 203 of the NIRC of 1997, as amended,[3] should apply.

In this regard, I respectfully submit that the doctrine laid down in the *Aznar case* must be revisited in order to come up with a proper interpretation and application of the said provision, specifically, on the applicability of the ten-year prescriptive period in cases where the taxpayer's return is found to be false. It must be stressed that a careful application of Section 222 of the NIRC of 1997, as amended, is important to safeguard the rights of the taxpayers against the limitless taxing power of the government.

Section 222 of the NIRC of 1997, as amended, originated from Section 332(a) of the NIRC of 1939, which was lifted from Section 276(a)

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[3] SEC. 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 be begun after the expiration of such period: *Provided*, That in a case where a return is filed beyond the period prescribed by law, the three-year period shall be counted from the day the return was filed. For 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.

of the Internal Revenue Code of 1939 of the United States of America.[4] When Presidential Degree No. 1158 was enacted into law, Section 332(a) of the NIRC of 1939 was adopted as Section 223(a) of the NIRC of 1977, as follows:

> "Sec. 223. Exceptions as to period of limitation of assessment and collection of taxes. – (a) In the case of 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 the 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 the civil or criminal action for the collection thereof."

With the enactment of Republic Act No. 8424, otherwise known as National Internal Revenue Code of 1997, Section 222(a) restated Section 223(a) of the NIRC of 1977, as follows:

> "Sec. 222. Exceptions as to period of limitation of assessment and collection of taxes. – (a) In the case of 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 filed without assessment, at any time within the 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 civil or criminal action for the collection thereof."

After a careful reading of the afore-cited Section 222 of the NIRC of 1997, as amended, I am of the opinion that the phrase "with intent to evade tax" does not only apply to cases of fraudulent returns, but also to cases of false returns. This is evident by the fact that no comma was placed between the words *"[i]n the case of false"* and the words *"or fraudulent return with intent to evade tax"*. This clearly shows that the phrase *"with intent to evade tax"* modifies not only the words *"fraudulent return"* but also the word *"false"*.

Moreover, American jurisprudence on the matter, although merely persuasive as sizeable portion of the Philippine Tax Code is lifted from the United States Internal Revenue Code[5], is instructive:

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[4] In the case of false or fraudulent return with intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

[5] Commissioner of Internal Revenue vs. Visayan Electric Company, G.R. No. L-22611, May 27, 1968.

1) **It is not sufficient that the return filed be false if, in fact, there exists no intent to evade any tax**. Thus, the mere fact that the inadequacy of the taxpayer's bookkeeping system causes a false return to be filed does not prevent the running of the statute where no concealment of any kind has been attempted and falsity has not knowingly been indulged in to evade the tax;[6] and,

2) It has been held [that] where the taxpayer made no disclosure of a transaction on which he made a profit, his return was false with intent to evade the tax and that such tax could be assessed after the expiration of the usual period of limitation.[7]

Indubitably, the filing of a false return must be coupled with intent to evade tax in order for the usual period of limitation not to apply. Applying this to Section 222 of the NIRC of 1997, as amended, a false return must have been made with intent to evade tax in order for the ten (10) year prescriptive period to apply.

The application of the ten-year prescriptive period to assess even to situations involving false tax returns, <u>without intent to evade tax</u> on the part of the taxpayer, would render lifeless the three-year prescriptive period to assess under Section 203 of the NIRC of 1997, as amended, for practically all deficiency tax assessments involve entries in the return that are necessarily false. It will result in an absurd situation wherein the ten-year prescriptive period will be the usual period of limitation instead of the three-year prescriptive period. Such application will run counter to the Supreme Court's categorical pronouncement in *Republic of the Philippines v. Ablaza,*[8] *viz.*:

> "The law on prescription being a remedial measure should be **interpreted in a way conducive to bringing about the beneficent purpose of affording protection to the taxpayer** within the contemplation of the Commission which recommend[ed] the approval of the law." (Emphasis supplied)

[6] J. MERTENS, THE LAW OF FEDERAL INCOME TAXATION, Sec.57.36 (1978), citing Willian L. James, 30 BTA 491.
[7] J. MERTENS, THE LAW OF FEDERAL INCOME TAXATION, Sec.57.36 (1978), citing Louis Ginsburg, 13 BTA 417.
[8] G.R. No. L-14519, July 26, 1960.

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In the case at bar, petitioner's Director of Finance, Mr. Patricio S. Carlos, in his Supplemental Judicial Affidavit,[9] was not able to explain the P15,903,910.69 under declaration of its gross revenues in its VAT returns. Petitioner merely gave a lame excuse that their records were no longer available. If petitioner has no intention to evade the payment of tax, it could have easily explained its under declaration. Failing to give a reasonable explanation, it can be said that there is an intent to evade tax. Considering that the falsified return was made with intent to evade tax, the ten (10) year prescriptive period was correctly applied.

For all the foregoing, I **VOTE** to **DENY** the Petition for Review filed by Next Mobile, Inc. in CTA EB Case No. 1059 and concur with the well-written *ponencia* of Honorable Associate Justice Erlinda P. Uy.

ROMAN G. DEL ROSARIO
Presiding Justice

[9] Formal Offer of Evidence, Exhibit "UU", Docket, pp. 515 to 520.