REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

PHILIPPINE AMUSEMENT AND GAMING CORPORATION,
Petitioner,

- versus -

THE BUREAU OF INTERNAL REVENUE, THE HON. COMMISSIONER OF INTERNAL REVENUE and THE REGIONAL DIRECTOR, REVENUE REGION NO. 6, in their official capacities as officers of the Bureau of Internal Revenue,
Respondents.

CTA CASE NO. 7880

Members:

ACOSTA, *Chairperson*
UY, *and*
FABON-VICTORINO, *JJ.*

Promulgated:

JUL 06 2011 ; 9:07 a.m.

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DECISION

FABON-VICTORINO, J.:

Claiming exemption from payment of fringe benefits tax under its charter, petitioner Philippine Amusement and Gaming Corporation (PAGCOR) filed the instant Petition for Review on March 11, 2009, seeking the cancellation of the Final Assessment Notice (FAN) dated January 14, 2008, issued against it by respondents for alleged deficiency fringe benefits tax for taxable year 2004.

Petitioner claims that it is a duly organized government-owned and controlled corporation existing under and by virtue of Presidential Decree No. 1869, as amended, with business address at the 6th Floor, Hyatt Hotel and Casino, Pedro Gil corner M.H. Del Pilar Streets, Malate, Manila. It was created to regulate, establish and operate clubs and casinos for amusement and recreation, including sports gaming pools, and such other forms of amusement and recreation.[1]

Respondent Commissioner of Internal Revenue (CIR), on the other hand, is the Head of the Bureau of Internal Revenue (BIR) with authority among others to resolve protests on assessments issued by her office or her authorized representatives. She holds office at the BIR National Office Buiding, Agham Road, Diliman, Quezon City.

Petitioner provides a car plan program to its qualified officers under which sixty percent (60%) of the car plan availment is shouldered by petitioner and the remaining forty percent (40%) for the account of the officer, payable in five (5) years.

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[1] Pars. 4 and 5, Joint Stipulation of Facts, Joint Stipulation of Facts (JSF), docket, p. 126.

On October 10, 2007, petitioner received a Post Reporting Notice dated September 28, 2007 from BIR Regional Director Alfredo Misajon of Revenue Region 6, Revenue District No. 33, for an informal conference to discuss the result of its investigation on petitioner's internal revenue taxes in 2004.[2] The Post Reporting Notice shows that petitioner has deficiencies on Value Added Tax (VAT), Withholding Tax on VAT (WTV), Expanded Withholding Tax (EWT), and Fringe Benefits Tax (FBT).[3]

Subsequently, the BIR abandoned the claim for deficiency assessments on VAT, WTV and EWT in the Letter to petitioner dated November 23, 2007[4] in view of the principles laid down in *Commissioner of Internal Revenue vs. Acesite Hotel Corporation*[5] exempting petitioner and its contractors from VAT. However, the assessment on deficiency FBT subsists and remains due to date.

On January 17, 2008, petitioner received a Final Assessment Notice (FAN) dated January 14, 2008, with demand for payment of deficiency FBT for taxable year 2004 in the amount of P48,589,507.65.[6]

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[2] Par. 7, Joint Stipulation of Facts, JSF, docket, p. 127.
[3] Annex "A," Petition for Review, docket, p. 19.
[4] Annex "B," Petition for Review, docket, page 20.
[5] G.R. No. 147295.
[6] Annexes "D", "D-1", and "D-2", Petition for Review; Par. 8, Joint Stipulation of Facts, docket, p. 127.

On January 24, 2008, petitioner filed a protest to the FAN addressed to Regional Director Alfredo Misajon of Revenue Region No. 6 of the BIR. [7]

On August 14, 2008, petitioner elevated its protest to respondent CIR in a Letter dated August 13, 2008, there being no action taken thereon as of that date.[8]

In a Letter dated September 23, 2008 [9] received on September 25, 2008, petitioner was informed that the Legal Division of Revenue Region No. 6 sustained Revenue Officer Ma. Elena Llantada on the imposition of FBT against it based on the provisions of Revenue Regulations (RR) No. 3-98 and that its protest was forwarded to the Assessment Division for further action.[10]

On November 19, 2008, petitioner received a letter from the OIC-Regional Director, Revenue Region No. 6 (Manila), stating that its letter protest was referred to Revenue District Office No. 33 for appropriate action.[11]

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[7] Annex "E", Petition for Review, docket, page 25.
[8] Annex "H", Petition for Review, docket, page 35.
[9] Annex "I," Petition for Review, docket, page 41.
[10] Par. 9, Joint Stipulation of Facts, docket, page 127.
[11] Par. 10, Joint Stipulation of Facts, docket, page 127.

On March 11, 2009, petitioner filed the instant Petition for Review alleging respondents' inaction in its protest on the disputed deficiency FBT.

On April 27, 2010, petitioner manifested in open court that the instant Petition involves a purely legal question as petitioner is not disputing the assessment made by respondents but is simply claiming exemption from payment of FBT under its charter. Consequently, the Court directed the parties to file their respective Memoranda after which the Petition shall be deemed submitted for decision. [12]

On July 12, 2010, the case was submitted for decision[13] after respondent filed her Memorandum on June 22, 2010[14] and petitioner on July 8, 2010.[15]

The parties submitted the following issues for the resolution by the Court:[16]

> 1. Whether or not the filing of the instant Petition for Review before the Honorable Court is already barred by prescription.

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[12] Docket, p. 188.
[13] Docket, pp. 197-208.
[14] Docket, pp. 214-232.
[15] Docket, p. 282.
[16] Joint Stipulation of Facts, docket, p. 128.

2. Whether or not the petitioner is liable for deficiency FBT in the amount of P48,589,507.65 for year 2004.

3. Whether or not petitioner PAGCOR is liable for surcharges, interest and penalties on the deficiency FBT for year 2004.

In its Memorandum, petitioner rejects respondents' claim that its administrative protest is already barred by prescription having been filed on August 14, 2008, or beyond the 30-day period under Section 228 of the NIRC. Allegedly, it received the Formal Letter of Demand and Assessment Notices on January 17, 2008 and seasonably filed its administrative protest on January 24, 2008.

Petitioner also posits that its administrative protest raised a pure question of law negating the alleged need and the failure to submit to respondents sufficient documents in support of the said protest.

Further, under Presidential Decree (P.D.) No. 1869, particularly Section 13 thereof, it is only liable to five percent (5%) franchise tax in lieu of all kinds of taxes, fees, or assessments of any kind, nature or description, levied, established or collected by any municipal, provincial or national government authority. Thus, it cannot be held liable for the assessed deficiency FBT in the amount of P48,589,507.65.

Besides, various administrative rulings and issuances declare that aside from the 5% franchise tax under its charter, petitioner is exempt from all forms of taxes, which necessarily includes FBT. These administrative issuances include the following:

(1) Opinion No. 058, Series of 1995 dated March 03, 1995 of the Office of the Government Corporate Counsel (OGCC)

(2) Opinion of the Office of the Solicitor General (OSG) dated April 10, 1995

(3) Opinion of the Office of the Solicitor General (OSG) dated January 25, 1996

(4) Opinion Letter dated August 29, 1995 from the Office of the President

(5) Opinion Letter dated May 14, 1996 from the Department of Justice

(6) Letter dated July 02, 1997 of the Secretary of the Department of Finance

(7) Resolution dated December 22, 2006 in OSJ Case No. 2004-1 issued by the Department of Justice

(8) Resolution dated March 12, 2007 in DOJ Case No. 2004-1 issued by the Department of Justice

Further, in the case of *Commissioner of Internal Revenue vs. Acesite (Philippines) Hotel Corporation,*[17] petitioner was accorded a blanket exemption from payment of taxes *sans* distinction between direct or indirect taxes. Petitioner was not only exempted from VAT, but from all other forms of taxes as well.

Even assuming *arguendo* that petitioner is subject to FBT, the car plan availed of by its qualified officers is still not subject to FBT as the said fringe benefit is required by the nature of or necessary to the trade or business of petitioner and shall redound to the convenience and benefit of the company, in consonance with Section 33 (A) of the NIRC and Section 2.33(C)(5 & 6) of Revenue Regulations No. 03-98. From the foregoing provisions, it is clear that if the grant of fringe benefits is required by the nature, or necessary to the trade, business, or profession, or is for the convenience of the employer, then the fringe benefit is not subject to tax. The circumstances of the case fall within the four walls of the cited provisions fortifying petitioner's claim for exemption from payment of the alleged deficiency in FBT.

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[17] G.R. No. 147295, February 16, 2007.

Petitioner invokes as well BIR Rulings DA-275-08 and DA-374-08 dated May 02, 2008 and June 19, 2008, respectively, in which it was declared that the fringe benefit by way of mobile phone allowance granted by Infosys-BPO to 24 hours a day on call status employees redounds to the benefit of the company hence, not subject to FBT. While the said rulings pertain to mobile phone allowance, it is akin to the subject car plan benefit granted by petitioner to its selected officials and therefore must as well be exempted from FBT.

Respondents however insist that petitioner filed its administrative protest on the subject assessment on FBT beyond the reglementary period of 30 days under Section 228 of the NIRC, R.R. No. 12-99 and Section 3(a), Rule 8 of the Revised Rules of the Court of Tax Appeals, rendering the assailed assessment under protest final and executory.

And even if the administrative protest was seasonably filed, the same must still fail for being *pro-forma* as petitioner was unable to submit relevant documents in support thereof. As such, it did not toll the running of the reglementary period of 30 days to contest the assessment which became final and executory effectively depriving the Court of jurisdiction over the case.

Further, when petitioner afforded a Car Expense Plan for its managerial and supervisory employees, it provided a fringe benefit to said employees and under Section 33 of the NIRC, petitioner is mandated to pay a final tax on grossed-up monetary value of fringe benefits furnished or granted to its managerial and supervisory employees.

Respondents also opine that petitioner violated the rule on *sub judice* when it filed the instant Petition. Sometime in 2006, petitioner filed a Petition for Certiorari under Rule 65 docketed as G.R. No. 172087 challenging the constitutionality of Section 1(C) of R.A. No. 9337 which took effect on November 1, 2005. The provision renders petitioner liable for corporate income tax on taxable income, VAT on its gross receipts, and fringe benefit tax. Since the petition is still pending with the Supreme Court, the filing of the instant Petition before this Court violated the *sub judice* rule.

Further, BIR Rulings DA-275-08 and DA-374-08 are not on all fours with the instant case. The taxpayer in the cited rulings is a business process outsourcing company which nature of business is definitely different from that of petitioner.

More importantly, the subject assessment is presumed correct and made in good faith, and petitioner failed to overcome this presumption in favor of respondents.

DISCUSSION/RULING

It cannot be denied that the administrative protest was seasonably filed by petitioner. In their Joint Stipulation of Facts and Issues, the parties stipulated that petitioner received the FAN dated January 14, 2008, with a demand for payment of deficiency FBT for taxable year 2004 on January 17, 2008.[18] About seven (7) days thereafter, or on January 24, 2008, [19] petitioner filed its administrative protest. Clear as a day that the administrative protest was filed within 30 days from receipt of the FAN. In short, petitioner's administrative protest was timely instituted in accordance with Section 228 of the NIRC and R.R. No. 12-99.

While it may be conceded that the protest filed on January 24, 2008 was addressed to Alfredo V. Misajon, Regional Director of the BIR Revenue District 6, and not to respondent CIR, one cannot also ignore the fact that the FAN received by petitioner on

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[18] paragraph 8, Joint Stipulation of Facts dated October 26, 2009, docket, page 127.
[19] Annex E, Petition for Review, docket, page 25.

January 17, 2008 was issued by the same Regional Director Misajon.

As a general rule, respondent CIR may delegate any power vested upon her by law to Division Chiefs or to officials of higher rank.[20] She may also delegate the authority to make tax assessments to subordinate officers which has with the same force and effect as the ones she herself issued, if not reviewed or revised by her, as obtaining in this case. A request for reconsideration of the tax deficiency assessment issued in the manner described above should be filed within thirty (30) days from the taxpayer's receipt thereof, otherwise, the decision becomes final, unappealable, therefore, demandable.[21]

Since the issuance of the FAN by Regional Director Misajon is deemed a valid delegation of authority, it necessarily follows that the administrative protest was validly and seasonably filed on January 24, 2008.

But while the administrative protest is deemed timely lodged, the same is not true with the instant Petition for Review.

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[20] Oceanic Wireless Network vs. CIR, G.R. NO. 148380, December 09, 2005.
[21] Id.

Section 228 of the NIRC states that if the protest is not acted upon within 180 days from submission of documents, the taxpayer adversely affected by the inaction of the CIR or her duly authorized representative may appeal to the CTA within 30 days from the lapse of the 180-day period.[22]

This 30-day period within which to file an appeal is jurisdictional and failure to comply therewith bars the appeal and deprives the CTA of jurisdiction to entertain and determine the correctness of the assessments. Such period is not merely directory but mandatory and it is beyond the power of the courts to extend the same.[23]

As earlier stated, petitioner timely filed its administrative protest on January 24, 2008. In accordance with Section 228 of the Tax Code, respondent CIR or her duly authorized representative had 180 days or until July 22, 2008 to act on the protest. After the expiration of the 180-day period without action on the protest, as in the instant case, the taxpayer, specifically petitioner, had 30 days or until August 21, 2008 to assail the non-determination of its protest.

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[22] CIR vs. First Express Pawnshop, G.R. Nos. 172045-46, June 16, 2009.
[23] RCBC vs. CIR, G.R. No. 168498, April 24, 2007.

Clearly, the conclusion that the instant Petition for Review was filed way beyond the reglementary period for appeal on March 11, 2009, effectively depriving the Court of jurisdiction over the petition, is inescapable.

And as provided in Section 228 of the NIRC, the failure of petitioner to appeal from an assessment on time rendered the same final, executory and demandable. Consequently, petitioner is already precluded from disputing the correctness of the assessment.[24] The failure to comply with the 30-day statutory period would bar the appeal and deprive the Court of Tax Appeals of its jurisdiction to entertain and determine the correctness of the assessment.[25]

Even assuming *in gratia argumenti* that the Court has jurisdiction over the case as claimed by petitioner, the petition must still fail on the ground that petitioner is not exempt from payment of the assessed FBT under its charter.

Note that petitioner is assessed for non-payment of FBT on the grossed-up monetary value of the car plan granted to its selected officials in the amount of P46,589,507.65, inclusive of increments, pursuant to Section 33 of the NIRC of 1997 and

[24] RCBC vs. CIR, G.R. NO. 168498, June 16, 2006.
[25] RCBC vs. CIR, G.R. NO. 168498, June 16, 2006.

Section 2.33 of Revenue Regulations No. 3-98. The details are computed as follows:

Car Plan Granted	P 53,514,975.00
Divide by	0.68
Grossed-up Monetary Value	P 78,698,492.65
Multiply by rate	32%
Deficiency Tax Due	P 25,183,517.65
Add: 25% Surcharge (Sec. 248)	6,295,879.41
20% interest p.a. from ______ to 01/15/08 (Sec. 249)	15,110,110.59
Total Amount Due and Collectible	**P 46,589,507.65**[26]

Sections 33(B) of the NIRC and 2.33(B) of Revenue Regulations No. 3-98 define fringe benefit as "any good, service or other benefit furnished or granted in cash or in kind by an employer to an individual employee (except rank and file employees) such as, but not limited to, the following:

(1) Housing;
(2) Expense account;
(3) Vehicle of any kind;
(4) Household personnel, such as maid, driver and others;
(5) Interest on loan at less than market rate to the extent of the difference between the market rate and actual rate granted;
(6) Membership fees, dues and other expenses borne by the employer for the employee in social and athletic clubs or other similar organizations;
(7) Expenses for foreign travel;
(8) Holiday and vacation expenses;

[26] Erroneously totaled as P48,589,507.65 in the Assessment Notice.

(9) Educational assistance to the employee or his dependents; and

(10) Life or health insurance and other non-life insurance premiums or similar amounts in excess of what the law allows."

In relation to the foregoing, Section 33(A) of the NIRC of 1997 provides that fringe benefits which are "required by the nature of, or necessary to the trade, business or profession of the employer, or when the fringe benefit is for the convenience or advantage of the employer" are not subject to FBT.

To implement the above provision, the BIR issued Revenue Regulations No. 3-98, which provides, thus:

SEC. 2.33. SPECIAL TREATMENT OF FRINGE BENEFITS

xxx xxx xxx

(C) *Fringe Benefits Not Subject to Fringe Benefits Tax* – In general, the fringe benefits tax shall not be imposed on the following fringe benefits:

(1) Fringe benefits which are authorized and exempted from income tax under the Code or under special law;

(2) Contributions of the employer for the benefit of the employee to retirement, insurance and hospitalization benefit plans;

(3) Benefits given to the rank and file, whether granted under a collective bargaining agreement or not;

(4) De minimis benefits as defined in these Regulations;

> (5) If the grant of fringe benefits to the employee is required by the nature of, or necessary to the trade, business or profession of the employer; or
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> (6) If the grant of the fringe benefit is for the convenience of the employer.

Petitioner claims that its car plan was required by the nature of or was necessary to its business operation. However, it failed to substantiate such claim. It was unable to present sufficient and convincing evidence that the subject fringe benefit was required or necessary in the conduct of its business or without such fringe benefit its operation would be hampered or adversely affected. Neither was petitioner able to prove that the car plan extended to its employees inured to its benefit.

Furthermore, the exemption of petitioner as franchise holder does not extend to its employees. The employer-employee relationship does not in any way transfer petitioner's tax exemption to its employees since tax exemptions are non-transferable and unassignable. Note that exemptions from taxes are strictly construed and an exemption cannot be claimed unless granted by the express provision of law.

A tax exemption must be clear and unequivocal and cannot arise from vague inferences. Thus, a taxpayer claiming a tax exemption must point to a specific provision of law conferring unto him, in clear and plain terms, the exemption from a common burden. Any doubt whether a tax exemption exists is resolved against the taxpayer.[27]

Further, while a fringe benefit tax is a final tax, it is not petitioner but its employees or recipients of the said fringe benefit that is being subjected to final tax. Under the fringe benefit system, petitioner is constituted as a withholding agent of the FBT.[28] This obligation of petitioner proceeds from its duty as an agent of the government in the collection of taxes. This tax principle was explained by the Final Arbiter in *Commissioner of Internal Revenue vs. The Court of Appeals, et al.*[29], in this wise:

> "**In the operation of the withholding tax system, the withholding agent is the payor, a separate entity acting no more than an agent of the government for the collection of the tax in order to ensure its payments**; the payer is the taxpayer — he is the person subject to tax imposed by law; and the payee is the taxing authority. In other words, **the withholding agent is merely a tax collector, not a taxpayer**. Under the withholding system, however, the agent-payor becomes a payee by fiction of law. His

[27] City of Iloilo vs. Smart communications, G.R. No. 167260, February 27, 2009, citing Digital Telecommunications, Inc. v. City Government of Batangas, et al.
[28] St. Luke's Medical Center, Inc. vs. Commissioner of Internal Revenue, CTA Case No. 6993, May 11, 2011.
[29] G.R. No. 108576, January 20, 1999.

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> (agent) liability is direct and independent from the taxpayer, because the income tax is still imposed on and due from the latter. The agent is not liable for the tax as no wealth flowed into him — he earned no income. The Tax Code only makes the agent personally liable for the tax arising from the breach of its legal duty to withhold as distinguish from its duty to pay since:
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>> '**the government's cause of action against the withholding agent is not for the collection of income tax, but for the enforcement of the withholding provision** of Section 53 of the Tax Code, **compliance with which is imposed on the withholding agent and *not* upon the taxpayer**." (*Emphasis supplied*)

Since the car plan provided by petitioner partakes of the nature of a personal expense attributable to its employees, it shall be treated as taxable fringe benefit of its employees, whether or not the same is duly receipted in the name of the employer. Therefore, petitioner's obligation as an agent of the government to withhold and remit the final tax on the fringe benefit received by its employees is personal and direct. The government's cause of action against petitioner is not for the collection of income tax, for which petitioner is exempted, but for the enforcement of the withholding provision of the 1997 NIRC, compliance of which is imposed on petitioner, as the withholding agent, and not upon its employees. Consequently, petitioner's non-compliance with said obligation to withhold makes it personally liable for the tax arising from the breach of its legal duty.

WHEREFORE, premises considered, the instant Petition for Review is hereby **DISMISSED** for having been filed out of time.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We concur:

ERNESTO D. ACOSTA
Presiding Justice

ERLINDA P. UY
Associate Justice

CERTIFICATION

Pursuant to Article VIII, Section 13 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's Division.

ERNESTO D. ACOSTA
Presiding Justice