REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

BARCELON, ROXAS SECURITIES, INC.
(NOW KNOWN AS UBP SECURITIES, INC.),
Petitioner,

- versus -

C.T.A. CASE NO. 5662

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
MAY 17 2000

x - x

DECISION

This is a Petition for Review seeking for the withdrawal and cancellation of an assessment for alleged deficiency income tax for taxable year 1987 in the total amount of P826,698.31 arising from the disallowance of the portion of business expense in the form of salaries, bonuses and allowances in the amount of P1,219,093.93.

Petitioner is a corporation duly organized and existing under the laws of the Philippines with principal office address at SSS (Makati) building, Ayala Avenue corner Herrera St., Makati City.

On March 17, 1992, Petitioner was served with a Warrant of Distraint and/or Levy (Exh. A) dated September 7, 1991, signed by Mr. Jaime M. Maza, Assistant Commissioner, Collection Office, to enforce an alleged Deficiency Income Tax Assessment for P826,698.31 covered by Formal Assessment Notice No. FAN-1-87-91-000649 (Exh. 4-A for the respondent) dated February 1, 1991. It was alleged that said notice of assessment was never received by herein Petitioner.

On March 26, 1992, petitioner through its tax counsel, SGV and Co. filed a formal protest against the said Warrant of Distraint and/or Levy, which for the reasons stated therein requested for the cancellation of the said assessment and the said Warrant of Distraint and/or Levy (Exh. B).

On July 3, 1998, Petitioner through SGV and Co. received the decision of Respondent dated April 30, 1998 denying Petitioner's protest with finality. Hence, on July 31, 1998, Petitioner appealed the said denial of its protest against the disputed tax assessment with this Court.

By way of Answer to the Petition for Review, Respondent raised the following Special and Affirmative Defenses, to wit:

> "4. The assessment has become final and unappealable for failure of petitioner to protest the same within thirty (30) days from its receipt thereof (Sec. 229, 1986 Tax Code). Hence, this Honorable Court has no jurisdiction to act on the petition *(Republic vs. Lim Tian Teng Sons & Co., Inc. 16 SCRA 584)*
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> 5. Investigation of petitioner's 1987 income tax return disclosed that out of the amount of P2,492,194.00 claimed as expenses for salaries, bonuses and allowances, the amount of P1,219,093.33 was not subjected to withholding tax. Hence said amount of P1,219,093.33 is not deductible from income (Sec. 29[j], 1986 Tax Code)
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> 6. The assessment was issued in accordance with law and regulations.
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> 7. Tax assessments are presumed correct and made in good faith. The taxpayer has the burden of showing that the assessment is illegal or improper *(CIR vs. Construction Resourses of Asia, Inc., 145 SCRA 671)."*

During the course of the hearing both parties formally offered their respective evidence to support and substantiate each of their contentions. Thus, Petitioner submitted the following documents which were admitted by this Court on its July 29, 1999 resolution, to wit:

Exhibit	Description
A and A-1	Warrant of Distraint and/or Levy No. N-A-99-83-91
B and B-1	Letter Protesting the Warrant of Distraint and/or Levy
C	Letter of BIR denying said Protest

It appears from the records of the case that the deficiency income tax assessment arose when a portion of the item of salaries, bonuses and allowances in the amount of P1,219,093.93 was disallowed as a deductible expense for failure on the part of Petitioner to subject it to withholding tax.

It is the contention of the Petitioner that said disallowed amount was arrived at by the respondent by merely subtracting the amount of taxes withheld on compensation as per the Petitioner's annual information return on taxes withheld for 1997 of P1,273,100.07 from the total amount of salaries, bonuses and allowances declared in the Petitioner's annual income tax return for the same year of P2,492,194.00.

Petitioner believes that said disallowances is devoid of any factual or legal basis as not all of the items included in the salaries, bonuses and allowances expense are subject to withholding tax on compensation. It further contends that part of the amount disallowed as an expense pertains to non-taxable fringe benefits given by Petitioner to its employees and other part of the amount disallowed pertains to the reimbursements received from the Union Bank of the Philippines of the Petitioner's share in the overhead expenses as per its cost sharing agreement with the said bank.

Furthermore, Petitioner in its memorandum categorically avers that Respondent's right to assess the alleged deficiency income tax has already prescribed since the alleged assessment notice which is claimed by Respondent to be sent by registered mail on February 6, 1991 was never received by the Petitioner. Petitioner only learned of the alleged deficiency income tax when it received the Warrant of Distraint and Levy on March 17, 1992. Petitioner contends that since it only came to know of the alleged deficiency income tax through the warrant, technically speaking, said warrant constitutes the assessment notice which was issued and served beyond the 3 year period prescribed by law. Petitioner further adds that assuming arguendo that said assessment notice was received by the taxpayer, the right of the Respondent to collect on said deficiency income tax has likewise prescribed since the three year period has lapsed without effort from the Respondent to collect.

Respondent however posits that Petitioner's allegation that it did not receive the assessment is merely an afterthought, thus, it does not have the effect of overcoming the presumption that a letter was received in the regular course of mail. It further contends that since Petitioner did not raise the issue of prescription in the administrative level, this defense cannot be raised for the first time on appeal.

Considering all the foregoing allegations of the parties, this Court is now confronted with the task of resolving the following issues, to wit:

1. Whether or not the right of the Bureau of Internal Revenue to assess the alleged deficiency income tax for 1987 is barred by prescription and;

2. Whether or not Petitioner is liable for the alleged deficiency income tax assessment in the amount of P826,698.31 resulting from the disallowance of the salaries, wages, bonus and other allowances as deductible expense.

Inasmuch as Petitioner raised the defense of prescription, it is proper therefore to resolve first this preliminary issue before delving on the validity of the assessment on its merits.

It is to be noted however that this defense of prescription was ventilated by the Petitioner for the first time before this Court. As stated by the Respondent on its memorandum "since Petitioner did not raise this issue in the administrative level, the same cannot be raised for the first time on appeal, citing Aguinaldo Industries Corp. vs. Commissioner of Internal Revenue, 112 SCRA 136.

We do not agree.

The case in point cited by the Respondent has a different factual backdrop from that of the issue in the case at bar. The Respondent used as legal basis the decision in Aguinaldo Industries Corp. vs. CIR case to support its contention that prescription – as a defense – cannot be availed by the Petitioner because it had not been set up in the first instance before the Respondent Commissioner. It seems however, that the case cited by Respondent does not find parrallelism to the instant case. In a Court of Appeals case entitled Atlas Consolidated Mining and Development Corp. vs. CIR, et al, CA G.R. SP No. 26087, promulgated on May 22, 1992, the said Court ruled that the defense of prescription can be validly taken up to the Court of Tax Appeals even though it was not raised before the Commissioner. It declares that the Aguinaldo Industries case does not apply, since the defense used by Petitioner in the said case refers to the defense of tax exemption which is not raised in time. However, in the instant case, what is being articulated before this Court is the defense of prescription which is not raised at the first instance.

Inferring from the above distinction, the effect of failure to invoke the tax exemption status at the first level is to allow a litigant to entirely change its line of contention and assume a different stance when he comes before an appellate court which is obviously violative of the principle of prior exhaustion of administrative remedies. However, to raise the defense of prescription for the first time with the Tax Court does not entirely sanction the adverse litigant to create a whole new line of contention to challenge the taxpayer's defense of prescription on the assessment. The defense of prescription, as long as alleged on the face of the pleading and duly supported by evidence establishing the date when the period started to run and when it ended, is sufficient for the Court to determine if a case is meritorious or not. (Queral vs. Collector of Internal Revenue, L-16705, October 20, 1962). Thus, as held in the case of Atlas Consolidated Mining and Development Corp. vs. CIR, et al CA GR SP No. 26087 promulgated on May 22, 1992, thus:

> " x x x This being so, the failure to raise the defense of prescription before the Commissioner cannot be deemed to be a waiver of the defense *(Philippine National Bank vs. Pacific Commission House, 27 SCRA 766)* Where the action is barred by time – and it is clear from the pleading that is is so – the action may be properly dismissed by the Court (Jicano, et al. vs. Gegalo, et al. 157 SCRA 140). it was therefore error for the respondent to spurn the petitioner's plea that the BIR is barred by time and law from assessing and collecting taxes x x x, simply because the petitioner had not originally raised the defense before the respondent Commissioner."

Finding that the Petitioner may still validly raise the issue of prescription before this Court, we now come to the factual basis of petitioner in alleging the said defense.

Pertinent legal provision governing the prescription of the Government's right to assess taxes is Section 203 of the Tax Code which reads, as follows:

> "Section 203. Period of limitation upon assessment and collection. – Except as provided in the succeeding section, internal revenue taxes shall be assessed within 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." x x x

The question of prescription of the Government's right to assess a tax is important because if such tax is assessed after the lapse of the 3 year prescriptive period, the assessment would be rendered invalid and without force and effect and if the assessment is invalid, it follows that the collection of the tax covered by the prescribed assessment becomes ineffectual.

The 3-year prescriptive period is conditioned on the fact that the taxpayer has filed the required return of the tax involved. And since records show that Petitioner's Annual Income Tax Return was filed on April 14, 1988 (p. 31, BIR records), then the 3-year period should be counted from the last day of the filing of the return which is April 15, 1988 and would end on April 15, 1991.

In the case at bar, Petitioner stands firm that it never received the assessment notice issued by the BIR. It only came to know of the alleged deficiency income tax when it was served with the warrant of distraint and levy on March 17, 1992 (Exh. A).

On the other hand, Respondent alleged that said assessment notice was sent to Petitioner through registered mail on February 6, 1991, as evidenced by the entries contained in the BIR logbook (Exhibit 5, Resp's evidence).

Jurisprudence is replete with cases holding that if the taxpayer denies ever having received an assessment from the BIR, it is incumbent upon the latter to prove by competent evidence that such notice was indeed received by the addressee. The onus probandi was shifted to respondent to prove by contrary evidence that the Petitioner received the assessment in the due course of mail. The Supreme Court has consistently held that while a mailed letter is deemed received by the addressee in the course of mail, this is merely a disputable presumption subject to controversion and a direct denial thereof shifts the burden to the party favored by the presumption to prove that the mailed letter was indeed received by the addressee (*Republic vs. Court of Appeals 149 SCRA 351)* Thus, as held by the Supreme Court *in Gonzalo P. Nava vs. Commissioner of Internal Revenue, 13 SCRA 104, January 30, 1965*:

> "The facts to be proved to raise this presumption are (a) that the letter was properly addressed with postage prepaid, and (b) that it was mailed. Once these facts are proved, the presumption is that the letter was received by the addressee as soon as it could have been transmitted to him in the ordinary course of the mail. But if one of the said facts fails to appear, the presumption does not lie. (VI, Moran, Comments on the Rules of Court, 1963 ed, 56-57 citing *Enriquez vs. Sunlife Assurance of Canada, 41, Phil 269)."*

In the instant case, Respondent utterly failed to discharge this duty. No substantial evidence was ever presented to prove that the assessment notice No. FAN-1-87-91-000649 or other supposed notices subsequent thereto were in fact issued or sent to the taxpayer. As a matter of fact, it only submitted the BIR record book which allegedly contains the list of taxpayer's names, the reference number, the year, the nature of tax, the city/municipality and the amount (see Exh. 5-a for the Respondent). Purportedly, Respondent intended to show to this Court that all assessments made are entered into a record book in chronological order outlining the details of the assessment and the taxpayer liable thereon. However, as can be gleaned from the face of the exhibit, all entries thereon appears to be immaterial and impertinent in proving that the assessment notice was mailed and duly received by Petitioner. Nothing indicates therein all essential facts that could sustain the burden of proof being shifted to the Respondent. What is essential to prove the fact of mailing is the registry receipt issued by the Bureau of Posts or the Registry return card which would have been signed by the Petitioner or its authorized representative. And if said documents cannot be located, Respondent at the very least, should have submitted to this Court a certification issued by the Bureau of Posts and any other pertinent document which is executed with the intervention of the Bureau of Posts. This Court does not put much credence to the self serving documentations made by the BIR personnel especially if they are unsupported by substantial evidence establishing the fact of mailing. Thus:

> "While we have held that an assessment is made when sent within the prescribed period, even if received by the taxpayer after its *expiration (Coll. of Int. Rev. vs. Bautista, L-12250 and L-12259, May 27, 1959),* this ruling makes it the more imperative that the release, mailing or sending of the notice be clearly and satisfactorily proved. Mere notations made without the taxpayer's intervention, notice or control, without adequate supporting evidence cannot suffice; otherwise, the taxpayer would be at the mercy of the revenue offices, without adequate protection or defense." *Nava vs. CIR, 13 SCRA 104, January 30, 1965).*

In the case of **Commissioner of Internal Revenue vs. Arnoldus Woodworks International Inc. and The Court of Tax Appeals, CA-G.R. SP. No. 340019, August 31, 1995** it was held that under Section 8, Rule 13 of the Rules of Court, service by registered mail is deemed completed upon actual receipt by the addressee. If he fails to claim his mail from the post office within five (5) days from the date of first notice of the postmaster, service shall take effect at the expiration of such time. And Under Section 10 of the same Rule, proof of such service shall consist of an affidavit of the person mailing of facts showing compliance with Section 5 of Rule 10. The receipt issued by the mailing office, and the registry return card evidencing receipt of the mail by the addressee, or in lieu thereof the letter unclaimed together with the certified or sworn copy of the notice given by the postmaster to the addressee.

The failure of the respondent to prove receipt of the assessment by the Petitioner leads to the conclusion that no assessment was issued. Consequently, the government's right to issue an assessment for the said period has already prescribed. (*Industrial Textile Manufacturing Co. of the Phils., Inc. vs. CIR CTA Case 4885, August 22, 1996).*

Having reached the conclusion that, the right of the government to assess is barred by prescription, it is now futile to resolve the validity of the assessment per se on its merits.

WHEREFORE, in view of the foregoing, the 1988 Deficiency Tax Assessment against Petitioner is hereby **CANCELLED**. Respondent is hereby **ORDERED TO DESIST** from collecting said deficiency tax. No pronouncement as to costs.

SO ORDERED.

AMANCIO Q. SAGA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

(on leave)
RAMON O. DE VEYRA
Associate Judge

CERTIFICATION

I hereby certify that this decision was reached after due consultation among the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge