REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

VISAYAS GEOTHERMAL POWER COMPANY,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8425

Members:

DEL ROSARIO, *Chairperson,*
UY, *and*
MINDARO-GRULLA, *JJ.*

Promulgated:

MAR 1 6 2015 ; 1:15 p.m.

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RESOLUTION

MINDARO-GRULLA, J.:

For this Court's resolution is petitioner's **Motion for Reconsideration (RE: Decision dated 17 November 2014)** filed through registered mail on December 4, 2014, and received by the Court on December 15, 2014, with respondent's **Comment/Opposition (To Petitioner's Motion for Reconsideration** filed on January 29, 2015.

Petitioner moves for the reconsideration of the Decision promulgated on November 17, 2014, the dispositive portion of which reads:

> "**WHEREFORE**, premises considered, the instant Petition for Review is hereby **DENIED** for lack of merit.
>
> **SO ORDERED.**"

In the assailed Decision, the Court denied petitioner's appeal on the cancellation and nullification of Assessment Notices and Preliminary Collection Letter issued by respondent for deficiency final withholding tax ("FWT") and final withholding value-added tax ("WVAT") for the year 2002 in the aggregate amount of ₱26,236,354.41, inclusive of surcharges, interest and penalties. The deficiencies arose from petitioner's failure to prove that payments made to MidAmerican Energy Holdings Company ("MEHC") were made for services rendered outside the Philippines, hence, should have been exempted from FWT and WVAT. The Court found petitioner's returns to be false, thus, it applied the ten (10)-year prescriptive period under Section 222[1] of the National Internal Revenue Code (NIRC) of 1997, as amended.

In its Motion for Reconsideration, petitioner contends that the crux of the present controversy is whether the prescription of respondent's right to assess and/or collect can be negated by mere and bare allegations of falsity of a return.

Petitioner argues that the 10-year prescriptive period is not applicable. It alleges that since its income payments to MEHC, a non-resident foreign corporation not engaged in trade or business in the Philippines, were consideration for off-shore services, it did not subject the same from Philippine withholding tax and VAT. It contends that by exempting the income earned by MEHC from withholding and thereafter filing *"nil"* returns, it merely complied with the express mandate of the Tax Code. It argues that to classify/consider its FWT and WVAT returns as false for its failure to substantiate why income payments made to MEHC were not subjected to FWT and WVAT, thereby warranting the application of the 10-year prescriptive period, would be inequitable.

According to petitioner, the reasoning adopted in the assailed Decision could lead to an absurd situation where any mistake (no matter how substantial the mistake made would be) would

[1] **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.

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automatically render a return false. It further contends that to continue adopting this line of reasoning would not only render the application of the three (3)-year prescriptive period useless but would more importantly defeat the very purpose behind the enactment of Section 203[2] of the NIRC of 1997, as amended.

Petitioner alleges that there was no evidence presented to prove its intention to deviate from the truth when it filed the corresponding FWT and WVAT returns. It argues that the details of the computation of the alleged deficiency taxes reveals that only a 25% surcharge was sought to be imposed by respondent, demonstrating that there was no finding or even allegation of fraud or falsity when either the Preliminary Assessment Notice (PAN) or Assessment Notices were formulated and issued.

In her Comment/Opposition, respondent avers that petitioner's arguments were erroneous, misplaced, misleading, and bereft of factual and legal basis.

Respondent contends that the Motion for Reconsideration is a *pro forma* motion since the arguments raised by petitioner were mere repetition and reiteration of the arguments already passed and ruled upon by the Court. It alleges that petitioner neither raise any new evidence nor any cogent reason to disturb the assailed Decision.

After a careful study of the arguments proffered by both parties in their respective pleadings, the Court finds no compelling reason to reverse or set aside the assailed Decision dated November 17, 2014.

Respondent correctly pointed out that the arguments raised by petitioner were mere rehash of the arguments raised in its Memorandum[3] filed on March 31, 2014 and were thoroughly threshed out in the assailed Decision. The pertinent portion of the assailed Decision, reads:

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[2] **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 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 (3)-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day.
[3] Docket (vol. II), pp. 1125-1147.

Finally, the Court finds that respondent's right to assess and/or collect from petitioner deficiency FWT and WVAT has not yet lapsed.

Internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return. Section 203 of the NIRC of 1997, as amended, provides:

> 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 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 (3)-year period shall be counted from the day the return was filed. For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day.

However, in case of false or fraudulent return with intent to evade tax or of failure to file a return, a tax may be assessed and/or collected at any time within ten (10) years after the discovery of the falsity, fraud or omission. Section 222(a) of the NIRC of 1997, as amended, states:

> 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 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.

Petitioner argues that respondent's right to assess it has already prescribed, applying Section 203 of the NIRC of 1997. Respondent counters that since petitioner failed to indicate in its returns the income payments made in favor of MidAmerican Energy Holdings Company, petitioner's returns are considered false, warranting the application of the ten (10)-year prescriptive period under Section 222 of the NIRC of 1997. As a result, the assessment issued against petitioner has not yet prescribed.

A false return implies deviation from the truth whether intentional or not. Since petitioner failed to prove that MidAmerican Energy Holdings Company's source income is derived from sources outside the Philippines and that it rendered services outside of the Philippines, the returns filed are considered false, justifying the application of the ten-year prescriptive period under Section 222 of the NIRC of 1997.

The various returns of petitioner for FWT and WVAT were filed in 2002 and 2003. Counting ten years from those years, respondent had until 2012 and 2013 to assess petitioner for deficiency FWT and WVAT. Since the PAN, the FAN, and the Preliminary Collection Letter were received by petitioner on May 5, 2006, June 23, 2006, and January 9, 2012, respectively, respondent's right to assess and/or collect from petitioner deficiency FWT and WVAT has not yet prescribed.

In the case of *Aznar vs. Court of Tax Appeals*[4], the Supreme Court held that a return is considered false when there is deviation from the truth whether intentional or not, to wit:

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

> "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." *(Emphasis supplied)*

Furthermore, in the case of *Commissioner of Internal Revenue vs. The Estate of Benigno P. Toda, Jr., et al.*[5], the Supreme Court ruled that even if the return merely failed to reflect the true or actual amount without fraud on the part of the taxpayer, the prescriptive period to assess the correct taxes is ten years from the discovery of the falsity.

> "And even assuming *arguendo* that there was no fraud, we find that the income tax return filed by CIC for the year 1989 was false. It did not reflect the true or actual amount gained from the sale of the Cibeles property."

The *"nil"* returns filed by petitioner are considered false since petitioner is liable for FWT and WVAT when it failed to prove that the income payments made to MEHC were exempt from FWT and WVAT. Moreover, petitioner's allegation that there was no evidence presented to prove its intention to deviate from the truth when it filed the corresponding FWT and WVAT returns is of no moment. A false return implies deviation from the truth whether intentional or not.

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[5] G.R. No. 147188, September 14, 2004.

The fact that only 25% surcharge was earlier imposed by respondent in the PAN and in the Assessment Notices does not automatically mean that there was no finding of fraud or falsity. The 25% surcharge imposed on petitioner is based on Section 248[6] of the NIRC of 1997, as amended which deals on civil penalties, and not on the period of limitation for assessment of tax.

Finally, it must be noted that all presumptions are in favor of the correctness of the tax assessment. In the case of *Commissioner of Internal Revenue vs. Bank of the Philippine Islands*[7], the Supreme Court held that:

> "Tax assessments 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."

WHEREFORE, in view of the foregoing, petitioner's "Motion for Reconsideration (RE: Decision dated 17 November 2014)" is hereby **DENIED** for lack of merit.

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[6] **SEC. 248.** ***Civil Penalties.* -**

(A) There shall be imposed, in addition to the tax required to be paid, a penalty equivalent to twenty-five percent (25%) of the amount due, in the following cases:

(1) Failure to file any return and pay the tax due thereon as required under the provisions of this Code or rules and regulations on the date prescribed; or

(2) Unless otherwise authorized by the Commissioner, filing a return with an internal revenue officer other than those with whom the return is required to be filed; or

(3) Failure to pay the deficiency tax within the time prescribed for its payment in the notice of assessment; or

(4) Failure to pay the full or part of the amount of tax shown on any return required to be filed under the provisions of this Code or rules and regulations, or the full amount of tax due for which no return is required to be filed, on or before the date prescribed for its payment.

(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.

[7] G.R. No. 134062, April 17, 2007, citing *Sy Po v. Court of Appeals*, G.R. No. L-81446, August 18, 1988, 164 SCRA 524, 530.

SO ORDERED.

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

WE CONCUR:

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

ERLINDA P. UY
Associate Justice

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DEL ROSARIO, *Chairperson,*
UY, *and*
MINDARO-GRULLA, *JJ.*

Promulgated:

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CONCURRING OPINION

DEL ROSARIO, PJ.:

I concur with my esteemed colleague, the Honorable Associate Justice Cielito N. Mindaro-Grulla, in denying petitioner's Motion for Reconsideration (RE: Decision dated 17 November 2014).

In the absence of any evidence to support its position that its income payments to MidAmerican Energy Holdings Company (MEHC) are exempt from FWT and WVAT, the Court found petitioner's withholding tax returns false as petitioner failed to indicate therein said income payments to MEHC. Since petitioner's withholding tax returns were false, the application of the ten-year prescriptive period to assess petitioner for deficiency final withholding tax (FWT) and deficiency final withholding tax on VAT (WVAT), under Section 222 of the National Internal Revenue Code (NIRC) of 1997, as amended, was justified.

In *Aznar vs. Court of Tax Appeals*,[1] the Supreme Court held that to be considered false returns, mere deviation from the truth, whether intentional or not, is sufficient, *viz.*:

> "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.

Unless and until modified by the Supreme Court *En Banc*, the pronouncement of the Supreme Court in the *Aznar case* stands. It need not be emphasized that in our judicial hierarchy, the Supreme Court reigns supreme. All courts, tribunals and administrative bodies exercising quasi-judicial functions are obliged to conform to its pronouncements. It has the last word on what the law is; it is the final arbiter of any justiciable controversy. In other words, there is only one Supreme Court from whose decisions all other courts should take their bearings.[2]

By way of obiter, however, I wish to state my humble view that in cases of false returns with no intent to evade tax, **<u>but due only to plain oversight, negligence or mistake</u>**, the three (3) year prescriptive period under Section 203 of the NIRC of 1997, as amended,[3] should apply.

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

[2] *Development Bank of the Philippines v. NLRC*, March 1, 1995, 242 SCRA 59; *Albert v. Court of First Instance of Manila (Branch VI)*, L-26364, May 29, 1968, 23 SCRA 948 *cited in* the Concurring Opinion of Sandoval–Gutierrez, J., *Raul L. Lambino v. The Commission on Elections*, G.R. No. 174153, October 25, 2006.

[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

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) 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."

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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.

[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.

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:

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

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

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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)

For all the foregoing, I **VOTE** to **DENY** petitioner's Motion for Reconsideration (RE: Decision dated 17 November 2014).

ROMAN G. DEL ROSARIO
Presiding Justice

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[8] G.R. No. L-14519, July 26, 1960.