REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

NAGASE PHILIPPINES CORPORATION,
Respondent.

CTA EB NO. 1048
(CTA Case No. 7784)

Present:

Del Rosario, *P.J.,*
Castañeda, Jr.
Bautista,
Uy,
Casanova,
Fabon-Victorino,
Mindaro-Grulla,
Cotangco-Manalastas,
Ringpis-Liban, *JJ.*

Promulgated:

JAN 2 9 2015
10:45 a.m.

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DECISION

RINGPIS-LIBAN, J.

Before the Court *En Banc* is a Petition for Review filed by petitioner Commissioner of Internal Revenue (CIR) under Sec. 3(b), Rule 8 of the Revised Rules of the Court of Tax Appeals seeking the nullification of the Decision[1] dated April 18, 2013, the dispositive portion of which reads:

> "**WHEREFORE,** premises considered, the Petition for Review is hereby **GRANTED.** The Assessment Notice No. IT-

[1] Rollo, CTA EB Case No. 1048 p. 16.

45612-03-07-0338 dated September 12, 2007 for deficiency Income Tax including fifty percent (50%) surcharge and interest, totaling P36,433,548.87 is hereby **CANCELLED.**

SO ORDERED."

and the Resolution[2] dated July 15, 2013 of the same Special Third Division of the Court (Court in Division) denying the CIR's Motion for Reconsideration.

THE FACTS

On April 14, 2004, Nagase Philippines Corporation (Nagase) filed its Annual Income Tax Return (ITR)[3].

The parties agreed in the Joint Stipulation of Facts that on September 14, 2007, Nagase received from the CIR a Formal Assessment Notice (FAN) dated September 12, 2007, together with Details of Discrepancies, alleging that Nagase has deficiency income tax liability in the amount of P36,433,548.87, inclusive of 50% surcharge and interest for taxable year 2003.[4]

On October 10, 2007, Nagase filed its protest to the FAN, which was received by the CIR on October 11, 2007.[5]

In its protest, Nagase took the position that the CIR's assessment for alleged deficiency income tax has no legal and factual bases, and requested that said assessment be reconsidered, withdrawn and cancelled.[6]

On November 27, 2007, Nagase received a letter from the CIR, through OIC-Regional Director Ma. Nieva A. Guerrero, BIR Revenue Region No. 8, informing it that the entire tax docket, including Nagase's protest letter, has been forwarded to the Revenue District Office No. 50, South Makati, for further evaluation and necessary action.[7]

On May 6, 2008, Nagase filed a Petition for Review before the Court in Division[8] against the CIR, assailing the assessment for alleged deficiency income tax, including the 50% surcharge and interest, for taxable year 2003 issued by the CIR.

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2 Rollo p. 27.
3 BIR Record p. 49.
4 Docket, CTA Case No. 7748, "Joint Stipulation of Facts and Issues," p. 55.
5 Ibid. p. 56.
6 Ibid.
7 Ibid.
8 Docket, CTA Case No. 7784, pp. 1 to 13.

On June 30, 2008, the CIR filed her Answer[9] raising the following Special and Affirmative Defenses:

> "5. The assessments in question were made in accordance with law, rules and regulations.
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> 6. Verification disclosed that petitioner has treated some importations as indent commission so as to lessen the tax due from it. Based on petitioner's records, it is also engaging in indenting or merchandise brokering and its suppliers and the principal companies being brokered are the same corporations namely: Nagase Singapore Pte., Ltd., and Nagase & Co., Ltd., - Japan, related companies.
>
> 7. It was discovered that petitioner's indenting and importation were not clearly identified in its books. It was likewise observed that importations made were all intended for client located in the economic zone, while the sales outside the economic zones were treated as indent sales. Since petitioner failed to submit documents to substantiate the income from these transactions were only indent commissions, the same has been treated as actual importations and based on the gross profits rate, sales thereon were computed. Thus, additional taxable sales were assessed pursuant to Section 32 of the NIRC, as amended.
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> 8. Petitioner's contention that it is prohibited from selling the imported goods to enterprise other than ECOZONE enterprises is not acceptable. There was no prohibition, provided that corresponding custom duties and taxes were paid before withdrawal of products from customs bonded warehouse. Moreover, the BIR Rulings that petitioner were (sic) cited are not applicable in this case, as the facts are different. It did not maintain a clear identification of what are petitioner's importation and indenting. Based in its Articles of Incorporation, indenting is not the primary purpose of the petitioner. Moreover, the relevant provision of RP-Singapore and RP-Japan Tax Treaties on permanent establishment is also applicable in the instant case. Hence, the BIR maintains its position that the alleged income from indenting from the sales outside of the economic zones should be properly treated as taxable sales of petitioner.
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> 9. Petitioner has requested for re-investigation and was granted by the respondent when it filed its protest letter dated March 28, 2007 on the respondent's Pre-Assessment Notice dated March 22, 2007.

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[9] Docket, CTA Case No. 7784, p. 34.

10. All presumptions are in favour of the correctness of the tax assessment (Interprovincial Autobus vs. Collector of Internal Revenue, 98 Phil. 290)."

After trial on the merits wherein both parties presented their respective evidence, and upon submission of Nagase's memorandum, the case was submitted for decision on April 2, 2012.

On April 18, 2013 and July 15, 2013, the Court in Division rendered the questioned Decision and Resolution.

Aggrieved, the CIR filed before the Court *En Banc* this Petition for Review[10].

In the Resolution[11] dated September 27, 2013, Nagase was directed by the Court *En Banc* to file its Comment in this case. On October 21, 2013, respondent filed its Comment[12], and sought for this Court *En Banc* to dismiss this Petition for Review.

Thereafter, both parties were ordered to file their respective Memoranda[13]. Nagase filed its Memorandum[14] on January 17, 2014.

The Records Verification Report dated March 17, 2014[15] states that the CIR failed to file her Memorandum.

This case was deemed submitted for decision on April 8, 2014.[16]

ISSUE

The principal issue in this case is whether the Court in Division erred in cancelling and setting aside the assessment for deficiency income tax including the 50% surcharge and interest, issued against Nagase for Taxable Year 2003.

PETITIONER'S ARGUMENTS

The CIR argues that the Court in Division erred in holding that her right to make an assessment had prescribed; that the Court in Division erred in not

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[10] Rollo, CTA EB CASE No.1048, p.5.
[11]Ibid p. 41.
[12]Ibid p. 43.
[13]Ibid p. 82.
[14]Ibid p. 84.
[15] Ibid. p. 90.
[16] Ibid p. 92.

holding that Nagase filed a false return; that the Court in Division erred in holding that in a false return, the CIR still need to present proof that Nagase filed a false return with intent of evading the tax; that the Court is Division erred in not holding that a re-investigation was conducted after the issuance of the Preliminary Assessment Notice (PAN).

RESPONDENT'S ARGUMENTS

In its Comment, Nagase questioned the timeliness of the instant petition arguing that the instant petition was filed out of time since the stamp receipt of the Court bears the date August 28, 2013; that petitioner's right to make an assessment had prescribed when the Final Assessment Notice (FAN) was issued; that it requested a reconsideration not a reinvestigation; that the Petition for Review contained merely a rehash of the arguments stated in the Motion for Reconsideration.

RULINGS OF THE COURT EN BANC

Timeliness of the Petition

The Court shall first discuss Nagase's assertion that the instant petition was filed out of time.

Records show that on July 19, 2013, the CIR received the Resolution denying the Motion for Reconsideration. Thus, she had until August 3, 2013 to file an appeal before this Court.

On July 31, 2013, the CIR filed a Motion for Extension of Time to File the instant petition from August 3, 2013 or until August 18, 2013. August 18, 2013 was a Sunday. The next calendar days, August 19 and 20, 2013 were declared as non-working days due to a typhoon while August 21, 2013 was a holiday. Hence, the last day for the filing of the petition was on August 22, 2013. The CIR filed, through registered mail, the instant petition on August 22, 2013. Attached to the petition is a copy of Registry Receipt No. 8972.

Section 3, Rule 18 of the Rules of Court provides:

> *Manner of filing.* – The filing of pleadings, appearances, motions, notices, orders, judgments and all other papers shall be made by presenting the original copies thereof, plainly indicated as such, personally to the clerk of court or by sending them by registered mail. In the first case, the clerk of court shall endorse on the pleading the date and hour of filing. **In the second case, the date of mailing of motion, pleadings, or any other papers**

> **or payments or deposits, as shown by the post office stamp on the envelope or the registry receipt, shall be considered as the date of their filing, payment, or deposit in court.** The envelope shall be attached to the record of the case. (Emphasis Ours.)

Applying the foregoing rule, the instant petition was filed on time.

No proof that Nagase requested for a reinvestigation

The CIR argues that Nagase requested for reinvestigation and it was this request for a "reinvestigation" which lead to the issuance of the FAN only on September 12, 2007.

In *CIR vs. Phil. Global Communications*[17], the Supreme Court discussed the difference between a reconsideration and reinvestigation. *Thus*:

> "Revenue Regulations No. 12-85, the Procedure Governing Administrative Protests of Assessment of the Bureau of Internal Revenue, issued on 27 November 1985, defines the two types of protest, the request for reconsideration and the request for reinvestigation, and distinguishes one from the other in this manner:
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>> Section 6. Protest. - The taxpayer may protest administratively an assessment by filing a written request for reconsideration or reinvestigation specifying the following particulars:
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>> x x x x
>>
>> For the purpose of protest herein-
>>
>> (a) *Request for reconsideration*-- refers to a plea for a re-evaluation of an assessment on the basis of existing records without need of additional evidence. It may involve both a question of fact or of law or both.
>>
>> (b) *Request for reinvestigation*-refers to a plea for re-evaluation of an assessment on the basis of newly-discovered evidence or additional evidence that a taxpayer intends to present in the investigation. It may also involve a question of fact or law or both.

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[17] G.R. No. 167146, October 31, 2006.

The main difference between these two types of protests lies in the records or evidence to be examined by internal revenue officers, whether these are existing records or newly discovered or additional evidence. A re-evaluation of existing records which results from a request for reconsideration does not toll the running of the prescription period for the collection of an assessed tax. Section 271 distinctly limits the suspension of the running of the statute of limitations to instances when **reinvestigation** is requested by a taxpayer and is granted by the CIR. The Court provided a clear-cut rationale in the case of *Bank of the Philippine Islands v. Commissioner of Internal Revenue* explaining why a request for reinvestigation, and not a request for reconsideration, interrupts the running of the statute of limitations on the collection of the assessed tax:

> Undoubtedly, a reinvestigation, which entails the reception and evaluation of additional evidence, will take more time than a reconsideration of a tax assessment, which will be limited to the evidence already at hand; this justifies why the former can suspend the running of the statute of limitations on collection of the assessed tax, while the latter cannot."

It is a rule that he who alleges must prove. Section 1, Rule 131 of the Rules of Court defines burden of proof as follows:

> Burden of proof is the duty of a party to present evidence on the facts in issue necessary to establish his claim or defense by the amount of evidence required by law.

The PAN and Nagase's protest to the PAN were not presented in evidence. What is on record is Nagase's protest letter to the FAN, which reads in part:

> "NAGASE received your FAN on September 13, 2007 or more than three (3) years from and after April 15, 2004 *(last day of filing of NAGASE's income tax return for the year ended December 31, 2003).*
>
> In the last paragraph of our protest to your PAN, we stated that ***"we respectfully submit that your contemplated assessment for alleged deficiency income tax has no legal and factual bases, and it is, therefore, respectfully requested that the same be accordingly reconsidered and withdrawn and cancelled"***, and it is very clear therein that no re-investigation has been requested by NAGASE. There being no

request for re-investigation which has been granted by your Office, the FAN having been served only on **September 13, 2007**, or beyond the prescriptive period of three (3) years has no more force and effect. To impose the surcharge (fraud penalty) of 50% and alleging that NAGASE has committed fraud by filing a false or fraudulent return with intent to evade the tax is but a lame excuse or expedient to escape from the effect of prescription. As we have indicated in the above, ***fraud is a question of fact and the circumstances constituting it must be alleged and proved. Fraud is a serious charge and to be sustained, it must be supported by clear and convincing proof"***, not by the simple expedient of just alleging fraud without any proof thereof."[18]

The CIR did not present any evidence to refute the contents of this letter and to prove that Nagase requested for a reinvestigation. Her argument must thus fail.

The period to assess has prescribed

Section 222 of the NIRC provides:

> *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* –
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> xxx
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> (b) If before the expiration of the time prescribed in Section 203 for the assessment of the tax, **both the Commissioner and the taxpayer have agreed in writing to its assessment after such time, the tax may be assessed within the period agreed upon. The period so agreed upon may be extended by subsequent written agreement made before the expiration of the period previously agreed upon.**
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> xxx
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> (d) Any internal revenue tax which has been assessed within the period agreed upon as provided in paragraph (b) hereinabove may be collected by distraint or levy or by a proceeding in court within the period agreed upon in writing before the expiration of the five (5) year period. The period so agreed upon may be extended by subsequent written agreements made before the expiration of the period previously agreed upon. (Emphasis Ours.)

[18] Docket, CTA Case No. 7784, p. 173.

An assessment that was given beyond the statute of limitations can never become final and executory, hence, the assessments would not be binding on the taxpayer[19] ***except*** if there is a valid waiver for the extension of the assessment and collection of the taxes due.

In this case, there is nothing on record to show that Nagase executed a waiver or that Nagase requested for a reinvestigation.

The Supreme Court had consistently ruled in a number of cases that a request for reconsideration and reinvestigation by the taxpayer, without a valid waiver of the prescriptive periods for the assessment and collection of tax, as required by the Tax Code and implementing rules, will not suspend the running thereof.[20]

The CIR argues that her right to assess Nagase for deficiency income tax for the year 2003 has not prescribed pursuant to Section 222 of the NIRC.

As correctly ruled by the Court in Division:

> "Section 222. Exceptions as to Period of Limitation of Assessment and Collection of Taxes.-
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> (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." (Underscoring Ours.)
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> As provided above, in cases when a false or fraudulent return is filed with the intent of evading the tax or when no return was filed at all, the CIR can assess or begin a court proceeding for the collection without an assessment within ten years. In these cases, the ten-year period for prescription begins, or is counted from the date of discovery of the falsity, fraud or omission.
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> Fraud is a question of fact which must be alleged and proved. It must be proved to exist by clear and convincing

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19 Commissioner of Internal Revenue vs. Ayala Securities Corporation, 70 SCRA 204.

20 Bank of the Philippines Islands vs. Commissioner of Internal Revenue, G.R. NO. 139736, October 17, 2005; citing Philippine Journalists, Inc. v. Commissioner of Internal Revenue, G.R. No. 162852, 16 December 2004, 447 SCRA 214; Commissioner of Internal Revenue v. Court of Appeals, G.R. No. 115712, 25 February 1999, 303 SCRA 614; Collector of Internal Revenue v. Pineda, 112 Phil 321 (1961).

evidence – mere preponderance of evidence is not even adequate to prove fraud.

xxx

As stated, not every mistake or deviation from the truth necessarily brings a particular return under the coverage of Section 222 of the NIRC. The fraud contemplated by Section 222 is actual and not constructive, and must amount to intentional wrong-doing with the sole object of avoiding taxation, not merely error.

Fraud must be proven by clear and convincing evidence, and not by mere conjectures and speculations. Beyond the allegation of fraud in its "Details of Discrepancies" and presentation of internal Memoranda prepared by Revenue Officer Dionisio Lumagui mentioning the same, not much else was asserted or presented to bolster the serious allegation. Neither was this allegation tackled in Revenue Officer Lumagui's Judicial Affidavit, or subsequent testimony. It is a settled rule that an assessment should not be based on mere presumptions no matter how reasonable or logical said presumptions may be. Furthermore, fraud is a serious charge and to be sustained, it must be supported by clear and convincing proof. Thus, due to respondent's failure to prove fraud on the part of petitioner, the assessment issued against it beyond the three year period allowed by law, is **void**."

An assessment to be valid must conform to the provisions of Section 203 and 228 of the NIRC, RR No. 12-99[21] and Revenue Memorandum Order No. 37-94[22].

Under the rules,[23] when the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings by sending of a PAN, which shall state the facts and the laws, rules and regulations, or jurisprudence on which the proposed assessment is based. Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to the notice If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings. Such assessment may be protested administratively by filing a request for reconsideration or

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21 Implementing the Provisions of the NIRC of 1997 Governing the Rules on Assessment of National Internal Revenue Taxes, Civil Penalties and Interest and the Extra-Judicial Settlement of a Taxpayer's Criminal Violation of the Code through Payment of a Suggested Compromise Penalty.

22 Revision to RMOs 27-85 and 51-89 regarding procedures on the preparation, approval and release of assessment notices and demand letters and the preparation of BIR Form 40.00.

23 Section 228 of the NIRC.

reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations.

Considering that the FAN and Details of Discrepancies were issued beyond the three year period from the time Nagase filed its 2003 ITR, the assessment for Taxable Year 2003 dated September 12, 2007 is null and void and should therefore be cancelled.

WHEREFORE, premises considered, the Petition for Review is hereby **DENIED for lack of merit.** Accordingly, the Decision dated April 18, 2013 and Resolution dated July 15, 2013 are hereby affirmed.

SO ORDERED.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO – MANALASTAS
Associate Justice

CERTIFICATION

Pursuant to Section 13 of Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court En Banc before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice