REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	CTA EB No. 1084 (CTA CASE NO. 7525)
	Present:
-versus-	DEL ROSARIO, *PJ*; CASTAÑEDA, JR., BAUTISTA, UY,
FSM CINEMA, INCORPORATED, Respondent.	CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, COTANGCO-MANALASTAS and RINGPIS-LIBAN, JJ.
	Promulgated:
	JUN 18 2015 4:03 p.m.

x---x

RESOLUTION

FABON-VICTORINO, J.:

Before the Court is the Motion for Reconsideration filed through registered mail by petitioner Commissioner of Internal Revenue (CIR) on February 25, 2015, assailing the Decision dated January 23, 2015, the dispositive portion of which reads, as follows:

> **WHEREFORE**, the Petition for Review filed by petitioner Commissioner of Internal Revenue on December 11, 2013 is hereby

DENIED for lack of merit. Accordingly, the assailed Amended Decision dated July 4, 2013, and the assailed Resolution dated November 5, 2013, are hereby **AFFIRMED**.

SO ORDERED.

The assailed decision sustained the ruling of the Court in Division cancelling and setting aside the assessed deficiency Expanded Withholding Tax (EWT) and Final Withholding Tax (FWT) of respondent FSM Cinema, Incorporated, in the amounts of Php2,299,339.35 and Php2,360,097.90 for taxable year 2000, on the ground that the said assessments were null and void having been issued beyond the three (3)-year prescriptive period.

Petitioner contends that contrary to the Court's findings, the issue of falsity of respondent's tax returns for taxable year 2000 was not raised for the first time in her Motion for Reconsideration to the Amended Decision of July 4, 2013 as they were raised in her Answer as well as in the parties' Joint Stipulation of Facts and Issues (JSFI) as one of the issues. In her Answer, she alleged that "petitioner have incurred loans payable amounting to P29,939,721.00 and salaries expense amounting to P820,595.69, but were not reported in its financial statements, hence considered undeclared source of income". In the parties' JSFI, one of the issues was: "whether or not Petitioner has undeclared income for taxable year 2000". Considering that respondent has more than 30% of undeclared sources of income for taxable year 2000, such substantial under-declaration of sales, receipts or income or overstatement of deductions in tax returns shall constitute a prima facie evidence of a false return, pursuant to Section 248(B) of the 1997 Tax Code.

Further, a review of respondent's monthly EWT returns for taxable year 2000[1] reveals that it substantially under-declared its income. The said findings were indicated in the Details of Discrepancies attached to the Formal Assessment Notice (FAN) dated December 23, 2005 for deficiency EWT for taxable year 2000 issued against respondent. In view thereof, respondent's monthly EWT returns for taxable year

---

[1] Exhibits "NNNNNN" to "YYYYYY".

2000 should be considered as "false returns" within the contemplation of Section 222(a) of the 1997 Tax Code, which can be assessed within ten (10) years from discovery of falsity. Thus, the FAN No. WE-4800-00-05-0452 dated December 23, 2005 for deficiency EWT for taxable year 2000 was validly issued within the ten (10) - year prescriptive period under Section 222(a) of the 1997 Tax Code.

Petitioner claims that the case of *CDL Hotels (Phils.) Corporation vs. Commissioner of Internal Revenue*[2] is applicable to the instant case, wherein the Court *En Banc* held "that the 'Monthly Remittance Returns of Income Taxes Withheld' for the year 1998 filed by petitioner are considered false returns since petitioner declared no income, when in truth there was income subject to tax. Given that petitioner's returns are false returns, the applicable prescriptive period is ten (10) years from the discovery of falsity, as provided in section 222 of the 1997 NIRC."

The principle laid down in *Aznar vs. Court of Tax Appeals*[3] is likewise applicable, *viz*:

> "xxxx. **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**

---
[2] CTA EB No. 339, August 10, 2009 [CTA Case No. 6585].
[3] G.R. No. L-20569, August 23, 1974, 58 SCRA 519.

> **of the discovery of the falsity, fraud or omission even seems to be inadequate and should be the one enforced.**" (emphasis supplied)

As for the respondent's intercorporate dividend, petitioner argues that for it not to be subject to withholding tax, the said intercorporate dividend should be recorded in the books of the issuing corporation and the recipient stockholders, as declared in BIR Ruling No. DA-583-99 dated October 6, 1999 and in accordance with the ruling of the Court *En Banc* in *Engtek Philippines, Inc. vs. Commissioner of Internal Revenue*[4]. But record shows that respondent as the issuing corporation of the cash dividends failed to present its accounting records which would prove that its declaration were duly recorded in its books, as well as in the books of the recipient corporate stockholders. Consequently, the cash dividends of respondent in the amount of Php11,811,545.00 for taxable year 2000 should be subject to 10% withholding tax. Therefore, respondent is liable to pay the assessed deficiency FWT in the total amount of Php2,360,097.90, inclusive of interest.

Finally, petitioner puts premium on the presumption that tax assessments are presumed correct and made in good faith, which respondent allegedly failed to overcome. Petitioner further posits that the BIR assessment should be given full weight and credit, in the absence of proof submitted by a taxpayer to the contrary.

By way of Comment to the Motion for Reconsideration, respondent FSM Cinema, Incorporated counter-argues that:

1) Petitioner failed to raise the issue of the applicability of the 10-year prescriptive period and is now barred by estoppel for raising the issue for the first time on appeal;

2) The case of *Aznar vs. Court of Tax Appeals and Collector of Internal Revenue, Engtek Philippines, Inc. vs. Commissioner of Internal Revenue* and *CDL Hotels (Phils.) Corp. vs. Commissioner of*

[4] CTA EB No. 89, June 14, 2006.

Internal Revenue are not applicable in this case and do not support petitioner's right to assess.; and

3) Petitioner has lost her right to issue the withholding tax assessments because of prescription.

Petitioner's Motion for Reconsideration lacks merit, hence, should be denied.

Aside from petitioner's contention that she already raised the issue of falsity before the Court in Division, specifically in her Answer, the other issues are mere rehash of her previous arguments which the Court *En Banc* had judiciously explained in the assailed Decision of January 23, 2015, as well as by the Court in Division in the Amended Decision of July 4, 2013 and Resolution of November 5, 2013.

In any event, in order to fully discharge the issues at hand, the Court *En Banc* revisited the record and found that petitioner indeed was able to allege in her Answer posted on December 12, 2006, respondent's undeclared income. However, petitioner was not able to prove that respondent filed false EWT returns for taxable year 2000, for her to enjoy the exception to the 3-year prescriptive period to assess petitioner. The relevant part of Section 222(a) of the NIRC of 1997, as amended, which enumerates the exceptions to the period of prescription, reads:

> "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 after the collection of such tax may be begun without assessment, at any time within 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 collection thereof."

Petitioner alleged in her Answer that respondent committed "falsity" considering that it "incurred loans payable amounting to P29,939,721.00 and salaries expense amounting to P820,595.69, but were not reported in its financial statements, hence, considered undeclared source of income subject to income tax at the rate of 32% pursuant to Section 27 in relation to Section 32, both of the NIRC."[5] Further, petitioner contented that the parties recognized the presence of falsity since one of the issues in their JSFI is "whether or not petitioner has undeclared income for taxable year 2000"[6].

But petitioner's declaration remains to be self-serving without any evidence to support the same. Petitioner failed to present evidence strong enough to remove the questioned assessments out of the mantle of protection provided by the statute of limitations. A declaration alone that respondent has undeclared source of income does not constitute proof of filing a false return which contains wrong information due to mistake, carelessness or ignorance[7].

Basic is the rule in evidence that the burden of proof lies on the party who makes the allegations — *ei incumbit probatio, qui dicit, non qui negat; cum per rerum naturam factum negantis probatio nulla sit.*[8] Raising mere doubts or unsubstantiated allegations against the respondent, whether as a taxpayer or as an agent for the withholding of taxes, would not do, where the taxpayer or agent invokes the defense of prescription. Petitioner's allegation as to the falsity of respondent's withholding tax returns involves a question of fact, and the burden rests upon petitioner to prove that respondent intentionally filed false EWT returns. Failing to prove falsity in the filing of returns, this Court

[5] Answer, par. 7 of Special and Affirmative Defenses, docket of CTA Case No. 7525, vol. I, p. 37.
[6] JSFI, Issues (No.4), *ibid.*, p. 70.
[7] *Aznar vs. Court of Tax Appeals*, 58 SCRA 519, 541, August 23, 1974. The word "false" is defined as an adjective which means not true or not correct (Dictionary of Law, 2nd ed., Peter Collin Publishing [1997]).
[8] *Acabal vs. Acabal*, G.R. No. 148376, March 31, 2005.

cannot accord petitioner the benefit of the ten-year prescriptive period invoked under Section 222 (a) of the NIRC of 1997, as amended.

As the Supreme Court emphasized in *Bank of the Philippine Islands vs. Commissioner of Internal Revenue*[9], "[t]he statute of limitations on assessment and collection of taxes is for the protection of the taxpayer and, thus, shall be construed liberally in his favor."

The law on prescription should be liberally construed in order to protect taxpayers and that, as a corollary, the exceptions to the law on prescription should be strictly construed.[10]

As to petitioner's argument that respondent's intercorporate dividend should be subject to 10% final withholding tax, suffice it to say that this issue had been fully addressed by the Court in Division in the Amended Decision of July 4, 2013, *viz:*

> "A verification of the evidence presented by the parties and the records of this case show that petitioner's total cash dividend amounted to P11,811,545.00 for taxable year 2000, as per Audited Financial Statements of FSM Cinemas, Inc. for the taxable year 2000. Respondent imposed a 10% final withholding tax thereon as per Formal Assessment Notice dated December 23, 2005. Likewise, it was found that petitioner FSM Cinemas is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines; that two (2) of petitioner's corporate stockholders, Festival Supermall, Inc., and Cinema Services Chain Corporation, are domestic corporations created and organized under the laws of the Philippines; 31 and that the said corporate stockholders collectively owns 249,9991 shares out of the 250,000 shares representing petitioner's

[9] G.R. No. 139736, October 17, 2005.
[10] *Commissioner of Internal Revenue vs. Philippine Global Communication, Inc.*, G.R. No. 167146, October 31, 2006. citing *Commissioner of Internal Revenue vs. B.F. Goodrich*, 363 Phil. 169, 178 [1999].

authorized capital stock subscribed, or 99.99% of the capital stock of petitioner.

Considering that the above-mentioned corporate stockholders are found to be domestic corporations, exempt from final withholding tax on dividends declared by another domestic corporation and that the said corporate stockholders, which collectively owns 99.99% of the capital stock of petitioner, appear to have been paid the majority of the subject cash dividends, it can be concluded that the assessment for 10% final withholding tax on the whole amount of P11,811,545.00, representing petitioner's total cash dividend for taxable year 2000, was erroneous."

Further, in the Resolution of November 5, 2013, the Court in Division ruled as follows:

"Section 27 (D) (4) of the National Internal Revenue Code (NIRC) of 1997, as amended, states that dividends received by a domestic corporation from another domestic corporation shall not be subject to tax. Nowhere is it provided that there is a need to record the dividends in the respective books of the issuing corporation and the recipient corporate stockholders in order for an inter-corporate dividends to be exempted from taxation.

xxx xxx xxx

The following differences between the Engtek case and the instant case are noteworthy:

Engtek case	**FSM case**
1. Petitioner is not a domestic corporation.	1. Petitioner is a domestic corporation

2. It issued cash dividends to 99.99% foreign corporation as petitioner is owned by Engtek Teknologi Holdings BHd, which is registered and existing under the laws of Malaysia.	2. It issued cash dividends to 99.99% domestic corporation as petitioner is collectively owned 99.99% by Festival Supermall, Inc. and Cinema Services Chain Corporation, which are both domestic corporations registered under the Securities and Exchange Commission (SEC).
3. There was reversal of the cash dividends	3. There was no reversal of the same
4. Petitioner did not offer in evidence its accounting records such as its audited financial statements for the year 2000 to prove its financial position at the time the cash dividends were declared.	4. Petitioner presented and formally offered its audited financial statements for taxable year 2000 and statements of income and retained earnings for taxable year 2000 and the same were admitted in evidence.

Clearly, the *Engtek* case is not applicable in the case at bar.

The purpose of the dividend exclusion is that it is a device for reducing extra or double taxation of distributed earnings. Since a corporation cannot deduct from its gross income the amount of dividends distributed to its shareholders during the taxable year, any distributed earnings are necessarily taxed twice, initially, at the corporate level when they are included in the corporation's taxable income, and again, at the

> corporation-shareholder level when they are received as dividend. Thus, without exclusion, the successive taxation of the dividend as it passes from corporation to corporation would result in repeated taxation of the same income and would leave very little for the ultimate shareholder.
>
> Thus, subjecting petitioner to deficiency final withholding tax will defeat the purpose of Section 27 (D) (4) of the National Internal Revenue Code (NIRC) of 1997."

Lastly, as to petitioner's contention that respondent was not able to overturn the presumption of correctness of a tax assessment, the Court reiterates that the prima facie correctness of a tax assessment does not apply upon proof that an assessment is utterly without foundation, meaning it is arbitrary and capricious.[11]

In order to stand the test of judicial scrutiny, the assessment must be based on actual facts. The presumption of correctness of assessment being a mere presumption cannot be made to rest on another presumption. Hence, assessment should not be based on mere presumptions no matter how reasonable or logical said presumptions may be.[12]

WHEREFORE, the Motion for Reconsideration filed by petitioner Commissioner of Internal Revenue on February 25, 2015, through registered mail, is hereby **DENIED** for lack of merit.

[11] *Commissioner of Internal Revenue vs. Hantex Trading Co., Inc.*, G.R. No. 136975, March 31, 2005.

[12] *Commissioner of Internal Revenue vs. Island Garment Manufacturing Corporation and the Court of Tax Appeals*, G.R. No. L-46644, September 11, 1987, citing *Commissioner of Internal Revenue vs. Alberto D. Benipayo*, G.R. No. L-13656, January 31, 1962.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We Concur:

ROMAN G. DEL ROSARIO
Presiding Justice

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

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

(On Leave)
CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

MA. BELEN RINGPIS-LIBAN
Associate Justice