REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

ERNESTO S. MALLARI, Petitioner,	**EB CRIM No. 002** (CTA Case No. A-1, A-2) (RTC Branch 3, Balanga City Case No. 7491 7492)
-versus-	Present: ACOSTA, *PJ.* CASTAÑEDA JR., BAUTISTA UY, CASANOVA, and PALANCA-ENRIQUEZ, *JJ.*
PEOPLE OF THE PHILIPPINES, Respondent.	Promulgated: JAN 08 2008

x - x 3:35 p.m.

DECISION

CASANOVA, J:

This is an appeal, by way of a Petition for Review,[1] filed by the petitioner-ERNESTO S. MALLARI (MALLARI) from the Decision[2] (*Assailed Decision*) of the Court of Tax Appeals Second Division (*CTA Second Division*) dated September 4, 2006 in CTA Criminal Case Nos. A-1 & A-2 entitled, "*People of the Philippines, Plaintiff-Appellee vs. Ernesto S. Mallari, Accused-Appellant*" affirming, with modification as to the penalty, the Decision of the Regional Trial Court, Branch 3, Balanga City, Bataan, docketed as Criminal Case Nos. 7491 and 7492, and from the Resolution[3] (*Assailed Resolution*) dated February 9, 2007 denying Petitioner-MALLARI's Motion for Reconsideration for lack of merit.

---

[1] CTA En Banc Rollo., pp. 8-31.
[2] Annex "A", Petition for Review, CTA En Banc Rollo., pp. 35-63.
[3] Annex "B", Petition for Review, CTA En Banc Rollo., pp. 75-89.

The facts of the case, as culled from the records, are as follows:

"Accused-appellant, Ernesto S. Mallari, is a licensed engineer and was engaged in business under the name 'E.S. Mallari Trading and Construction' in 1993. He filed his Individual Income Tax Return for the taxable year 1993 and paid the corresponding income tax due.[4] Attached to the return were the financial statements prepared by Certified Public Accountant Rolando H. Dizon, which included a schedule of taxes and licenses paid during the subject period.

On July 1, 1994, Revenue District Officer Amador L. Martinez of the Bureau of Internal Revenue, Revenue District No. 20, Balanga, Bataan, issued to Revenue Officer Elenita M. Dizon, a Letter of Authority No. 955 to examine accused-appellant's books of accounts and other accounting records for income and value-added taxes for the taxable year 1993.[5] A copy of the said Letter of Authority was received by the accused-appellant on July 8, 1994.

Pursuant to the letter of authority, Elenita M. Dizon repeatedly requested the accused-appellant to submit his books of accounts for examination. And, for failure of the accused-appellant to submit his books, despite several telephone conversations and meetings with him, said witness prepared and submitted her Audit Report on Income Tax and Audit Report on Value-Added Tax based on the income tax return and financial statements of the accused-appellant.[6]

On October 15, 1995, two separate Assessment Notices (both bearing the same Assessment No. 200-113-93-000528) were issued for deficiency income tax in the amount of ₱61,680.23 and deficiency value-added tax in the amount of ₱1,339,519.57.[7]

---

4 Exhibit "F", RTC Rollo.
5 Exhibits "E", "E-1" and "E-2", CTA RTC Rollo.
6 TSN, hearing on October 19, 2000. See also Exhibits "H", "H-1", "I" and "I-1", RTC Rollo.
7 Exhibits "A", "A-1", "B" and "B-1", RTC Rollo.

On July 16, 1996, Revenue District Officer Amador L. Martinez issued a Warrant of Distraint and/or Levy No. 085-96 to Revenue Officer I Orlando Reyes to distrain the personal properties and levy upon the real property of the accused-appellant and to sell and/or forfeit in favor of the government so much of the personal/real properties of the accused-appellant in order to satisfy in full the sum of ₱1,401,199.80 (₱61,680.23 for deficiency income tax and ₱1,339,519.57 for deficiency value-added tax).[8] A copy of the Warrant was served to the accused-appellant on August 8, 1996.

Efren P. Martinez, Chief of the Legal Division, BIR, Region No. IV, sent a demand letter dated October 28, 1999 to the accused-appellant for the payment of deficiency taxes.[9]

On February 1, 2000, 2nd Assistant Provincial Prosecutor Angelito V. Lumabas filed two separate Informations against the accused-appellant for violation of Sections 16(a), 205, 229, 248 and 249 of Tax Code (docketed as the assailed judgment of the court *a quo* dated January 17, 2005) before the Court *a quo*.[10] The accusatory portion of the Information in Criminal Case No. 7491 reads:

> 'That on or about October 15, 1995 in the Municipality of Balanga, Province of Bataan, Philippines and within the jurisdiction of this Honorable Court, the said accused, did then and there willfully and unlawfully fail and neglect, and still fails and neglects to pay the amount of ₱61,680.23 representing his 1993 deficiency income tax to the government despite repeated demands, to the damage and prejudice of the Republic of the Philippines.
>
> CONTRARY TO LAW.'

While, the accusatory portion of the Information in Criminal Case No. 7492 reads:

---

8 Exhibit "K", "K-1" to "K-4", RTC Rollo.

9 Exhibits D, D-1 to D-2, RTC Rollo.

10 Raffled to Branch 3, Balanga City, Bataan.

> 'That on or about October 15, 1995 in the Municipality of Balanga, Province of Bataan, Philippines and within the jurisdiction of this Honorable Court, the said accused, did then and there willfully and unlawfully fail and neglect, and still fails and neglects to pay the amount of ₱1,339,519.57 representing his 1993 value added tax to the government despite repeated demands, to the damage and prejudice of the Republic of the Philippines.
>
> CONTRARY TO LAW.'

Thereafter, a warrant of arrest was issued on February 9, 2000. The accused-appellant filed a motion for reduction of bail which was granted by the trial court. After posting a cash bail in the reduced amount of ₱5,000.00 for each case, the accused-appellant was granted provisional liberty.[11] Arraignment was held on April 5, 2000 and the accused, with the assistance of his counsel *de parte,* pleaded not guilty to the two charges filed against him.

In the course of the trial, the prosecution presented five (5) witnesses while the defense presented two (2) witnesses only. After trial, the trial court rendered the assailed Judgment on January 17, 2005. The trial court summarized the testimonial and documentary evidence of both parties in its Judgment and ruled as follows:

> 'The Court finds complainant Bureau of Internal Revenue to have adduced adequate evidence to hold accused Ernesto S. Mallari accountable for deficient payment in income and value-added taxes for taxable year 1993.
>
> Throughout the joint proceedings, accused, by his counsel, vehemently denied having received the Assessment Notices posted by complainant. He claimed that what he merely received was the Letter of Authority dated June 10, 1994 deputizing Revenue Officer Elenita M. Dizon to conduct an examination of his books of accounts covering the year 1993 (Exhibit 'F', *supra.*). As he asserted in his Position Paper (pp. 237-239, *id.*), the

---

[11] Order, RTC Branch 3, Balanga City, Bataan., dated February 17, 2000. RTC Crim Case No. 7491 Rollo, p. 22.

Assessment Notices must be considered to have been served upon him on the same date he received copy of the Letter of Authority, which was July 8, 1994 (Exhibits 'E-2' and '3-a', *supra.*), from which the five-year prescriptive period provided for under Section 280 of the National Internal Revenue Code must be computed. He submits that since the present charges were investigated only November 23, 1999, prescription had already set in inasmuch as more than five (5) years had already lapsed from the date he received copy of the Letter of Authority.

The contention of accused is untenable. Evidence for the Prosecution suffices to prove that Assessment Notices were sent to accused through registered mail on October 25, 1995 (Exhibits 'J', 'J-1' and 'J-2', *supra.*). In the ordinary course of mail, absent any showing that these notices had been returned to complainant as unclaimed, they must be presumed to have been duly received by accused. The BIR Regional Office personnel in San Fernando City, Pampanga enjoy the presumption of regularity in the performance of duty sans proof to the contrary (People v. De Guzman, 229 SCRA 759). Hence, without evidence establishing them as sham or fabricated, the official documents presented and offered by complainant against accused must be afforded full faith and credit. In this connection, the Court opines that accused could not be deemed to have received the Assessment Notices on July 8, 1994 simply because nothing has as yet been examined and assessed against him on said date. The Assessment Notices bear the date October 15, 1995 (Exhibits 'A' and 'B', *supra.*), and it is from there that the prescriptive period of five (5) years must be reckoned. Records reveal that investigation of these two (2) cases commenced on November 23, 1999 and charges were filed in Court on February 1, 2000, or well within the five-year period prescribed in the Code.

Parenthetically, it seems that all along, accused was fully aware of his tax accountability as early as 1997 or 1998. He so testified that he entertained the alleged offers of two men from the BIR Regional Office to 'fix' or settle his tax problem by giving them a sizeable amount of money. Viewed from any angle, this is admission that he was aware of his tax liability. The testimony verily had the effect of weakening not only his defense but his credibility. Granting that the transaction he had with these men were

> aboveboard, it is difficult to understand why accused, an engineer by profession and a notable businessman in the community, would part of his money without asking for any receipt in return. And even if the transaction were otherwise, why did he not file charges against these unscrupulous government employees?
>
> In the main, what appears is that despite service of Assessment Notices and Warrants of Distraint and/or Levy, accused deliberately failed to remit to the Government the amount of Php61,680.23 in deficiency income tax and value-added tax liability of Php1,339,519.57 for taxable year 1993.'

On February 11, 2005, accused-appellant filed his Notice of Appeal with the Court *a quo*. On March 18, 2005, the Court *a quo* elevated the complete records of the case to this Court.

On January 18, 2006, this Court issued a Resolution submitting the case for decision after receipt of the parties' respective Briefs and accused-appellant's Reply Brief."

Upon consideration of the arguments raised by both parties in their respective pleadings and the documentary evidence presented before the *CTA Second Division*, the Court promulgated the *Assailed Decision* with Justices Juanito C. Castañeda Jr. and Olga Palanca-Enriquez comprising the majority opinion[12], and Justice Erlinda P. Uy manifesting her dissenting opinion[13]. The dispositive portion of which reads as follows:

> '**WHEREFORE**, premises considered, with the modification as to the penalty, the appealed decision is hereby **AFFIRMED**, as follows:
>
> 1) In C.T.A. Crim. Case No. A-1 (RTC Crim. Case No. 7491) -
>
> The accused-appellant is hereby sentenced to suffer one (1) year imprisonment and to pay a fine of ten thousand pesos (P10,000),

[12] CTA EB Rollo, pp. 35-63.
[13] CTA EB Rollo, pp. 64-74.

pursuant to Section 254 of the 1977 National Internal Revenue Code, as amended, and to pay his 1993 deficiency income tax in the amount of P61,680.03 and a penalty equivalent to twenty-five (25%) of said amount, plus interest based on the resulting figure at the rate of twenty per cent (20%) per annum from November 25, 1995 until fully paid pursuant to Sections 252, 248 and 249 of the same Code; and

2) In C.T.A. Crim. Case No. A-2 (RTC Crim. Case No. 7492) -

The accused-appellant is hereby sentenced to suffer one (1) year imprisonment and to pay a fine of ten thousand pesos (P10,000), pursuant to Section 254 of the 1977 National Internal Revenue Code, as amended and to pay his 1993 deficiency value-added tax in the amount of P1,339,519.57 and a penalty equivalent to twenty-five (25%) of said amount, plus interest based on the resulting figure at the rate of twenty (20%) percent per annum from November 25, 1995, pursuant to Sections 252, 248 and 249 of the same Code, until fully paid.

SO ORDERED."

Aggrieved by the above pronouncement, Petitioner-MALLARI filed a Motion for Reconsideration[14] on October 9, 2006 seeking for the reconsideration and setting aside of the Assailed Decision. On February 9, 2007, the *CTA Second Division* promulgated a Resolution denying the said motion for lack of merit, with Justice Erlinda P. Uy maintaining her dissenting opinion.

On March. 7, 2007, Petitioner-MALLARI filed a "Motion for Extension of Time to File Petition for Review and to Resolve the Case En Banc[15]" with the *CTA En Banc*. In a Resolution[16] dated March 12, 2007, the *CTA En Banc* granted the said motion thereby giving petitioner a final and non-extendible period of fifteen (15) days from March 7, 2007 or until March 22, 2007, within which to file a Petition for Review. On March 21, 2007, Petitioner-MALLARI filed the instant Petition for Review[17] with the *CTA En Banc*, praying that the Petition for Review

[14] CTA Second Division Rollo, pp. 131-137.
[15] CTA En Banc Rollo., p. 3-4.
[16] CTA En Banc Rollo., p. 7.
[17] Ibid.

be given due course, and after due hearing, grant the relief sought for in the said petition and acquit Petitioner-MALLARI of the charges against him.

Petitioner raised the following grounds in support of the instant petition, to wit:

"5.1. THERE WAS NO VALID AND PROPER FINAL ASSESSMENT OF THE TAX LIABILITY OF THE ACCUSED-APPELLANT;

5.2. THE ELEMENTS OF THE OFFENSE CHARGED WERE NOT PROVEN BY EVIDENCE BEYOND REASONABLE DOUBT;

5.3. THE RIGHT OF THE GOVERNMENT TO ASSESS AND COLLECT THE ALLEGED DEFICIENCY TAXES HAS ALREADY PRESCRIBED;

5.4. WITH DUE RESPECT, PETITIONER IS NOT GUILTY BEYOND REASONABLE DOUBT FOR VIOLATION OF SEC. 16(9), 205, 229, 248 &249 OF THE NATIONAL INTERNAL REVENUE CODE, i.e., FOR WILLFULLY AND UNLAWFULLY FAILING AND NEGLECTING TO PAY THE AMOUNT OF PHP 61,680.33 AND PHP 1,339,519.57 REPRESENTING DEFICIENCY 1993 INCOME TAX AND VALUE ADDED TAX RESPECTIVELY, AS NO FINAL ASSESSMENT NOTICE WAS DULY SERVED UPON HIM."[18]

After a careful and thorough evaluation and consideration of the records of the case, the *CTA En Banc* finds that the Dissenting Opinion of Justice Erlinda P. Uy has exhaustively discussed and sufficiently shown the non-liability of Petitioner-MALLARI of the charges against him. The said dissenting opinion is hereunder reproduced and adopted by the *CTA En Banc*, as follows:

"The abovementioned documentary and testimonial evidence are insufficient proofs to establish accused-appellant's guilt beyond reasonable doubt. It must be emphasized that the prosecution has the primordial duty not only to prove that a tax is due, deficiency income and value-added taxes in this case,[19] but

---

[18] Petition for Review, CTA EB Rollo, p. 13
[19] Commissioner of Internal Revenue vs. Court of Appeals, 257 SCRA 200 (1996).

also to establish that the accused-appellant 'willfully fails' to pay the tax due.

In the present case, the prosecution presented the assessment notices which it allegedly sent to the accused-appellant to prove that the act of disregarding said notices constitutes willful failure to pay the tax due. Such pieces of evidence, however, are not sufficient proof at all.

Although it is true that where the assessment notice was released and mailed by the BIR to the taxpayer and the original was not returned to the BIR, the presumption is that the taxpayer received it. However, such presumption is merely a disputable one. Therefore, the same is subject to controversion and a direct denial by the taxpayer of the receipt of the assessment notice shifts the burden upon the party favored by the presumption (the BIR) to prove that the mailed letter was received by the taxpayer.[20]

As consistently alleged by the accused-appellant, he vehemently denied receipt of the subject assessment notices both issued on October 15, 1995. Simply put, the abovementioned presumption is clearly disputed by the accused-appellant in the present case. Consequently, it is up to the prosecution to prove otherwise.

To my mind, the transmittal list presented by the prosecution is not sufficient to establish that accused-appellant actually received the subject assessment notices, such transmittal list being self-serving. It bears no probative value, for it fails to state the nature of the document supposedly mailed to the accused-appellant. This fact becomes more underscored when the prosecution's witness, Ma. Marilou S. Paras, testified that something was in fact mailed to the accused-appellant

---

[20] Arnoldus Woodworks International, Inc. vs. The Commissioner of Internal Revenue, et al., CTA Case No. 4269, March 18, 1994 (affirmed by the Court of Appeals in CA-G.R. SP No. 34019, August 31, 1995) citing Republic of the Philippines vs. Court of Appeals and Nielsen and Company, Inc. 149 SCRA 351 (1987).

without presenting any corroborative evidence establishing the contents of the mailed envelope. More importantly, prosecution witness Elenita Dizon testified that she did not resort to any form of communication, other than verbal, in informing the accused-appellant of the assessments as the latter held office in the same building where the BIR was also renting.[21]

Accordingly, there is neither any clear proof nor convincing evidence that will prove that the mailed letter was indeed sent to and received by the accused-appellant.

There are prescribed procedures under the Rules on Evidence which must be followed or resorted to in order to establish receipt of a particular mailed document by the addressee. Unfortunately, the records of this case negate compliance with said procedures.

Moreover, mere transmittal records do not prove anything and it is unreliable in proving that indeed the assessment notices and letter of demand were sent to and received by the taxpayer as prescribed by law. This is so because transmittal records, by its very nature, do not clearly indicate whether it was indeed the assessment notices and letter of demand that were mailed.

It is worthy to mention in this connection that the last sentence of Section 7(b)(1) of Republic Act No. 1125, as amended by Republic Act No. 9282 is explicit in providing, that 'xxx [a]ny provision of law or the Rules of Court to the contrary notwithstanding, the criminal action and the corresponding civil action for the recovery of civil liability for taxes and penalties shall at all times be simultaneously instituted with, and jointly determined in the same proceeding by the CTA, the filing of the criminal action being deemed to necessarily carry with it the filing of the

[21] TSN, October 19, 2000, p. 14.

civil action, and no right to reserve the filing of such civil action separately from the criminal will be recognized'.

Considering the aforequoted provision of law, the civil action that is deemed instituted together with the criminal action may be futile if there is no prior determination of the amount of taxes that have not been paid, nor an assessment notice and a letter of demand having first been issued to and received by the taxpayer.

Simple logic dictates that if the law requires a convincing proof to show that indeed an assessment notice and letter of demand were actually sent to and received by the taxpayer, for purposes of the civil action to recover unpaid taxes, with more reason that such requirement on notice and demand be made to hold a person criminally liable. In the latter instance, the proof must be beyond reasonable doubt. Hence, no person may be criminally liable under Section 254 of the NIRC of 1997 without first establishing beyond reasonable doubt that a notice of assessment was indeed issued and received by the accused. The aforesaid conclusion is based on the constitutional and statutory rights of the accused to be presumed innocent until the contrary is proved and to due process of law.[22]

Here, a scrutiny of the records reveals that no preliminary assessment for deficiency taxes as required under Section 229 of the NIRC of 1977, as amended, was issued and sent to the accused-appellant. Nonetheless, assuming that the BIR issued and sent a preliminary assessment notice to the accused-appellant as required, the BIR still failed to sufficiently prove that it was able to send accused-appellant copies of the Final Assessment Notices which could be the proper basis of the criminal action and the civil action that is deemed instituted.

[22] Sections 14(1) and (2) of the 1987 Philippine Constitution; Section 1, Rule 115 of the Revised Rules of Court.

This Court cannot turn blind on the importance of such notices. Assessment is a notice to the effect that the amount therein stated is due as tax and a demand for the payment thereof. Otherwise put, an assessment contains not only a computation of tax liability, but also a demand for payment within a prescribed period. As soon as it is served, an obligation arises on the part of the taxpayer concerned to the amount assessed and demanded. It is relevant in the proper pursuit of judicial and extrajudicial remedies to enforce taxpayer's liabilities and certain matters that relate to it. The ultimate purpose of assessment is to ascertain the amount that the taxpayer is to pay.[23] Tax assessment is deemed made only when said notice is released, mailed or sent to the taxpayer,[24] subject to proof of actual receipt by the taxpayer in case of denial.

Given the facts and circumstances of the case, it is likewise improper to treat the demand letter dated October 28, 1999[25] as a notice of assessment to the accused-appellant. The issuance of the said letter, clearly beyond the three-year period to assess deficiency taxes, has a budge of malice and intention to harass the accused-appellant. To establish one's guilt in willfully evading taxes, a proof beyond reasonable doubt is necessary."

(Underscoring supplied)

With regard to the civil liability of accused-MALLARI, the Court finds him not liable.

Well settled is the rule that, "the extinction of a penal action does not carry with it extinction of the civil action. However, the civil action based on delict shall be deemed extinguished if there is a finding in a final judgment in a

[23] Tupaz vs. Ulep, 316 SCRA 118 (1999).
[24] Basilan Estates, Inc. vs. Commissioner of Internal Revenue, 21 SCRA 17 (1967).
[25] Exhibit "D".

criminal action that the act or omission from which the civil liability may arise did not exist." *(Sec. 2, 4th paragraph, Rule 111 of the Revised Rules of Court)*

As discussed above, the accused did not receive the assessment notices, both the Preliminary Assessment Notice and the Final Assessment Notice, allegedly sent by the BIR through registered mail. The transmittal list presented by the prosecution is not sufficient to establish that accused-MALLARI actually received the subject assessment notices. There was neither any clear proof nor convincing evidence that will prove that the mailed letter was indeed sent to and received by the accused. Without the alleged assessment notices, accused-MALLARI cannot be required to pay his alleged deficiency income and deficiency value-added tax liabilities for the taxable year 1993. Accused-MALLARI was not duly informed of his alleged tax liabilities and was not given the opportunity to rebut such claim of the BIR. Due process was not observed in the instant case.

Such being the case, finding accused-MALLARI not liable for violation of Sections 16(a), 205, 229, 248 and 249, contained in two separate Informations filed with the RTC Branch 3, Balanga City, Bataan due to the fact that accused did not receive the subject assessment notices that would give rise to his tax liabilities, such would also exonerate accused-MALLARI of any civil liabilities thereto.

IN VIEW OF THE FOREGOING, Petitioner-MALLARI's Petition for Review is hereby **GRANTED**. Therefore, the *CTA Second Division's Assailed Decision* dated September 4, 2006 and the *Assailed Resolution* dated February 9, 2007 are hereby **REVERSED** and **SET ASIDE**, and a new one is hereby entered **ACQUITTING** Petitioner-**ERNESTO S. MALLARI** for the offense charged and not liable for any civil liability.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

(With Dissenting Opinion)
JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

(Concurs with the Dissenting Opinion of Justice Castañeda)
OLGA PALANCA-ENRIQUEZ
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.

ERNESTO D. ACOSTA
Presiding Justice