REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

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AMKOR TECHNOLOGY PHILIPPINES (P1/P2) INC. (Formerly AUTOMATED MICROELECTRONICS, INC.),
Petitioner,

\- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 6694

Members:

ACOSTA, *Chairperson*
BAUTISTA, and
CASANOVA, *JJ.*

Promulgated:

JUL 11 2007; 1:10PM

x - x

DECISION

CASANOVA, *J.*:

This is a Petition for Review seeking the cancellation and/or withdrawal of petitioner's deficiency income, fringe benefits, and expanded withholding tax assessments in the aggregate amount of **FORTY SIX MILLION EIGHT HUNDRED THIRTY FIVE THOUSAND FIVE HUNDRED EIGHTY THREE AND 85/100 PESOS (P46,835,583.85), covering** the taxable year 1998.

Petitioner, Amkor Technology Philippines, Inc., is a domestic corporation duly organized and existing under the laws of the Republic of the Philippines, and registered with the Securities and Exchange Commission (SEC)[1]. Automated Microelectronics, Inc. (AME)

[1] Par 1, Joint Stipulation of Facts and Issues

was absorbed in a merger by and between itself and Amkor Anam Philippines, Incorporated (AAPI) on December 1, 1998. As a result of the merger, AME was dissolved and its entire assets and liabilities were transferred to and absorbed by AAPI, the surviving company. Subsequently, on September 29, 2000, petitioner filed with the SEC its Certificate of Filing of Amended Articles of Incorporation – Change of Name from AAPI to Amkor Technology Philippines (P1/P2), Inc. (ATPI)[2].

Respondent is the Commissioner of the Bureau of Internal Revenue, who was duly appointed and empowered to perform the duties of his office, including, among others, the power to decide, cancel, and abate tax liabilities pursuant to Section 204 (B) of the Tax Code, as amended by Republic Act (R.A.) 8424, otherwise known as the "Tax Reform Act" (TRA) of 1997[3].

On October 11, 1999, a Letter of Authority was issued to petitioner to examine the latter's books of accounts and other accounting records for all internal revenue taxes covering the period from January 1 to December 31, 1998[4].

On July 18, 2002, petitioner received two (2) Preliminary Collection Letters dated July 16 and 17, 2002, for deficiency income, fringe benefits, and expanded withholding taxes in the total amount of P46,835,583.85[5] for the taxable year 1998, broken down as follows:

A. Deficiency Income Taxes for 1998

Net Loss per Income per return		(74,913,548.00)
Add: Underdeclared income	83,689,592.86	
Disallowances:		
Unsupported Int Exp	22,585,277.54	
Exp not subj to fringe benefit		
Fringe Benefit Exp	1,394,049.08	
Exp not subj to exp withholding		
Salaries (contractual)	57,268,421.24	164,937,340.72

[2] Exhibit "C"
[3] Par 3, Joint Stipulations of Facts and Issues
[4] Par 4, Joint Stipulation of Facts and Issues
[5] Pars 5-8, Joint Stipulation of Facts and Issues

Adjusted Taxable Income		90,023,792.72
Tax Due Thereof (34%)		30,608,089.52
Less: Tax Paid		2,179,446.00
Tax Still Due		28,428,643.52
Add: Interest from 04-16-99 to -2-28-02		16,312,072.79
Total Amount Due		**44,740,716.31**

B. Deficiency Fringe Benefit Tax

Exp not subject to fringe benefit tax		
Fringe Benefit Expense		2,597,406.00
Total		2,597,406.00
Grossed-up Monetary Value		3,935,463.64
Multiply by tax rate		34%
Tax due		1,338,057.64
Less: Tax Paid		619,911.14
Tax Still Due		718,146.50
Add: Interest from 01-26-99 to 02-28-02		449,940.16
Total Amount Due		**1,168,086.66**

C. Deficiency Expanded Withholding Tax

Exp not subj to expanded withholding Tax		
Salaries (Contractual) 1%	57,268,421.24	572,684.21
Total Tax Still due per investigation		572,684.21
Add: Interest from 01-26-99 to -2-28-02		354,096.67
Total Amount Due		**926,780.88**

The deficiency tax assessments arose from the findings of respondent's examiner that:

a. Petitioner allegedly under-declared its income in the amount of P83,689,592.86 based on the alleged difference between AME's sales reported in its financial statements and its filed monthly and quarterly value-added tax returns;

b. Interest expense amounting to P22,585,277.54 allegedly represents AME's payments of its advances from its parent company which advances were used by AME to finance its expansion billing for assembly fees and purchases of indirect materials and therefore not allowed as deductible expense from gross income;

c. Fringe benefit expense amounting to P2,597,406.00 was allegedly not subjected to fringe benefits tax; and

d. Salaries expense amounting to P57,268,421.24 which was allegedly paid to contractual employees was not subjected to expanded withholding taxes in violation of Revenue Regulations No. 2-98.

On August 19, 2002, petitioner formally contested the two (2) Preliminary Collection Letters by filing with the respondent, through the Regional Director of Revenue Region No. 8 in Makati City, its letter dated August 16, 2002, pursuant to Section 228 of the Tax Code, as amended[6]. A Supplemental Protest Letter was likewise filed on October 18, 2002.

Petitioner basically argued that respondent's right to assess its tax deficiencies for the taxable year 1998 had already been barred by prescription. Petitioner averred that it filed its Annual Income Tax Return for the taxable year 1998 on April 30, 1999, thus, respondent had until April 30, 2002 within which to serve his Formal Assessment Notice. Accordingly, the Formal Assessment Notice dated March 5, 2002, which was purportedly delivered to AME, was never received by its office. Aside from the facsimile copies of the collection letters it received on July 18, 2002, no other copies of the notice and letters were ever received by petitioner. Thus, in view of respondent's failure to validly serve the assessment notice for the taxable year 1998, respondent's right has already prescribed, pursuant to Section 203 of the National Internal Revenue Code (NIRC) of 1997, which states that:

> **Sec. 203. Period of limitation upon assessment and collection**. - Except as provided in the succeeding section, internal revenue taxes shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after 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 the purposes of this section, a return is filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day.

Nonetheless, petitioner filed its Supplemental Protest letter questioning respondent's bases in assessing it of income, fringe benefit, and expanded withholding tax deficiencies for

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[6] Par 10, Joint Stipulation of Facts and Issues

the taxable year 1998 and consequently requesting for the cancellation and/or withdrawal of the Preliminary Collection Letters issued against it.

Having received no reply from respondent, and before it would be barred by prescription, petitioner then filed this instant Petition for Review with this Court on May 15, 2003.

On July 21, 2003, respondent filed his Answer interposing the following Special and Affirmative Defenses:

> 6. The assessments in question were made and issued in accordance with law, rules and regulations.
>
> 7. No deduction from gross income shall be allowed unless the taxpayer shall substantiate with sufficient evidence the amount of expense being deducted, and the direct connection or relation of the expense being deducted to the development, management, operation and/or conduct of the trade, business or profession of the taxpayer. (Gancayco vs. CIR, 1 SCRA 980)
>
> 8. The subject deficiency assessments on income tax, fringe benefit tax and expanded withholding tax have long become final, executory and demandable; hence the Honorable Court of Tax Appeals has no jurisdiction to take cognizance of the instant case.
>
> 9. All presumptions are in favor of the correctness of the tax assessment (Interprovincial Autobus vs. Collector of Internal Revenue, 98 Phil 290).

This instant appeal was submitted for decision on February 26, 2007, considering that petitioner had already filed its Memorandum, without respondent having done so.

The parties have jointly stipulated that the following are the issues for which this Court is called upon to resolve:

1. Whether or not the assessment is void under Section 203 of the Tax Code;

2. Whether or not petitioner is liable for deficiency income, fringe benefits tax and expanded withholding tax assessments in the amounts of P44,740,716.31, P1,168,086.66, and P926,780.88, respectively, inclusive of increments for the taxable year 1998;

3. Whether or not there was an underdeclaration of petitioner's sales in the amount of P83,689,592.86;

4. Whether or not petitioner's interest expense in the amount of P22,585,277.00 is an allowable deduction;

5. Whether or not there was an underpayment of fringe benefits tax in the amount of P1,168,086.66;

6. Whether or not salaries expense amounting to P57,268,421.24 were paid to contractors and therefore subject to the 1% withholding tax; and

7. Whether or not there was underwithholding of tax on salaries expense amounting to P926,780.88.

The issue on prescription being the primordial consideration before any other issues raised may be resolved, this Court deems it proper to discuss the same first.

At the outset, petitioner stresses that it did not receive the Formal Assessment Notice (FAN) dated March 5, 2002 which was purportedly to have been delivered to petitioner. Neither did petitioner receive any Preliminary Assessment Notice (PAN) from the respondent, which should have been issued prior to the issuance of any FAN.

Petitioner submits that the essence of the constitutional requirement of due process in the issuance of a deficiency tax assessment, is explicitly provided for under Section 228 of the NIRC of 1997, and discussed further in Section 3 of Revenue Regulations (RR) No. 12-99, which requires that assessment notices be issued "showing in detail, the facts and the law, rules and regulations, or jurisprudence on which the proposed assessment is based." Based on the foregoing provisions of law, petitioner avers that the requirements of due process for the validity of a letter of demand and an assessment notice are the issuance of: (1) a notice for informal conference; (2) a preliminary assessment notice sent to the taxpayer at least by registered mail; and (3) a formal letter of demand and assessment notice sent to the taxpayer only by registered mail or personal delivery.

Petitioner maintains that an assessment to be valid, it must be issued, served and received within the three (3) year prescriptive period allowed by law pursuant to Section 203 of the NIRC of 1997. In this case, however, petitioner avers that, counting from April 30, 1999, the date when its Annual Corporate Income Tax Return for the taxable year 1998 was filed, respondent only had until April 30, 2002 within which to issue the subject assessment notice.

Furthermore, petitioner contends that herein respondent failed to present any evidence to prove that the FAN was validly served upon the petitioner either by personal delivery or registered mail. On the contrary, respondent waived his right to present additional evidence during the hearing on October 10, 2006.

After a careful scrutiny of the evidence on record, arguments of the parties, laws applicable and existing jurisprudence, this Court finds for the petitioner.

Section 203 of the National Internal Revenue Code of 1986, as amended, provides that:

> **Sec. 203. Period of limitation upon assessment and collection**. - Except as provided in the succeeding section, internal revenue taxes shall be assessed **within three years after the return was filed**, and no proceeding in court without assessment for the collection of such taxes shall be begun after 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 the purposes of this section, a return is filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day.
> (Emphasis supplied)

From the foregoing provision of law, the general rule as to the prescriptive period for assessment is that, where a return was filed, the period within which to issue an assessment notice is within three (3) years after the date the return was due, or was actually filed, whichever is later. An assessment is deemed made for the purpose of giving effect thereto if it is (a) made within the period of three (3) years or ten (10) years, as the case may be[7],

[7] In the case of false or fraudulent return or failure to file a return

and (b) notice of the assessment is **released, mailed, or sent to the taxpayer also within the same period.** And it is not actually required that the notice be received by the taxpayer within the three (3) year prescribed period[8].

It is a settled rule that "where an assessment notice is sent by mail (for example by ordinary mail), it is presumed that the taxpayer received the mailed notice within the period of time when mail of such kind are ordinarily received so that if such presumed receipt is still within the prescriptive period, the taxpayer's contention that the Government's right to assess the tax has already prescribed cannot be given credit"[9].

Under Section 3 (v) of Rule 131 of the Rules of Evidence, there is a disputable presumption that a letter duly directed and mailed was received in the regular course of mail. Corollary thereto, Section 10 of Rule 13 of the Revised Rules of Court provides that "service by registered mail is complete upon actual receipt by the addressee, or after five (5) days from the date he received the first notice of the postmaster, whichever date is earlier."

However, as in any other disputable presumption, 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 respondent to prove that the mailed letter was received by the taxpayer. Jurisprudence is replete with cases holding that if the taxpayer denied 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* is therefore shifted to the respondent to prove by contrary evidence that the petitioner received the assessment notice in the due course of mail.[10] In other words, an assessment notice is not considered validly issued if the taxpayer denied receipt thereof.[11]

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[8] Basilan Estate Inc. vs. Commissioner, L-22429, September 5, 1967.

[9] Republic vs. Tan Kim En, CA-GR-28743-R, February 29, 1964

[10] Republic vs. Court of Appeals, 140 SCRA 351; Arnoldus Woodworks Inernational vs. The Commissioner of Internal Revenue, CTA Case No. 4269, March 18, 1994

[11] Commissioner of Internal Revenue vs. Obayashi Philippines Corporation, CTA EB No. 42 (CTA Case No. 6222) June 10, 2005; Commissioner of Internal Revenue vs. Akitsu Shipping Co., Ltd., CTA EB No. 33 (CTA Case No. 6360) March 31, 2005

An assessment notice is the finding by the taxing agency that the taxpayer has not paid his correct taxes. The ultimate purpose of an assessment is to ascertain the amount that the taxpayer should pay. It is vital that an assessment be issued so as to enable the taxpayer to determine the remedies thereon and to afford the taxpayer his right to due process once the same is served and received. And for the assessment notice to be valid, it must be issued within the prescriptive period allowed by law, as well as, conform to the formal requisites[12] for such validity. Otherwise, the formal assessment notice shall be void.

In this instant case, petitioner denies having ever received a copy of the FAN allegedly sent on March 5, 2002. The burden of proving otherwise is thus shifted to the respondent. Unfortunately, respondent failed to do so. In fact, no evidence was presented by respondent to dispute such claim by petitioner. It is noted further that respondent, in the middle of the trial, even moved to withdraw the BIR records from the case.

Petitioner presented in evidence its Annual Corporate Income Tax Return for the year 1998 filed on April 30, 1999[13]. From the said date, and pursuant to Section 203 of the NIRC of 1997, respondent had until April 30, 2002 within which to issue a Formal Letter of Demand and Assessment Notice against petitioner for any deficiency taxes which may have been found and examined. Such act is an indispensable requirement for due process. However, no evidence was presented to prove the fact of the assessment notice being issued against and sent to petitioner within the prescribed period of three (3) years from the date of the filing of the annual corporate income tax return.

It must be emphasized that the law on prescription, being a remedial measure, is liberally construed in favor of the taxpayer for the reason that the taxpayers should be safeguarded from unreasonable examinations, investigations or assessments. Hence, where the period to assess has clearly prescribed, no such action may be taken to subject the

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[12] Sec. 3.1.4, RR No. 12-99
[13] Exhibit "D"

petitioner from further investigation for the alleged deficiency taxes.

In fine, since respondent failed to prove the issuance, delivery and receipt of the assessment notice by the petitioner, there was no valid assessment issued. Consequently, the government's right to issue an assessment for the said period has already prescribed[14]. This being the case, it is now futile to resolve the other issues regarding the validity of the assessment per se.

IN VIEW OF THE FOREGOING, this instant Petition for Review is hereby **GRANTED.** The 1998 deficiency income, fringe benefits, and expanded withholding tax assessments issued against petitioner is hereby **CANCELLED** and **SET ASIDE** for being issued beyond the prescriptive period allowed by law.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
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's Division.

ERNESTO D. ACOSTA
Presiding Justice
Chairman, First Division

[14] Industrial Textile Manufacturing Co. of the Phils., Inc. vs. CIR, CTA Case No. 4885, August 22, 1996