REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

-versus-

SM PRIME HOLDINGS, INC.,
Respondent.

E.B. No. 401
(C.T.A. Case No. 7347)

Present:

ACOSTA, *P.J.*
CASTAÑEDA, Jr.,
BAUTISTA,
UY,
CASANOVA, and
PALANCA-ENRIQUEZ, *JJ*:

Promulgated:

DEC 18 2008 4:10 p.m.

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DECISION

***ACOSTA, P.J.*:**

Before this Court is a Petition for Review *En Banc* filed on August 7, 2008 assailing the Decision of this Court's Second Division (Second Division) dated March 17, 2008 and the subsequent Resolution dated July 3, 2008, affirming the assailed Decision. The dispositive portion of the assailed Decision reads:

> "**WHEREFORE,** premises considered, the instant Petition for Review is hereby **GRANTED.** Accordingly, respondent's Decision denying petitioner's protest letters against its alleged deficiency value-added taxes on gross receipts derived from its cinema/theater admission ticket sales for the taxable years 2002 and 2003 is hereby **REVERSED**. Effectively, Assessment Notice Nos. 011-02 and 005-03 in the amounts of P136,780,636.10 and P127,695,049.30, respectively, are hereby **ORDERED CANCELLED** and **SET ASIDE.**
>
> **SO ORDERED**."

The undisputed facts are as follows:

Petitioner is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR), with office address at the 5th Floor, BIR National Office Building, BIR Road, Diliman, Quezon City.

Respondent SM Prime Holdings, Inc., is a domestic corporation duly organized and existing under the laws of the Republic of the Philippines, with principal office address at SM Corporate Offices, Bldg. A, 1000 Bay Blvd., SM Central Business Park, Bay City, Pasay City. It is authorized by the Securities and Exchange Commission to engage in the operation of movie houses.

On October 29, 2004 and September 9, 2004, respondent received from the BIR, Preliminary Assessment Notices (PANs) covering the calendar years of 2002 and 2003, respectively, finding respondent liable for deficiency Value Added Tax (VAT) in the amount of P135,131,674.98[1] and P125,908,305.41[2] for the years 2002 and 2003 respectively. The basis of petitioner's assessments is respondent's failure to declare in its VAT returns and to pay the corresponding VAT due on the gross receipts it derived from cinema ticket sales pursuant to Revenue Memorandum Circular (RMC) No. 28-2001, dated July 2, 2001, in relation to Section 108 of the National Internal Revenue Code (NIRC) of 1997 and Revenue Regulations No. 7-95.

Respondent filed its protests to the said PANs. Then, on December 2, 2004 and November 8, 2004, petitioner issued Formal Letters of Demand (FLD) covering the calendar years of 2002 and 2003, respectively. Respondent, likewise, filed its protests to the FLD.

On August 25, 2005, petitioner rendered his Decision upholding the assessments issued against respondent. Thus, respondent filed on October 20, 2005, a *Petition for Review With Prayer for Suspension of Collection* before this Court questioning petitioner's Decision. The said Petition was assigned to the Second Division of this Court.

[1] Inclusive of increments.
[2] Inclusive of increments.

During trial before the Second Division, respondent's counsel manifested that respondent will no longer present evidence since the case only involves legal issues. On the other hand, the Second Division considered petitioner to have waived his right to present evidence for failure of petitioner's counsel to appear on the scheduled date for the presentation of petitoner's evidence despite warnings issued by the Second Division.

The case was considered submitted for decision on August 7, 2007 upon filing of respondent's Memorandum *sans* petitioner's Memorandum.

On March 17, 2008 the Second Division rendered the assailed Decision, which ordered the cancellation and setting aside of petitioner's assessments. Petitioner filed his Motion for Reconsideration of the said Decision on April 9, 2008. The Second Division, however, denied petitioner's Motion in a Resolution dated July 3, 2008.

Hence, the instant Petition for Review before this Court sitting *en banc* seeking the reconsideration of the Second Division's Decision and Resolution, and that judgment be rendered ordering respondent to pay the amount of P136,780,636.10 and P127,695,049.30 as deficiency VAT for taxable years 2002 and 2003, plus 20% annual interest for late payment from October 29, 2004, until fully paid, pursuant to Sections 248 and 249 of the National Internal Revenue Code of 1997.

Petitioner assigns the following errors:

I

THE SECOND DIVISION OF THE HONORABLE CTA ERRONEOUSLY RULED THAT THE BUSINESS OF SHOWING CINEMATOGRAPHIC FILMS IS NOT A SALE OF SERVICE;

II

THE SECOND DIVISION OF THE HONORABLE CTA ERRONEOUSLY MISCONSTRUED PETITIONER'S ASSESSMENT AS STEMMING MERELY FROM THE DELETION OF A PROHIBITION;

III

THE SECOND DIVISION OF THE HONORABLE CTA ERRONEOUSLY APPLIED RULES OF STATUTORY

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CONSTRUCTION TO DETERMINE LEGISLATIVE INTENT ON OTHERWISE CLEAR PROVISIONS OF LAW;

IV

THE SECOND DIVISION OF THE HONORABLE CTA ERRONEOUSLY INTERPRETED SECTION 108 OF THE NATIONAL INTERNAL REVENUE CODE OF 1997; and

V

THE SECOND DIVISION OF THE HONORABLE CTA ERRONEOUSLY RULED THAT THE NON-PUBLICATION OF RMC NO. 28-2001 IS FATAL TO ITS ASSESSMENT.

The issues boil down to the principal issue of whether or not respondent's gross receipts derived from its cinema ticket sales are subject to VAT.

Petitioner posits that Sections 108 of the National Internal Revenue Code (NIRC) of 1997 plainly states *that the performance of all kinds of services in the Philippines for others for a fee, remuneration or consideration* is subject to VAT. This means that as long as it is a sale of service, no matter what business that is, and not expressly exempted by law, that sale of service is encompassed by "all sales of services" and that is tantamount to an express mention. The law is plain and clear, and there is no need to resort to extrinsic aids to interpret it.

Further, petitioner contends that the Second Division erred in interpreting the enumeration in Section 108 as exhaustive enumeration of services that are subject to VAT. Such interpretation would denigrate the coverage of the word "all".

We are not persuaded.

While We agree with petitioner's position that if the law is plain and clear, there is no need to resort to extrinsic aides in interpreting it, however, a literal application of Section 108 would lead to an application different from petitioner's stance.

Section 108 of the NIRC of 1997, as amended is partly quoted as follows:

"SEC. 108. **Value-added Tax on Sale of Services and Use or Lease of Properties. —**

(A) *Rate and Base of Tax.* — There shall be levied, assessed and collected, a value-added tax equivalent to ten percent (10%) of gross receipts derived from the sale or exchange of services, including the use or lease of properties.

The phrase 'sale or exchange of services' means the performance of all kinds of services in the Philippines for others for a fee, remuneration or consideration, including those performed or rendered by construction and service contractors; stock, real estate, commercial, customs and immigration brokers; lessors of property, whether personal or real; warehousing services; **lessors or distributors of cinematographic films**; persons engaged in milling, processing, manufacturing or repacking goods for others; proprietors, operators or keepers of hotels, motels, rest houses, pension houses, inns, resorts; proprietors or operators of restaurants, refreshment parlors, cafes and other eating places, including clubs and caterers; dealers in securities; lending investors; transportation contractors on their transport of goods or cargoes, including persons who transport goods or cargoes for hire and other domestic common carriers by land, air and water relative to their transport of goods or cargoes; services of franchise grantees of telephone and telegraph, radio and television broadcasting and all other franchise grantees except those under Section 119 of this Code; services of banks, non-bank financial intermediaries and finance companies; and non-life insurance companies (except their crop insurances), including surety, fidelity, indemnity and bonding companies; **and similar services** regardless of whether or not the performance thereof calls for the exercise or use of the physical or mental faculties. The phrase 'sale or exchange of services' shall likewise include:

(1) The lease or the use of or the right or privilege to use any copyright, patent, design or model, plan, secret formula or process, goodwill, trademark, trade brand or other like property or right;

(2) The lease or the use of, or the right to use of any industrial, commercial or scientific equipment;

(3) The supply of scientific, technical, industrial or commercial knowledge or information;

(4) The supply of any assistance that is ancillary and subsidiary to and is furnished as a means of enabling the application or enjoyment of any such property, or right as is mentioned in subparagraph (2) or any such knowledge or information as is mentioned in subparagraph (3);

> (5) The supply of services by a nonresident person or his employee in connection with the use of property or rights belonging to, or the installation or operation of any brand, machinery or other apparatus purchased from such nonresident person;
>
> (6) The supply of technical advice, assistance or services rendered in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme;
>
> (7) **The lease of motion picture films, films, tapes and discs**; and
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> (8) The lease or the use of or the right to use radio, television, satellite transmission and cable television time." (*Emphasis supplied.*)

Petitioner relied heavily on the first part of the second paragraph of Section 108 of the NIRC of 1997 which states that "[t]he phrase 'sale or exchange of services' means the performance of **all** kinds of **services** in the Philippines for others for a fee, remuneration or consideration". However, a continuous reading of the provision shows that there is an enumeration of services that are subject to VAT. Petitioner must be guided that in understanding the statutes, the particular words, clauses and phrases should not be studied as detached and isolated expressions, but the whole and every part of the statute must be considered in fixing the meaning of any of its parts and in order to produce a harmonious whole.[3]

The enumeration in Section 108 of the NIRC of 1997 is not merely placed by the legislature for naught. Evidently, the intention is to qualify the phrase "sale or exchange of services" with the enumeration and with the phrase "other similar services". The rationalization of the Second Division on this point finds relevance:

> "xxx under the principle of ejusdem generis, '**where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same kind or class as those specifically mentioned.**'
>
> While the meaning of the phrase 'sales or exchange of services' remained the same; the intention of the legislature to subject to VAT specific kinds of sales of services is clear. **Congress did not have the**

[3] Aisporna vs. Court of Appeals, G.R. No. L-39419, April 12, 1982.

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> **intention to use the general terms in their unrestricted sense, otherwise, it would have not have made an enumeration of particular subjects.** Obviously, our tax laws, past and present, did not intend to include the showing of films in public by the owners, operators or proprietors of cinema houses or theaters as subject to value-added tax on sales of services." (*Emphasis supplied.*)

A reading of Section 108 of the NIRC of 1997 clearly shows that "gross receipts derived from ticket sales for showing or exhibiting motion pictures, films or movies by cinema operators or proprietors" is not among the enumerated subjects of VAT. This being so, petitioner's assessment has no basis in law. Well entrenched is the rule that "a statute will not be construed as imposing a tax unless it does so clearly, expressly and unambiguously. A tax cannot be imposed without clear and express words for that purpose."[4]

Likewise, it is worth emphasizing that in spite of the several revisions and amendments of the VAT law, from E.O. No. 273[5] to R.A. 9238[6], "showing or exhibition of motion pictures, films or movies by cinema operators or proprietors" was never included as one of the services subject to VAT. If it was the intention of the legislature to subject to VAT the gross receipts derived by operators of cinema/theater houses from admission tickets, the legislature could have easily included such activity. Noteworthy that "**lessors or distributors of cinematographic films**" and "**leasing of motion picture films, films, tapes and discs"** are respectively included in the first set and second set of enumeration in Section 108. But "showing/exhibition of motion pictures, films or movies" was left out. This consequence could not have been overlooked by the framers of the NIRC considering that leasing/distributing and showing/exhibiting of motion picture films, although not similar, both services have motion picture films as their subject matter.

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[4] Commissioner of Internal Revenue vs. Court of Appeals, 271 SCRA 605.
[5] "Adopting A Value-Added Tax, Amending ForThis Purpose Certain Provisions Of The National Internal Revenue, And For Other Purposes."
[6] "An Act Amending Certain Sections of the National Internal Revenue Code of 1997, As Amended, By Excluding Several Services From the Coverage of the Value-Added Tax And Re-imposing the Gross Receipts Tax On Banks and Non-Bank Financial Intermediaries Performing Quasi-Banking Functions And Other Non-Bank Financial Intermediaries Beginning January 1, 2004."

The exclusion of "showing or exhibition of motion pictures, films or movies" from the enumeration in Section 108 of the NIRC of 1997 only means that since the inception of the VAT law, the legislature does not deem such activity as a service subject to VAT, rather, it is viewed as an amusement activity, subject to only one form of tax, *that is*, amusement tax found in the Local Government Code.

However, petitioner advances the argument that the enactment of the Local Government Code erased the exemption of cinema/theater admissions from other taxes properly imposable by law and administered by the national government. Petitioner continues that while it is true that cinema operator's/proprietor's gross receipts were merely subject solely to amusement taxes for quite some time, this situation had already changed because of the removal of the exemption. Currently, there is a VAT law that embraces all sales of goods, property or service, unless expressly exempted, from which petitioner derives its power to impose VAT.

To recall, **Section 195** (previously Section 260) of **Commonwealth Act No. 466**, the first codification **of the National Internal Revenue Code**, as amended, provided that there shall be collected amusement taxes from the gross receipts received by the proprietor, lessee, or operator of theaters, cinematographs, concert halls, circuses, and other places of amusement. Upon the issuance of **P.D. No. 231** (otherwise known as the Local Tax Code), which took effect on July 1, 1975, the levy and collection of amusement tax due from proprietors, lessees, or operators of theaters, cinemas, concert halls, circuses and other places of amusement on their paid admissions, **was transferred to the provincial government**, to the exclusion of both the national and municipal government. P.D. No. 231 was amended by RA No 7160, otherwise known as the Local Government Code of 1991 (LGC). The phrase "to the exclusion of both the national and municipal governments" found in the former law was not retained in the latter law.

Be that as it may, the removal of the phrase "to the exclusion of the national and municipal government" does not mean that the national government is now empowered to levy and collect taxes from the gross receipts derived from showing or exhibiting of movies or films. The reason being is that there is no law authorizing the levy and

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collection of tax from such activity. As already discussed, "showing or exhibiting of movies or films" was never included among the services enumerated subject to VAT under Section 108 of the NIRC of 1997, despite the several amendments thereto. This shows the legislative policy of excluding the service of showing/exhibiting motion picture films from VAT. When the legislature enacts a provision, it is understood that it is aware of previous statutes relating to the same subject matter and that in the absence of any express repeal or amendment therein, the new provision should be deemed enacted pursuant to the legislative policy embodied in the prior statutes.[7]

In stark contrast, the clear expression of the legislative intent to subject "showing or exhibition of motion pictures, films or movies" to one tax is found in Section 140 of the LGC. The said section authorizes the local government units to levy and collect from proprietors/operators of theaters and cinemas, amusement tax on the gross receipts from admission ticket and We quote:

> "SEC. 140. Amusement Tax. — (a) **The province may levy an amusement tax to be collected from the proprietors, lessees, or operators of theaters, cinemas,** concert halls, circuses, boxing stadia, and other places of amusement at a rate of not more than thirty percent (30%) of the gross receipts from admission fees.
>
> (b) In the case of theaters or cinemas, the tax shall first be deducted and withheld by their proprietors, lessees, or operators and paid to the provincial treasurer before the gross receipts are divided between said proprietors, lessees, or operators and the distributors of the cinematographic films.
>
> (c) The holding of operas, concerts, dramas, recitals, painting and art exhibitions, flower shows, musical programs, literary and oratorical presentations, except pop, rock, or similar concerts shall be exempt from the payment of the tax herein imposed.
>
> (d) The sangguniang panlalawigan may prescribe the time, manner, terms and conditions for the payment of tax. In case of fraud or failure to pay the tax, the sangguniang panlalawigan may impose such surcharges, interests and penalties as it may deem appropriate.

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[7] Legaspi vs. Executive Secretary, 68 SCRA 253.

> (e) The proceeds from the amusement tax shall be shared equally by the province and the municipality where such amusement places are located." (*Emphasis supplied.*)

Corollary to the aforequoted section, Section 131(c) of the Local Government Code (R.A. No. 7160) defines "amusement places" to include theaters, cinemas, concert halls, circuses and other places of amusement where one seeks admission to entertain oneself by seeing or viewing the show or performances. Thus, the amusement tax is to be imposed only on the admission fee charged for entering the amusement place.

From all the foregoing, respondent's gross receipts from cinema tickets sales is apparently within the contemplation of Section 140 of the LGC in relation to Section 131(c) of the same code, and for not being expressly included in Section 108 of the NIRC of 1997, such receipts is not subject to VAT.

With regard to the last issue, petitioner asseverates that whether or not RMC No. 28-2001 had gone through the requisite notice and publication is immaterial to the present case, respondent had been informed that it is being assessed pursuant to Section 108 of the NIRC, thus there exist no reason to discuss whether RMC No. 28-2001 had been published or not.

It bears stressing however that one of the issues submitted in the parties' Joint Stipulation of Facts and Issues[8] for the Second Division's disposition is "Whether or not petitioner (herein respondent) is taxable under RMC No. 28-2001". Disposing the submitted issue would require a determination whether the RMC No. 28-2001 is operative or not. Relevant thereto is an inquiry on whether the RMC had been issued in accordance with the required procedures to make it operative such as, the need of notice and publication thereof. Therefore, the Second Division cannot be faulted in discussing the importance of publishing RMC No. 28-2001.

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[8] Second Division's *Rollo*, page 198.

Petitioner also argues that RMC No. 28-2001 needs no publication as it is merely an interpretative rule. The questioned RMC which was issued on July 2, 2001 reads:

> "SUBJECT: Taxability of Movie/Cinema House Operators for VAT Purposes.
>
> TO: All Internal Revenue Officers and Others Concerned.
>
> For the information and guidance of all internal revenue officers and others concerned, quoted hereunder is the dispositive portion of VAT Ruling No. 031-2000 dated September 8, 2000, regarding the VAT treatment of admission receipts derived by operators of amusement places such as, but not limited to movie/cinema house operators, as follows:
>
>> 'VAT Review Committee Ruling No. 031-2000 dated September 8, 2000
>>
>> '. . . gross receipts from admission of persons to places of amusement operated in the course of the taxpayer's trade or business such as, but not limited to, cinema houses, became subject to 10% VAT beginning January 1, 1996, pursuant to the provisions of Section 102, old NIRC (now section 108, NIRC as renumbered), as amended by R.A. 7716, and as implemented by Revenue Regulations No. 7-95. This does not include, however, amusement places subject to amusement tax under Sec. 125 of the NIRC.'
>
> All revenue officials, employees and others concerned are hereby enjoined to give this Circular as wide a publicity as possible."

The above RMC although under the guise of being merely an internal issuance, primarily for the guidance of revenue officers, is actually an administrative legislation. The Supreme Court expounded the difference between administrative rules that are interpretative in nature and those that are legislative, in the case of *Commissioner of Internal Revenue vs. Hon. Court of Appeals*[9], to wit:

> "It should be understandable that **when an administrative rule is merely interpretative in nature, its applicability needs nothing further than its bare issuance for it gives no real consequence more than what the law itself has already prescribed.** When, upon the other hand, the administrative rule goes beyond merely providing for the means that can facilitate or render least cumbersome the implementation of the law but

[9] G.R. No. 119761, August 29, 1996.

> **substantially adds to or increases the burden of those governed, it behooves the agency to accord at least to those directly affected a chance to be heard, and thereafter to be duly informed, before that new issuance is given the force and effect of law.**"

Prescinding from the foregoing, an administrative rule is legislative in nature if, among others, it renders least cumbersome the implementation of the law it seeks to implement but **substantially adds to or increases the burden of those governed**. Being so, the administrative agency is required to accord due process to those who may be directly affected by it, and this can be done by giving the latter an opportunity to be heard.

The RMC No. 28-2001 created a burden not intended by Section 108 of the NIRC of 1997 when respondent's service of showing or exhibiting movies or films is made subject to VAT although such service is not one of the enumerated vatable activities under Section 108. In a nutshell, the RMC went beyond its intended purpose of providing guidance to revenue officers, it legislated. Being a legislative administrative rule/circular, it has to follow certain procedures for it to function.

Revenue Memorandum Circular (RMC) No. 20-86 provides for the procedures for the just enforcement of rules and regulation, in conformity with due process. Revenue officers are enjoined to strictly comply with the said prescribed procedures. The circular applies only to (a) Revenue Regulations; (b) Revenue Audit Memorandum Orders; and (c) **Revenue Memorandum Circulars** and Revenue Memorandum Orders bearing on internal revenue tax rules and regulations. Among others, the prescribed procedure requires a press release of the new revenue issuance in any newspaper or newspapers of general circulation, covering the highlights or features thereof, before the aforesaid internal revenue tax issuances shall be operative.

Petitioner failed to show that the RMC No. 28-2001 complied with the strict procedures laid down in RMC No. 20-86. Therefore, as correctly ruled by the Second Division, RMC No. 28-2001 cannot be given force and effect. Consequently, petitioner

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cannot be subject respondent's gross receipts derived from their cinemas/theaters admission ticket sales under RMC No. 28-2001.

WHEREFORE, finding no reversible error in the assailed Decision promulgated on March 17, 2008 and Resolution dated July 3, 2008, the instant Petition for Review is hereby **DISMISSED** for lack of merit.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Justice

We Concur:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII 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 *En Banc*.

ERNESTO D. ACOSTA
Presiding Justice

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