REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
Quezon City

FIRST DIVISION
****

PEOPLE OF THE PHILIPPINES,
Complainant,

-versus-

ANTONIO A. VIERNES,
(27 Amber St. Northview I, Batasan Hills, QC 1123)
Accused.

Criminal Case No. O-143
(I.S No.)

For: *Violation of Section 255 in relation to Sec. 253 (d) and Sec. 256 of R.A. No. 8424 (Tax Reform Act of 1997).*

Members:

ACOSTA, *P.J.*
BAUTISTA, and
CASANOVA, *JJ.*

Promulgated:

JUN 29 2009 ;11:10 am

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RESOLUTION

Antonio A. Viernes is charged before this Court with the violation of **Sec. 255 in relation to Section 253 (d), and 256 of the National Internal Revenue Code (NIRC) of 1997**, in an Information alleging the following:

> "That on or about February 22, 2005 and for sometime subsequent thereto, in the City of Manila, Philippines, the said accused, being then the owner and proprietor of ANTONIO VIERNES CONSTRUCTION, with business address at 27 Amber St., Northview I Batasan Hills, Quezon City, **having filed his**

internal revenue tax for the year 1997, and after an examination and audit of the same, it has been found out that there is due and collectible from said ANTONIO VIERNES CONSTRUCTION under [A]ssessment [N]otice [N]o. 32-2000 dated February 2, 2005, the amounts of P1,318,646.99 and P47,600.00 or a total of P1,366,246.99, representing deficiency income tax, value-added tax (VAT) and expanded withholding tax (EWT), for the said year, did then and there, willfully, and unlawfully fail, refuse and neglect to pay said taxes and without formally protesting against or appealing the same despite due notice and demand to do so, to the damage and prejudice of the Republic of the Philippines, in the aforesaid amount of P1,366,246.99, Philippine Currency.

Contrary to law." (*Emphasis supplied.*)

Attached to the Information are:

(1) July 16, 2007 Resolution of Assistant City Prosecutor, Maria Roma Flor A. Ortiz, with recommending approval of 2nd Assistant City Prosecutor, Rector E. Macapagal, recommending the filing of an Information against one ANTONIO A. VIERNES;

(2) Letter dated October 6, 2006, signed by Alfredo V. Misajon, Regional Director of the Bureau of Internal Revenue (BIR), recommending the immediate criminal prosecution of herein accused, with the following attachment:

Annex "A", a copy of the approval of the Commissioner of Internal Revenue to file criminal actions with the Office of the City Prosecutor of Manila against taxpayers/responsible officers for violations of the NIRC; the accused is among the therein enumerated taxpayers/responsible officers.

(3) October 6, 2006 Affidavit executed by Ramon B. Lorenzo, Atty. I, assigned at the Legal Division, Revenue Region No. 6 of the Bureau of Internal Revenue, Manila with the following attachments:

Annex "A", certified true photocopy of Assessment Notice No. 32-2002 dated February 22,

> 2005 for VAT in the amount of P1,318,646.99 inclusive of interest up to February 28, 2005;
>
> Annex "B", certified true photocopy of Demand No. 32-2002 dated February 22, 2005 demanding the payment of P20,000.00 representing deficiency Compromise Penalty on VAT;
>
> Annex "C", certified true photocopy of Demand No. 32-2002 dated February 22, 2005 demanding the payment of P27,600.00 representing deficiency on Compromise Penalty (Sec. 250) taxes; and
>
> Annex "D", certified true photocopy of the original Quarterly Value-Added Tax Return for the 4th quarter of 2002 of Antonio Viernes Construction, bearing the signature of Antonio A. Viernes.

The Court is now tasked to evaluate the Information, as well as, the supporting documents/evidence filed by the State Prosecutor to determine if there is probable cause to go on with the prosecution of the case.

Section 6(a), Rule 112 of the Rules of Court provides that:

> "**Sec. 6. When warrant of arrest may issue.** – (a) By the Regional Trial Court.- Within ten (10) days from the filing of the complaint or information, the judge shall personally evaluate the resolution of the prosecutor and its supporting evidence. **He may immediately dismiss the case if the evidence on record clearly fails to establish probable cause.** If he finds probable cause, he shall issue a warrant of arrest, or a commitment order if the accused has already been arrested pursuant to a warrant of arrest issued by a judge who conducted the preliminary investigation or when the complaint or information was filed pursuant to section 7 of this Rule. In case of doubt on the existence of probable cause, the judge may order the prosecutor to present additional evidence within five (5) days from notice and the issue must be resolved by the court within thirty (30) days from filing of the complaint or information." (*Emphasis supplied.*)

Sec. 4, Rule 9 of the Revised Rules of the Court of Tax Appeals likewise reads:

> "SEC.4. *Warrant of arrest*.- Within ten days from the filing of the information, the Division of the Court to which the case was raffled shall evaluate the resolution of the public prosecutor and its supporting evidence. **The division may immediately dismiss the case if it finds that the evidence on record clearly fails to establish probable cause.** If the Division finds probable cause, it shall issue a warrant of arrest signed by the Chairman of the Division. In case of doubt on the existence of probable cause, the Division may order the prosecutor to present additional evidence, ex *parte*, within five days from notice." (*Emphasis supplied.*)

Probable cause is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that there are lawful grounds to arrest the accused.[1] And once the Information is filed, the determination of the presence or absence of probable cause for the issuance of a warrant of arrest against the accused, or for the withdrawal of the Information, or for the dismissal of the case, is addressed to the sound discretion of the Court.[2]

After a judicious review of the allegations and documents attached to the Information, the Court finds that the evidence on record clearly failed to establish probable cause.

At the outset, the Information charges Antonio A. Viernes as the owner and proprietor of Antonio Viernes Construction for violation of Section 255 of the NIRC brought about by the latter's alleged willful failure and refusal to pay taxes for the year 1997, to the damage and prejudice of the Government in the total amount of P1,366,246.99.

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[1] *Allado vs. Diokno, 232 SCRA 192*
[2] *Sarigumba, et. al. vs. Sandiganbayan, 451 SCRA 533*

With the exception of the Resolution of Asst. City Prosecutor Ortiz recommending the filing of an Information against the accused, all the documents attached to the Information show that the taxable year which the accused has allegedly failed to pay his tax obligations is 2002 but the Information itself mentions that the internal revenue taxes involved in the instant case are for the year 1997. Also, the Information alleges that taxes are found due and collectible from Antonio Viernes Construction under Assessment Notice No. 32-2000 dated February 2, 2005. Nonetheless, a scrutiny of the documents attached to the information reveals that the only Assessment Notice found in the records is numbered 32-2002, dated February 22, 2005.

Based on the foregoing, substantial allegations on the taxable year and on the specific assessment notice mentioned in the Information are not supported by any of the documents attached to it and are even conflicting.

Furthermore, what the NIRC penalizes under Section 255 is the "**willful failure to pay tax.**" In other words, what the law makes criminal is the willful intent of non-payment of taxes. Thus, non-payment *per se,* does not warrant the institution of a criminal case against a taxpayer.

The allegations in the October 6, 2006 letter of Alfredo V. Misajon to the City Prosecutor that "in spite of several demands made" and the "service of Warrant of Distraint and/or Levy" the accused failed and refused to pay the assessed deficiency taxes are not sufficient to show that Antonio A. Viernes probably committed the crime charged. First, the Assessment Notice annexed to the Affidavit of Ramon B. Lorenzo of the BIR did not show whether the said notice was actually sent to and received by the accused. Absent proof of receipt, these assessments could not have attained finality, and in effect no willful failure to pay tax. Second, aside from Misajon's claim, no evidence was also presented as to the supposed Warrant of Distraint and/or Levy served upon the accused.

The Court likewise notes a discrepancy in the "I.S. No." appearing in the Information filed with this Court and that appearing in the Resolution of Asst. City Prosecutor Ortiz, recommending the filing of the information. The Information bears the "I.S. No. 06J-23935." On the other hand, the Resolution has an "I.S. No. of 06L-23935."

Accordingly, this case is hereby **DISMISSED** for clear failure of the evidence on record to establish probable cause, as provided for in Section 6(a), Rule 112 of the Rules of Court and Sec. 4, Rule 9 of the Revised Rules of the Court of Tax Appeals.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Justice

With Dissenting Opinion
LOVELL R. BAUTISTA
Associate Justice

CAESAR A. CASANOVA
Associate Justice

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(I.S. No. 06J-23935)

Present:

Acosta, *Chairperson,*
Bautista, and
Casanova, *JJ.:*

Promulgated:

JUN 29 2009 11:10 am

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DISSENTING OPINION

BAUTISTA, J.

With due respect, I humbly express my dissent from the opinion of my colleagues dismissing the case for clear failure of the evidence on record to establish probable cause on the following grounds:

- With the exception of the Resolution of Asst. Prosecutor Ortiz, all the documents attached to the Information show that the taxable year involved is 2002 but the Information states that the taxable year involved is 1997.

- The Information also mentions Assessment Notice No. 32-<u>2000</u> dated February <u>2</u>, 2005 but the Assessment Notice attached to the Information is numbered 32-<u>2002</u> and dated February <u>22</u>, 2005.
- The Information bears I.S. No. "06<u>J</u>-23935" while the Resolution bears I.S. No. "06<u>L</u>-23935".

In my humble opinion, the discrepancies mentioned above are typographical errors. Thus, the Court can order Assistant Prosecutor Ortiz to make the necessary formal corrections in the Information prior to the determination of probable cause. I believe that once corrected, the Amended Information and the documents attached thereto would establish probable cause to hold the accused for trial.

Moreover, the Resolution also states that the Assessment Notice annexed to the Affidavit of Ramon B. Lorenzo of the BIR did not show whether the said notice was actually sent to and received by the accused and that no evidence was presented as to the supposed Warrant of Distraint and/or Levy served upon the accused. I believe that these matters are evidential and would largely depend on the substantiation of the parties at the trial on the merits.

In view of the foregoing, it is my humble opinion that the case should not be dismissed. Instead, the Court should order Assistant Prosecutor Ortiz to make the necessary formal corrections in the Information prior to the proper determination of probable cause.

LOVELL R. BAUTISTA
Associate Justice