REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

PEOPLE OF THE PHILIPPINES,
Plaintiff-Appellee,

-versus-

ERNESTO S. MALLARI,
Accused-Appellant,

C.T.A. Crim. Case Nos. A-1 & A-2
(RTC Crim. Case Nos. 7491 & 7492)

Members:

CASTAÑEDA, JR., *Chairman,*
UY, and
PALANCA-ENRIQUEZ, *JJ.:*

Promulgated:
SEP 04 2006

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D E C I S I O N

CASTAÑEDA, JR., *J.*:

On appeal before this Court is the Judgment dated January 17, 2005 of the Regional Trial Court, Branch 3, Balanga City, Bataan, in Criminal Case Nos. 7491 and 7492 finding the accused-appellant guilty beyond reasonable doubt of violating Sections 16(a) and 102 of the National Internal Revenue Code.[1]

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[1] Penned by Judge Remigio M. Escalada, Jr.

The dispositive portion of the trial court's Decision reads as follows:[2]

> "WHEREFORE, accused ERNESTO S. MALLARI is found GUILTY beyond reasonable doubt of violating Sections 16(a) and 102 of the National Internal Revenue Code, and pursuant [to] Section 254 of the Code, is hereby sentenced to suffer ONE (1) YEAR of imprisonment. Likewise, in accordance with Sections 248 and 249 of the Code, accused is ordered to pay income tax deficiency and value-added tax liabilities in the aggregate amount of ONE MILLION FOUR HUNDRED ONE THOUSAND AND ONE HUNDRED NINETY NINE PESOS AND EIGHTY CENTAVOS (Php1,401,199.80), with penalty equivalent to twenty five percent (25%) of said amount, plus interest at the rate of twenty percent (20%) per annum of the resulting entire amount due from accused reckoned from October 1995.
>
> SO ORDERED."

THE FACTS

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.[3] 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

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[2] Promulgation of judgment was done in open court on January 27, 2005 and in the presence of the accused and his counsel *de parte* Norberto Caparas.

[3] Exhibit "F".

accounting records for income and value-added taxes for the taxable year 1993.[4] 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.[5]

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.[6]

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

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

₱1,339,519.57 for deficiency value-added tax).[7] 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.[8]

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 Criminal Case No. 7491 and 7492) before the Court *a quo*.[9] 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:

> "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

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7 Exhibit "K", "K-1" to "K-4".
8 Exhibits D, D-1 to D-2.
9 Raffled to Branch 3, Balanga City, Bataan.

> 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.[10] 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.
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> 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 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-

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10 Order, RTC Branch 3, Balanga City, Bataan., dated February 17, 2000.

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.

ASSIGNMENT OF ERRORS

In his Brief, the accused-appellant assigned the following errors as having been committed by the Court *a quo:*

I

> THE COURT A QUO ERRED IN HOLDING THAT THE NOTICES OF ASSESSMENT WERE RECEIVED BY THE ACCUSED-APPELLANT; and

II

> THE COURT A QUO ERRED IN FINDING THE ACCUSED-APPELLANT GUILTY OF FAILING TO PAY DEFICIENCY TAX AND VALUE-ADDED TAX.

ARGUMENTS OF THE ACCUSED-APPELLANT

As regards the first assignment of error, accused-appellant argues as follows:

"The transmittal list (Exh. "J") cannot be used as basis for holding that the Assessment Notices were sent to the accused-appellant on October 25, 1995, much less received by him. "In the first place, the list does not contain an indication of the nature of the mail matter sent to the accused-appellant, hence, it cannot be assumed that what were sent were the Notices of Assessment"; and

"In the second place, no Return Card was presented to the Court showing, among other things, what was sent to, and received, by the addressee, namely, the accused-appellant, and the signature of the person who received the mail matter. It appears that the failure to attach a Return Card was deliberate, for which the BIR must suffer the consequences.

As it is, with the transmittal list (Exh. "J") not indicating what was sent to the accused-appellant, and there being absent the all-important Return Card that would have contained an indication of what the mail matter was, how can it now be said with reasonable certainty that what were sent to the accused-appellant on October 25, 1995 were the Notices of Assessment for deficiency tax and value-added tax? Yes, indeed, something was sent to the accused-appellant on October 25, 1995, and that something could be anything but not necessarily the Notices of Assessment."

On the second assignment of error, accused-appellant argues that:

"The filing of criminal actions against the accused-appellant being without factual and legal basis, considering that the prosecution failed to establish beyond reasonable doubt that the accused-appellant received the Notices of Assessment, what with the absence of proof that the pivotal Notices of Assessment were sent to the accused-appellant, and, what is more, that the notices were received by him, the Court a quo had no alternative but to render a judgment of acquittal. That it did not was grave error resulting in gross injustice."

In his Reply-Brief, accused-appellant avers:

"The receipt of assessment notice which would have been the best evidence in this case, cannot be based on presumption but rather on proof beyond reasonable doubt to warrant conviction. Besides, such absence of receipt of notice of assessment did not only deprive the accused-appellant of due process of law but more importantly, he was deprived of his right to take the necessary remedial action to correct the matter if ever there was indeed a tax deficiency. Consequently, he was not able to make a protest nor a motion for reconsideration nor reinvestigation because there was no notice of assessment in the first place."

ARGUMENTS OF THE PLAINTIFF-APPELLEE

On the other hand, the plaintiff-appellee counters that accused-appellant's conviction must be affirmed for the latter's failure to pay the taxes due despite repeated demands.

Plaintiff-appellee however seeks modification of the Judgment of the trial court with respect to the penalty and civil liabilities imposed upon the accused-appellant. According to plaintiff-appellee, the trial court failed to consider that there were two informations filed against the accused-appellant. Appellant should have been sentenced with another year of imprisonment for the commission of the second offense pursuant to Section 254 of the Tax Code. Furthermore, the trial court should not have required appellant to pay an aggregate amount of ₱1,401,199.80; instead, appellant should have been required to pay the civil liability and surcharge for each offense committed. Pursuant to Sections 248 and 249 of the Tax Code, appellant should have been required to pay: (a) the deficiency income tax in the amount of ₱61,680.03 with additional penalty equivalent to twenty five percent (25%) of said amount, plus interest at the rate of twenty percent (20%)

per annum; and (b) the 1993 deficiency value-added tax of ₱1,339,519.57 with additional penalty equivalent to twenty five percent (25%) of said amount, plus interest at the rate of twenty percent (20%) per annum.

THIS COURT'S RULING

The appeal is not meritorious in view of the following reasons:

1. Accused-appellant was duly notified of the assessments;
2. Accused willfully failed to pay the tax; and
3. The offense has not prescribed.

Accused-appellant Was Duly Notified Of The Assessments

Accused-appellant alleges that he has no knowledge of the deficiency tax assessments against him because he did not receive the assessment notices. However, his actions belie his words, he testified that he gave P50,000 to two alleged BIR employees in order to fix his tax cases with the BIR. He admitted having bribed the alleged BIR personnel. As pointed out by the trial court, "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 had the effect of weakening not only his defense but his credibility"[11].

The prosecution adduced sufficient testimonial and documentary evidence to prove that the accused-appellant was notified of the assessments against him. The prosecution presented Marilou S. Paras, an employee of the Records Section, Administrative Division of the BIR Regional Office in San Fernando City, who testified that she "takes charge of preparing and sending various kinds of communications, among which are assessment notices. In connection with this case, she brought a transmittal list of names to whom registered mail matters where *(sic)* sent by her office to a number of addresses on October 25, 1995 *(Exhibit "J", p. 138, id.).* One of the names that appear in the list is that of accused Ernesto S. Mallari (Exhibit "J-1", *id.*). This list is with rubber stamp of the Post Office of San Fernando City, Pampanga showing that a letter was sent to accused on October 25, 1995 (Exhibit "J-2", *id.*)".[12]

She testified that the assessment notices (Exhibits *"A"* & *"B"*) were mailed by registered mail on October 25, 1995 (Exhibit *"J-2"*) as shown by a transmittal list (Exhibit *"J"*) containing, among others, the name and address of accused-appellant Ernesto Mallari listed as no. 6 thereof (Exhibit *"J-1"*) and that the mail sent to accused-appellant was

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11 *JUDGMENT*, Crim. Cases Nos. 7491 and 7492, January 17, 2005, Regional Trial Court of Bataan, Br. 3, p. 5.

12 *Ibid.*, p.3

not returned to sender (the BIR) by the post office of San Fernando, Pampanga[13]. Hence, the trial court found accused appellant's contention that he did not receive the assessment notices as untenable, thus:

> "The contention of the 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 the 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 795). Hence, without establishing them as sham or fabricated, the official documents presented and offered by complainant against accused must be afforded full faith and credit."[14]

The trial court's ruling is in accordance with the pronouncement of the Supreme Court that "an assessment is deemed made only when the collector of internal revenue releases, mails or sends such notice to the taxpayer"[15] and may be presumed to have been received by the taxpayer, notwithstanding denial of receipt thereof, upon proof that it was properly addressed and mailed by registered mail, thus:

> "Turning now to petitioner's denial that he received the 1985 assessment, we agree with the factual findings of the CTA that the assessment letter may be presumed to have been received by petitioner. The CTA found as follows:
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> > The 1985 assessment which petitioner denied as having been received was negated when the respondent introduced documentary evidence showing that it was mailed by registered mail. It was further buttressed by the testimony of witness Mr. Arnold

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13 *TSN*, January 18, 2001, pp. 9-18.

14 *JUDGMENT*, supra., p. 5

15 *Commissioner of Internal Revenue vs. Pascor Realty and Development Corporation, et al.*, G.R. No. 128315, June 29, 1999 (309 SCRA 402).

> Larroza, Chief Administrative Branch Mailing Section, Rev. Region No. 4B-1, Quezon City that the 1983, 1984 and 1985 assessments were placed in one envelope when it was mailed by registered mail. Presumably, it was received in the regular course of the mail. . . . The facts to be proved to raise this presumption are (a) that the letter was properly addressed with postage prepaid; and (b) that it was mailed. Once these facts are proved, the presumption is that the letter was received by the addressee as soon as it could have been transmitted to him in the ordinary course of the mails. Such being the case, this Court cannot be made to believe that the 1985 assessment which incidentally has a substantially greated amount involved, was not received by the petitioner. Hence, the same assessment is also considered final and unappealable for failure of the petitioner to protest the same within the reglementary period provided by law."[16]

Furthermore, the bare denial made by the accused-appellant that he did not receive the assessment notices lacks credibility, as such, it cannot prevail over the evidence on record. In fact, even the credibility of the accused-appellant as his own witness has been seriously impaired by inconsistencies between his testimony and the judicial admissions in his pleadings, *viz.*:

1. When the accused-appellant testified, he denied that the signature appearing on an Individual Income Tax Return for the year 1993 in the name of Ernesto S. Mallari Trading and Construction previously marked as Exhibit *"F"* for the prosecution is his. He testified, in part, as follows:

   "DIRECT-EXAMINATION BY
   ATTY. NORBERTO CAPARAS:

   Q - There appears on record, exhibit "F" for the prosecution, and this exhibit "F" appears to be a 1993 Individual Income Tax Return in the name of Ernesto S. Mallari Trading and Construction. There appears a signature on the lower left-hand portion of this Individual Income Tax Return. I am showing to you

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16 *Protector's Services, Inc., vs. Court of Appeals and Commissioner of Internal Revenue*, G.R. No. 118176, April 12, 2000 (330 SCRA 404).

the expediente copy, please tell us whether this is your signature?

A - This is not my signature, sir.

Q - But do you remember having filed an Income Tax Return for the year 1993?

A - Yes, sir, I remember having filed an Income Tax Return for that year.

Q - Do you have a copy of that 1993 Income Tax Return?

A - None, sir.

Q - Why?

A - Formerly, our office was situated at the VAV Building along capitol drive, but when our office was closed, my records were misplaced, sir."[17]

Counsel for the accused then requested that prosecution's Exhibit *"F"* be marked as Exhibit *"1"* and the signature which purports to be the signature of the accused was requested to be marked as Exhibit *"1-a"* of the accused. When the same 1993 Individual Income Tax Return in the name of Ernesto Mallari (Exhibit *"1"*) was formally offered in evidence by the accused, the purpose stated in his Formal Offer is *"to show that accused filed ITR"*[18]. Accused-appellant may have forgotten that he previously denied that the signature appearing on Exhibit *"1"* is his. Accused-appellant's denial during his testimony and his subsequent formal offer of evidence of the same Exhibit *"1"* as his Income Tax Return for the year 1993 is not only incongruent but contradictory.

2. In his Reply-Brief filed on January 10, 2006, accused-appellant maintains that the alleged violations have already prescribed, thus:

"5. Apparently, the said two (2) assessment notices were served upon the herein taxpayer-accused together with the said Letter of Authority. And these two (2) sets of documents (Letter of Authority and Assessment Notice) were served on that date of June 10, 1994. It should be noted that this Letter of Authority is the authority of the BIR examiners to conduct investigation of a taxpayer. While assessment is defined as Determination, calculation, or fixing of amount due. (Republic v. Limaco & de Guzman, 5 SCRA 990).

6. Inasmuch as the two (2) sets of documents were utilized by the prosecution in its Formal Offer of Evidence, the defense adopts the same evidence and invokes the defense of prescription which in

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17 *TSN*, June 21, 2001, p. 5.
18 *RTC Records*, Crim. Case No. 7491 & 7492, Regional Trial Court, Bataan, Branch 3, p.209.

> accordance with Section 280, of the National Internal Revenue Code as amended, provides that:
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> Sec. 280. Prescription for violations of any provision of this Code. - - All violations of any provision of this Code shall prescribe after five years, x x x"[19]
>
> Accused-appellant's judicial admission that the notices of assessment were served upon him on June 10, 1994 contradicts his testimony that he did not receive the assessment notices.

The foregoing inconsistencies prove that accused-appellant's denials are unworthy of belief. "In evaluating self-contradictions of a witness, inquiry should be made as to whether they are due to a mere mistake or to a deliberate falsehood. x x x Thus, when a witness contradicts himself as to material facts, his credibility will be impaired and the weight of his testimony, consequently reduced."[20]

Moreover, assuming *arguendo,* that he did not receive the original assessment, the accused-appellant personally received a Warrant of Distraint and Levy *(Exhibit "K")* on August 8, 1996. The signature of the accused-appellant appears on the Warrant of Distraint and Levy proving that accused-appellant personally received the same. Said Warrant of Distraint and/or Levy contains the particulars of the Assessment Notices such as the Assessment/Demand No., the date of issuance, the kind of tax due, the taxable year covered by the assessment and the amount of the assessments. This again proves that he has knowledge of the assessments against him as early as August

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19 *REPLY-BRIEF FOR APPELLANT*, p.3

20 *FRANCISCO*, Basic Evidence, Second Edition, 1999, p. 506.

1996. He could have already raised the defense that he did not receive the assessment notices. Instead, he did not do anything, he did not even dispute the Warrant of Distraint and Levy.

Likewise, accused received a Demand Letter dated October 28, 1999 *(Exhibit "D")*. The counsel for the accused-appellant admitted that "there exist a demand letter that was sent to the accused by the BIR, San Fernando, Pampanga" and that the accused-appellant received the demand letter[21]. The Supreme Court had ruled that a follow-up letter from the Bureau of Internal Revenue (BIR) reiterating its demand for the payment of taxes is considered a notice of assessment in itself, thus:

> "xxx Records, however, show that petitioner wrote private respondent a *follow-up letter* dated 19 September 1956, reiterating its demand for the payment of taxes as originally demanded in petitioner's letter dated 16 July 1955. This **follow up letter is considered a notice of assessment in itself** which was duly received by private respondent in accordance with its own admission."[22] *(Emphasis supplied)*

Clearly, the prosecution was able to establish that the accused-appellant was duly notified and had knowledge of the assessments against him through the documentary and testimonial evidence presented during the trial, to wit:

1. The Letter of Authority *(Exhibit E)* issued by the BIR dated July 1, 1994 was personally received by the accused-appellant on July 8, 1994 *(Exhibit E-2)*;

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21 *TSN*, May 24, 2000, p. 8

22 *Republic of the Philippines vs. The Court of Appeals and Nielson & Company, Inc.*, G.R. No. L-38540, April 30, 1987 (149 SCRA 351); *Commissioner of Internal Revenue vs. Isabela Cultural Corporation*, G.R. No. 135210, July 11, 2001 (361 SCRA 71).

2. The testimony[23] of Elenita M. Dizon, the revenue examiner assigned to examine the books of accounts and other accounting records of the accused-appellant. She testified that she was the one who served the Letter of Authority to the accused-appellant, that she demanded about five times for the accused-appellant to present his books of accounts but the accused did not do so. That the accused-appellant was informed of the results of audit since the office of the taxpayer was then located at the ground floor of the current office-building of the BIR and that after being informed of the results of the audit, accused-appellant was amenable that the docket be transferred to Pampanga for legal action[24];

3. That on October 25, 1995, the assessment notices were sent by registered mail to the accused-appellant *(Exhibit J)* and the testimony[25] of Marilou Paras, an employee of the Records Section, Administrative Division of the BIR Regional Office in San Fernando City, Pampanga that the assessment notices were sent by registered mail and that the same were not returned to the BIR by the post office of San Fernando, Pampanga.

4. A Warrant of Distraint and Levy *(Exhibit K)* was served upon the accused-appellant on August 8, 1996 and the testimony[26] of Orlando R. Reyes, Revenue Officer of the BIR that he personally served the Warrant of Distraint and Levy to accused-appellant and identified the accused as the person who received and signed the receipt portion of the warrant; and

5. A demand letter dated October 28, 1999 *(Exhibit D)* was sent to the accused-appellant by the BIR, the existence and receipt of said demand letter and that accused-appellant ignored the same were admitted by the accused-appellant[27], as well as, the testimony of Joseph Jeffrey Iggo that he prepared the demand letter and it was sent to the accused-appellant.

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[23] *TSN*, October 19, 2000.
[24] *Ibid.*, p. 14.
[25] See *TSN*, January 18, 2001.
[26] See *TSN*, March 1, 2001.
[27] See *TSN*, May 24, 2000, pp. 8-9.

The foregoing documentary and testimonial evidence prove that the assessment notices were sent by registered mail and that accused-appellant was informed and had knowledge of the assessments against him for taxable year 1993. The prosecution's evidence negates accused-appellant's denial of receipt of the assessment notice. Moreso, when taken with accused-appellant's admission that he resorted to bribery. As found by the trial court, "[h]e 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 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."[28] Settled is the rule that the appellate court, on appeal, will not interfere with the conclusions of the trial court concerning the credibility of the such witness in view of the fact that the trial court saw them in the act of testifying and observed their manner and demeanor as witnesses.

Appellate courts as a rule desist from disturbing the findings of the trial court on the credibility of witnesses, for the latter is in a better position to appreciate the same, having seen and heard the witnesses themselves and observed their behavior and manner of testifying during the trial. We find no reason to depart from this settled practice, since it

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[28] *JUDGMENT*, supra., p. 5.

has not been shown that the trial court has overlooked certain facts of substance and value that, if considered, might affect the result of the case.[29]

From 1994 up to 1999, the accused-appellant was consistently made aware of the status and progress of the assessments against him for taxable year 1993. Clearly, he was given due process, the essence of which is the opportunity to be heard and to fully plead his defenses but he opted not to do so thereby making the assessments against him final and unappealable. Notwithstanding said knowledge, accused-appellant did not do what was required of him under the circumstances. Instead, accused-appellant opted to bribe his way out of his deficiency taxes. At the very least, his conduct of giving P50,000 to the alleged BIR employees is circumstantial evidence against the accused-appellant of not paying the correct amount of taxes to the government. All told, his failure to pay was willful and deliberate.

Accused-appellant Willfully Failed to Pay the Tax

Section 254 of the National Internal Revenue Code of 1977, as amended reads:

> SEC. 254. *Failure to file return, supply correct and accurate information, pay tax, withhold and remit tax and refund excess taxes withheld on compensation.* – **Any person required** under this Code or by regulations

[29] *People v. Gumahin*, No. L-22357, October 31, 1967 (21 SCRA 729); *People v. Lumayag*, No. L-19142, March 13, 1965 (13 SCRA 502).

promulgated thereunder **to pay any tax**, make a return, keep any record, or supply correct and accurate information, **who willfully fails to pay such tax**, make such return, keep such record, or supply such correct and accurate information, or withhold or remit taxes withheld, or refund excess taxes withheld on compensation, at the time or times required by law or regulations shall, in addition to other penalties provided by law, upon conviction thereof, be fined not less than ten thousand pesos (₱10,000) and imprisonment of not less than one (1) year but not more than ten (10) years. *(Emphasis supplied)*

The prosecution was able to prove all elements of the offense, to wit:

1. the accused is required under the Tax Code **to pay a tax**, make a return, keep any record, or supply correct and accurate information; and

2. the accused **willfully fails to pay such tax**, make such return, keep such record, or supply such correct and accurate information, or withhold or remit taxes withheld, or refund excess taxes withheld on compensation, at the time or times required by law or regulations.

Demand Was Made
Upon The Accused-appellant
To Pay Deficiency Taxes

The factual findings of the trial court with regard to notice and demand upon the accused to pay his deficiency income and VAT taxes are as follows:

a. The notices of assessment were sent by registered mail to the accused-appellant *(Exhibit "J")* on October 25, 1995;

b. A Warrant of Distraint and Levy *(Exhibit "K")* was served upon the accused-appellant on August 8, 1996; and

c. A demand letter dated October 28, 1999 *(Exhibit D)* was sent to the accused by the BIR, the receipt of which was admitted by the accused-appellant.

The above-mentioned documentary evidence, including the testimonies of the plaintiff-appellee's witnesses, supports the trial court's finding that plaintiff-appellee presented enough evidence to prove that several demands for payment of the deficiency taxes were made upon the accused-appellant. Contrary to the accused-appellant's claim, the trial court's judgment finding him guilty beyond reasonable doubt is not based on Exhibit *"J"* alone. The prosecution presented enough documentary and testimonial evidence that supports the finding that the accused-appellant is guilty beyond reasonable doubt. Even the testimony of the accused himself was taken into account by the trial court when it ruled that "[t]he testimony verily had the effect of weakening not only his defense but his credibility".[30]

Accused-appellant Willfully Failed to Pay the Deficiency Taxes

The Supreme Court had ruled that the word *willful* in a statute means "not merely voluntary but with a bad purpose; in other words,

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30 *Ibid.*

corruptly"[31] and that a voluntary act is a free, intelligent, and intentional act.

Having as premises the knowledge of the accused-appellant that there are assessment notices issued against him (the existence of which was admitted by the accused during the hearing held on December 7, 2000[32]) which were proven to have been sent by registered mail *(Exhibit "J")*; that he received the Warrant of Distraint and Levy *(Exhibit "K")* and the Demand Letter *(Exhibit "D")* demanding payment of the deficiency taxes stated in the assessment notices; and the fact that he admitted that he ignored the demand for payment of the deficiency taxes, there is no other conclusion that can be drawn except that the accused-appellant willfully did not pay his deficiency tax liabilities.

Futhermore, accused-appellant's admission that he paid P50,000 to two BIR Regional District Office employees to settle his tax liabilities without asking for any receipt reveals a conscious effort to evade his 1993 tax liabilities. The act of bribing the BIR employees constitutes an overt act on the part of accused-appellant that showed his deliberate and willful refusal to pay his deficiency tax liabilities to the government. He resorted to bribery instead of fulfilling his legal obligation of paying his deficiency taxes.

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31 *U.S. vs. Ah Chong*, G.R. No. 5272, March 19, 1910 (15 Phil 488).

32 *Order,* December 7, 2000, Crim. Case No. 7491 & 7492, Regional Trial Court, Bataan, Branch 3, RTC Records, p.82.

Government's Right To File Criminal Action Not Barred by Prescription

Relative to accused-appellant's allegation that he did not receive the assessment notices, the accused-appellant invoked the defense of prescription in his Reply-Brief arguing that since the two (2) assessment notices were served upon accused-appellant together with the Letter of Authority on June 10, 1994 (*sic*) and that the information was filed only on February 1, 2000, "[i]t follows that the five (5) years and Five (5) month period have already lapsed when the case was filed for Investigation. It took five (5) years before it was filed in court. Therefore, in both cases, the alleged violations, if ever true, have already prescribed"[33]. Likewise, accused-appellant avers that:

> "The receipt of assessment notice which would have been the best evidence in this case, cannot be based on presumption but rather on proof beyond reasonable doubt to warrant conviction. Besides, such absence of receipt of notice of assessment did not only deprive the accused-appellant of due process of law but more importantly, he was deprived of his right to take the necessary remedial action to correct the matter if ever there was indeed a tax deficiency. Consequently, he was not able to make a protest nor a motion for reconsideration nor reinvestigation because there was no notice of assessment in the first place."[34]

The arguments of the accused-appellant are bereft of merit.

Pursuant to Section 280 of the 1977 National Internal Revenue Code (Section 281, 1997 NIRC), all violations shall prescribe after five years, counted from the day of the commission of the violation or if not

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[33] *Reply Brief for Appellant*, pp. 3-4.
[34] *Ibid.*, p. 5.

known at the time, from its discovery and the institution of judicial proceedings for its investigation and punishment, it reads:

> Sec. 280. Prescription for violations of any provision of this Code. - All violations of any provision of this Code shall prescribe after five years.
>
> Prescription shall begin to run from the day of the commission of the violation of the law, and if the same be not known at the time, from the discovery thereof and the institution of judicial proceedings for its investigation and punishment.
>
> The prescription shall be interrupted when the proceedings are instituted against the guilty persons and shall begin to run again if the proceedings are dismissed for reasons not constituting jeopardy.
>
> The term of prescription shall not run when the offender is absent from the Philippines."

The Supreme Court had interpreted the above-quoted provision of the Tax Code in the case of *Emilio E. Lim, Sr. and Antonia Sun Lim vs. Court of Appeals and People of the Philippines*[35] and ruled that for as long as the period from the discovery and institution of judicial proceedings for its investigation and punishment up to the filing of the information in court does not exceed five (5) years, the government's right to file an action will not prescribe. The Supreme Court ruled as follows:

> "As Section 354 stands in the statute book (and to this day it has remained unchanged) **it would indeed seem that tax cases,** such as the present ones, **are practically imprescriptible** for as long as the period from the discovery *and* institution of judicial proceedings for its investigation and punishment, *up to* the filing of the information in court does not exceed five (5) years.
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> Xxx xxx xxx

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[35] G.R. Nos. 48134-37, October 18, 1990 (190 SCRA 616).

> Unless amended by the Legislature, Section 354 stays in the Tax Code as it was written during the days of the Commonwealth. And as it is, must be applied regardless of its apparent one-sidedness in favor of the Government. In criminal cases, statutes of limitations are acts of grace, a surrendering by the sovereign of its right to prosecute. They receive a strict construction in favor of the Government and limitations in such cases will not be presumed in the absence of clear legislation." (Emphasis supplied)

In the present appeal, it is not disputed that accused-appellant received the Letter of Authority on July 8, 1994, it is illogical that the assessment notices shall be deemed to have been served on the same date. Precisely, the purpose of the Letter of Authority is to apprise the taxpayer that an examination of his books of accounts is forthcoming for the purpose of determining his tax liabilities. Thereafter, the results of the examination shall be stated in a notice of assessment. The assessment notices were sent by registered mail on October 25, 1995. Accused–appellant did not file any protest with the BIR, hence, the assessments became final and unappealable[36]. The finality of the assessment is the reckoning point of the five year prescriptive period. The rationale behind this is that "the offense was committed only after the finality of the assessment coupled with taxpayer's willful refusal to pay the taxes within the allotted period."[37] As borne by the records, the criminal Informations were instituted on February 1, 2000, well within the prescriptive period. In view of all the foregoing, the accused-appellant's reliance on the defense of prescription cannot be sustained.

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36 *Section 229*, National Internal Revenue Code of 1977, as amended.
37 *Tupaz vs. Hon. Ulep and People of the Philippines*, G.R. No. 127777, October 1, 1999 (316 SCRA 118).

We, therefore, see no cogent reason to disturb the finding of the trial court that the criminal action was filed well within the five-year prescriptive period provided in the Tax Code and the right of the government to prosecute the violations committed by the accused-appellant has not prescribed.

Findings of the Trial Court Supported by the Evidence On Record

The argument proffered by the accused-appellant that the Judgment is without any factual and legal basis is untenable. The trial court found that the "evidence for the prosecution suffices to prove that Assessment Notices were sent to the accused through registered mail". This finding is supported by the testimony of Marilou S. Paras, an employee of the Records Section of the BIR Regional Office in San Fernando City, Pampanga. The prosecution presented *Exhibit "J"*, a list showing that a letter was sent to accused on October 25, 1995 duly stamped "REGISTERED" by the post office in San Fernando, Pampanga, dated October 25, 1995. Moreover, the existence of the assessment against the accused was admitted during the hearing held on December 7, 2000 and with respect to the intended testimony of prosecution witness Jeannette C. Jocson, the following were stipulated and admitted in common:

> "1. That there was an assessment on the accused for business and income taxes for taxable year 1993;

2. that there was no reply on the part of the accused, either in form of protest or request for reconsideration or reinvestigation, of said assessment within the prescribed period of thirty (30) days from receipt of the notice of assessment."[38]

As already discussed, We concur with the finding of the Court *a quo* that [i]n 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[39].

The general rule is that the findings of the judge who tried the case and heard the witnesses are not to be disturbed on appeal, unless there are substantial facts and circumstances which have been overlooked and which, if properly considered, might affect the result of the case[40]. This Court, after reviewing the records of RTC Criminal Case Nos. 7491 and 7492, rules that the findings of the Court *a quo* are supported by facts and that the conclusions expressed in the Judgment are in accord with law and jurisprudence. We take exception, however, to the penalty imposed by the trial court.

Penalties Provided By Law

Section 254 of the National Internal Revenue Code of 1977 provides that upon conviction, a fine of not less than ten thousand pesos (₱10,000) and imprisonment of not less than one (1) year but not

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38 *Order*, December 7, 2000, RTC Records, Crim. Cases Nos. 7491 & 7492, p. 82.
39 *Judgment*, p.5
40 Regalado, Remedial Law Compendium, Volume II, Seventh Revised Edition, p.682.

more than ten (10) years shall be imposed. Considering that there were two informations filed, namely: Criminal Case No. 7491 for failure to pay deficiency income tax and Criminal Case No. 7492 for failure to pay deficiency value-added tax, the accused-appellant should have been imposed a fine of ten thousand pesos (P10,000) for each violation and meted one (1) year imprisonment likewise for each violation. The law used the conjunction "and" hence both the fine and imprisonment shall be imposed for every violation.

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), 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.

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

WE CONCUR:

(With Dissenting Opinion)
ERLINDA P. UY
Associate Justice

OLGA PALANCA-ENRIQUEZ
Associate Justice

ATTESTATION

I attest 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.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chair, Second Division

CERTIFICATION

I hereby certify that the decision was reached after due consultation with the members of the Division of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Justice