REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

****

BANFF REALTY & DEVELOPMENT CORP., Petitioner,	**CTA Case No. 8803**
	Members:
- versus -	**DEL ROSARIO,** *Chairperson*, **UY,** and **MINDARO-GRULLA,** *JJ.*
COMMISSIONER OF INTERNAL REVENUE, Respondent.	***Promulgated:*** MAY 23 2017 ; 9:15 pm

x - x

DECISION

UY, J.:

Before this Court is the *Petition for Review* filed on April 14, 2014 by Banff Realty & Development Corporation, petitioner, against the Commissioner of Internal Revenue, respondent, praying to set aside and to declare as null and void *ab initio* the Final Assessment Notice/Demand Letter No. 39-B08-07 dated March 11, 2013 issued by the latter.

Petitioner Banff Realty & Development Corp. is a company duly-organized and existing under and by virtue of Philippine laws, with principal office address at #34 Esteban Abada St., Loyola Heights, Quezon City.[1] It is primarily engaged in the business of real estate development, and is a duly-registered taxpayer with the

---

[1] Par. 1, Admitted Facts and Circumstances, Joint Stipulation of Facts and Issues (JSFI), in relation to Par. 1, Petition for Review, Docket, pp. 167 and 14.

Bureau of Internal Revenue (BIR) under Tax Identification No. 002-831-897-000.[2]

On the other hand, respondent Commissioner of Internal Revenue is the head of agency of the BIR, with official address at the BIR National Office Building, BIR Road, Diliman, Quezon City.[3] He is authorized by law to issue deficiency tax assessments, as well as to decide and act on protests thereto, and was the one who actually issued the questioned Final Assessment against petitioner.[4]

On April 15, 2008, petitioner filed before the BIR its Income Tax Return, together with its corresponding Financial Statements, for fiscal year 2007.[5]

Thereafter, or on July 25, 2008, petitioner was served with Letter of Authority No. 00039537 by the BIR, whereby petitioner was formally informed of the latter's intention to examine petitioner's books of accounts for the year 2007.[6]

Sometime in February 2011, the BIR filed a criminal complaint for alleged violation of Sections 5 and 11 of the Tax Reform Act of 1997 against petitioner's President, namely, Ramon A. Syhunliong, for the latter's putative failure to comply with the aforesaid subpoena *duces tecum*, which case was filed before the Office of the City Prosecutor of Quezon City, and docketed as XV-03-INV-11C-01993.[7]

Considering, however, that petitioner had fully complied with the said subpoena *duces tecum* of the BIR, the Office of the City Prosecutor of Quezon City issued the Resolution dated July 12, 2011, dismissing the aforecited criminal complaint against petitioner's President.[8]

---

[2] Par. 1, Admitted Facts and Circumstances, JSFI, in relation to Par. 1.1, Petition for Review, Docket, pp. 167 and 15.
[3] Par. 1, Admitted Facts and Circumstances, JSFI, in relation to Par. 2, Petition for Review, Docket, pp. 167 and 15.
[4] Par. 1, Admitted Facts and Circumstances, JSFI, in relation to Par. 2.1, Petition for Review, Docket, pp. 167 and 15.
[5] Par. 3, Petition for Review, vis-à-vis Par. 1, Answer, Docket, pp. 15 and 63; Exhibits "P-5", "P-6", and "R-7", BIR Records, p. 79.
[6] Par. 4, Petition for Review, vis-à-vis Par. 1, Answer, Docket, pp. 15 and 63; Refer also to Par. 2, Admitted Facts and Circumstances, JSFI, Docket, p. 167.
[7] Par. 5, Petition for Review, vis-à-vis Par. 1, Answer, Docket, pp. 15 to 16, and 63.
[8] Par. 6, Petition for Review, vis-à-vis Par. 1, Answer, Docket, pp. 16 and 63.

Subsequently, respondent issued a Preliminary Assessment Notice against petitioner[9], and thereafter, the Formal Letter of Demand (FLD) No. 39-B08-0 dated March 11, 2013,[10] which was received by petitioner on March 12, 2013.[11] Based on this FLD, petitioner was assessed of deficiency income tax in the aggregate amount of ₱18,855,340.68 and of deficiency expanded withholding tax in the aggregate amount of ₱2,587,623.71, respectively computed as follows:

I. DEFICIENCY INCOME TAX

Taxable income per Income Tax Return (ITR)		₱32,064,192.12
Add: Adjustments per investigation:		
Salaries and wages not subjected to withholding tax	₱ 546,814.40	
Income payments not subjected to withholding tax	3,075,530.10	
Unaccounted source of cash	682,286.47	
Disallowed personal expenses	15,417,156.36	
Disallowed expenses	341,351.94	
Unsupported representation and entertainment expense	1,500,000.00	21,563,139.27
Taxable Income per Investigation		**₱53,627,331.39**
Income tax due thereon		₱18,769,565.99
Less: Tax credits/payments:		
Unexpired excess of prior year's MCIT over NIT	₱ 49,146.27	
Prior years' excess credits	554,682.48	
Creditable withholding tax	10,569,133.05	
Payments	49,505.44	11,222,467.24
Deficiency Income Tax		₱ 7,547,098.75
Add: 50% Surcharge	₱ 3,773,549.37	
20% Interest p.a. (04.16.2008 to 04.11.13)	7,534,692.56	11,308,241.93
TOTAL AMOUNT DUE		**₱18,855,340.68**

II. DEFICIENCY EXPANDED WITHHOLDING TAX

	Amount	EWT rate	Amount due
Payments by top 20,000 Corp. to reg. supplier of services / contractors / subcontractors	₱ 3,015,530.10	2%	₱ 60,310.60
Payments by top 20,000 Corp. to reg. supplier of goods	82,360,714.85	1%	823,607.15
Professional fees	60,000.00	15%	9,000.00
Additions to property, plant and equipment	12,254,580.50	1%	122,545.81
Deficiency Expanded Withholding Tax			₱ 1,015,463.56
Add: 50% Surcharge		₱ 507,731.78	
20% Interest p.a. (01.16.2008 to 04.11.13)		1,064,428.37	1,572,160.15
TOTAL AMOUNT DUE			**₱ 2,587,623.71**

[9] Exhibits "P-3" and "R-2"; BIR Records, pp. 563 to 569.
[10] Exhibits "P-4" and "R-3-a"; BIR Records, pp. 570 to 580.
[11] Exhibits "P-11", Docket, pp. 225 to 226; BIR Records, pp. 604 to 605.

On April 11, 2013, petitioner filed its Letter-Protest dated April 11, 2013, questioning the said FLD on the ground of prescription.[12]

After the BIR denied its Letter-Protest dated April 11, 2013, petitioner was constrained to file the instant *Petition for Review* before this Court on April 14, 2014.[13]

Respondent filed his *Answer* on June 24, 2014,[14] interposing the following defenses, to wit:

> "3. Herein petitioner is presumed to have received the Final Assessment Notice, Formal Demand Letter and Details of Discrepancies. As such he is presumed to have been fully appraised of the facts and the Law upon the Final Assessment was based.
>
> 4. Records disclosed that a Letter of Authority dated July 18, 2008 has been duly issued for the investigation of the petitioner's internal revenue tax liabilities for the calendar year ending December 31, 2007; that the same has been duly served to and received by each authorized representative on June 25, 2008; that, pursuant thereto, you were requested to proceed for tax audit purposes, your books of accounts and other pertinent underlying accounting records, in order that your correct tax liability for the aforesaid taxable year may be determined; that, however, despite repeated requests for the presentation of the said records, you continuously failed to present the same for audit purposes, in violation of Sec. 235 of the National Internal Revenue Code of 1997, which provides that 'The said books and records shall be subject to examination and inspection by internal revenue officers;' that, in view of the continued refusal to present the said books and records for the aforesaid purpose, a subpoena duces tecum was issued by this office, dated March 11, 2010, pursuant to Sec. 5 of the Tax Code requiring that the aforesaid records be presented for audit purpose and advising that any

---

[12] *Supra.*
[13] Par. 3, Admitted Facts and Circumstances, JSFI, in relation to Par. 10, Petition for Review and Par. 1, Answer, Docket, pp. 167, 17 and 63.
[14] Docket, pp. 63 to 65.

violation thereof shall be punishable under 266 of the Code; that the said subpoena was duly served to and received by you or your duly authorized representative on March 18, 2010; that, however, despite thereof, the aforesaid books and records have not been presented for audit purposes, in violation of law; that, in view of the foregoing, this office was constrained to institute criminal action against you for violation of summons.

5. In the Supreme Court decision, in the case of Mariano Zamora vs. Collector of Internal Revenue, held that it is the legal obligation of the taxpayer to support his tax return filed with corresponding accounting records, otherwise, the Commissioner of Internal Revenue or his authorized representative may assess the proper tax based on best evidence obtainable, in which case, the examination may be made through estimate or approximation, bearing heavily if he chooses, upon the taxpayer whose inexactitude is of his own making.

6. Finally, settled in the rule that the tax assessments by tax examiners are presumed correct and made in good faith (Cagayan Robina Sugar Milling Co. vs. Court of Appeals, 342 SCRA 671). It is the taxpayer and not the Bureau of Internal Revenue who has the duty of providing otherwise. Equally settled is the rule that in the absence of proof of any irregularities in the performance of official duties, an assessment will not be disturbed. All presumptions are in favor of tax assessments. Dereliction on the part of petitioner to satisfactorily overcome the presumption of regularity and correctness of the assessment will justify the judicial upholding of said assessment notices."

Pre-Trial Conference was initially set on September 4, 2004.[15] However, after several motions filed by the parties, Pre-Trial Conference was held on June 18, 2015.[16] Respondent filed his *Pre-Trial* Brief on October 21, 2014;[17] while petitioner's *Pre-Trial Brief* was filed on November 24, 2014.[18]

---

[15] Notice of Pre-Trial Conference, Docket, p. 66.

[16] Orders dated August 29, 2014, November 24, 2014, January 27, 2015, and April 15, 2015 Docket, pp. 73, 89, 93, and 105, respectively.

[17] Docket, pp. 74 to 81.

[18] Docket, pp. 84 to 88.

By agreement of both counsels, the parties filed their *Joint Stipulation of Facts and Issues* (*JSFI*) on August 18, 2015.[19]

In the Resolution dated September 7, 2015,[20] the Court ordered the parties to file a *Supplemental JSFI* in order that the parties may comply with the Court's directive to state the complete list of the parties' exhibits with the correct mode of markings, the hearing dates, and the witnesses to be presented on the dates agree upon for their presentation, pursuant to the Resolution dated June 18, 2015.

Thus, a *Supplemental JSFI* was filed by the parties on November 9, 2015.[21] In the Resolution dated November 13, 2015,[22] the Court approved the parties' *JSFI* and *Supplemental JSFI*, and Pre-Trial was terminated. On December 1, 2015, the Court issued its Pre-Trial Order on the basis thereof.[23]

Subsequently, respondent submitted the BIR Records of petitioner for taxable year 2007, consisting of 642 pages embodied in one (1) folder.[24]

During trial, the parties presented their respective testimonial and documentary evidence. Petitioner presented two (1) witnesses: Emmanuel R. Garcia and Revenue Officer Flordeliza B. Reyes. On the part of respondent recalled Revenue Officer Flordeliza B. Reyes and presented her also as respondent's witness.

After respondent rested his case, the parties were given a period of thirty (30) days from receipt of the Resolution dated September 26, 2016 within which to file their respective memorandum.[25] Petitioner filed its *Memorandum* on November 7, 2016,[26] while respondent filed his *Memorandum* on November 28, 2016.[27]

---

[19] Docket, pp. 167 to 168.
[20] Docket, pp. 178 to 179.
[21] Docket, pp. 232 to 236.
[22] Docket, p. 241.
[23] Docket, pp. 252 to 258.
[24] Docket, pp. 273 to 276.
[25] Resolution dated September 26, 2016, Docket, pp. 358 to 359.
[26] Docket, pp. 368 to 379.
[27] Docket, pp. 380 to 393.

Thus, in the Resolution dated December 2, 2016,[28] the instant case was declared submitted for decision.

Hence, this Decision.

THE ISSUE

The parties submitted the following issue for the resolution of this Court, to wit:

> **"WHETHER OR NOT THE HEREIN QUESTIONED FINAL ASSESSMENT OF THE RESPONDENT IS VALID AND/OR BINDING ON THE PETITIONER."**[29]

Petitioner's arguments:

Petitioner argues that the BIR Final Assessment has already long prescribed by operation of law. It points out that considering that its Income Tax Return for the year 2007 was filed on April 15, 2008, the 3-year period set forth in Section 203 of the NIRC for issuing any deficiency tax assessment against the petitioner for the year 2007 ended or expired on April 15, 2011.

According to petitioner, the alternative 10-year prescriptive period has no application in this case considering the utter absence of fraud.

Furthermore, petitioner contends that there is neither legal nor factual basis for the said Final Assessment.

Respondent's counter-arguments:

Respondent, on the other hand, avers that his Final Assessment issued against petitioner is valid and with factual and legal bases.

Moreover, respondent emphasizes that the assessment against petitioner has not prescribed, hence, petitioner is liable for the

[28] Docket, p. 395.
[29] JSFI, Docket, p. 168.

deficiency income tax assessment and expanded withholding taxes in the aggregate amount of ₱21,442,964.39, plus increments.

THE COURT'S RULING

The Court finds merit in the instant *Petition for Review.*

Sections 203 and 222(a) of the National Internal Revenue Code (NIRC) of 1997 provide as follows:

> "SEC. 203. *Period of Limitation Upon Assessment.* — **Except as provided in Section 222, internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return**, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: *Provided*, That in a case where a return is filed beyond the period prescribed by law, the three (3)- year period shall be counted from the day the return was filed. **For purposes of this Section, a return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day.**" *(Emphases supplied)*
>
> "SEC. 222. *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* —
>
> (a) **In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed** or a proceeding in court for the collection of such tax may be filed without assessment, **at any time within ten (10) years after the discovery of the falsity, fraud or omission**: *Provided*, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof." *(Emphasis supplied)*

In *Commissioner of Internal Revenue vs. Fitness By Design, Inc.*,[30] the Supreme Court elucidated the foregoing provisions, to wit:

---

[30] G.R. No. 215957, November 9, 2016

"The prescriptive period in making an assessment depends upon whether a tax return was filed or whether the tax return filed was either false or fraudulent. When a tax return that is neither false nor fraudulent has been filed, the Bureau of Internal Revenue may assess within three (3) years, reckoned from the date of actual filing or from the last day prescribed by law for filing. However, in case of a false or fraudulent return with intent to evade tax, Section 222(a) provides:

> Section 222. Exceptions as to Period of Limitation of Assessment and Collection of Taxes.—
>
> (a) In the case of a false or fraudulent return with intent to evade tax or of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at *any time within ten (10) years after the discovery of the falsity, fraud or omission: Provided*, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof. (Emphasis supplied)

In *Aznar v. Court of Tax Appeals*,[31] this Court interpreted Section 332 (now Section 222[a] of the National Internal Revenue Code) by dividing it in three (3) different cases: first, in case of false return; second, in case of a fraudulent return with intent to evade; and third, in case of failure to file a return. Thus:

> Our stand that the law should be interpreted to mean a separation of the three different situations of false return, fraudulent return with intent to evade tax and failure to file a return is strengthened immeasurably by the last portion of the provision which aggregates the situations into three different classes, namely 'falsity', 'fraud' and 'omission.'

This Court held that there is a difference between 'false return' and a 'fraudulent return.' A false return

[31] 157 Phil. 510 (1974) [Per J. Esguerra, First Division]

simply involves a 'deviation from the truth, whether intentional or not' while **a fraudulent return 'implies intentional or deceitful entry with intent to evade the taxes due.'**

<u>Fraud is a question of fact that should be alleged and duly proven.</u> 'The willful neglect to file the required tax return or the fraudulent intent to evade the payment of taxes, considering that the same is accompanied by legal consequences, cannot be presumed.' Fraud entails corresponding sanctions under the tax law. Therefore, it is indispensable for the Commissioner of Internal Revenue to include the basis for its allegations of fraud in the assessment notice." *(Emphases and underscoring supplied)*

In this case, it is clear that the basis for the subject assessment is the supposed fraud committed on the part of petitioner. Respondent's lone witness, Flordeliza B. Reyes, testified as follows:

"ATTY. CRUZ

Q So in other words, what you are saying is that in this case, the applicable prescriptive period is ten (10) years, is that your point?

MS. REYES

A Yes Sir.

ATTY. CRUZ

Q Now, when did you first determine, number one, that there was fraud in this case, in the submission of the questioned Tax Returns?

MS. REYES

A On July 5, 2011.

ATTY. CRUZ

Q You are sure of that?

MS. REYES

A Yes Sir.

xxx xxx xxx

ATTY. CRUZ

Q Now, you said earlier that as early as 2011, you already determine that there was fraud, correct?

MS. REYES

A Yes.

ATTY. CRUZ

Q And therefore as early as 2011, it was already your position that the ten-year prescriptive period applies in this case?

MS. REYES

A Yes.

xxx xxx xxx

JUSTICE DEL ROSARIO

All right. If we consider the fraud you were saying, you considered that the fraud was committed simply because there were supposedly overstatement of deductions, correct?

MS. REYES

A Yes, your Honors.

JUSTICE DEL ROSARIO

And the supposed overstatement of deductions is also based on the Financial Statement attached to the Income Tax Return?

MS. REYES

A Based on the Financial Statement and their submitted documents.

JUSTICE DEL ROSARIO

So in other words, the conclusion of fraud is basically because of substantial over deductions only?

MS. REYES

A Yes, your Honors.

JUSTICE DEL ROSARIO

Thank you so much Ms. Reyes."[32]

However, apart from this bare assertion of fraud, respondent has not clearly established the existence thereof. As already stated, fraud must not only be alleged; it must also be established.[33] Fraud is a serious charge and, to be sustained, it must be supported by clear and convincing proof.[34] Thus, since respondent fails to show clear and convincing proof of the alleged fraud, the same cannot be sustained.

It must be pointed out that the mere overstatement of deductions which results in the understatement of tax is not by itself constitutive of fraud.

Relative thereto, in the very recent case of *Commissioner of Internal Revenue vs. Philippine Daily Inquirer*,[35] the Supreme Court said:

> "In *Commissioner of Internal Revenue v. Javier*,[36] this Court ruled that fraud is never imputed. The Court stated that it will not sustain findings of fraud upon circumstances which, at most, create only suspicion. **The Court added that the mere understatement of a tax is**

---

[32] Transcript of Stenographic Notes at the hearing held on June 28, 2016, pp. 22 to 23, and 42 to 43.
[33] *Republic of the Philippines vs. Lim De Yu*, G.R. No. L-17438, April 30, 1964.
[34] *Republic of the Philippines vs. Ker & Company, Ltd.*, G.R. No. L-21609, September 29, 1966.
[35] G.R. No. 213943, March 22, 2017.
[36] 276 Phil. 914 (1999).

not itself proof of fraud for the purpose of tax evasion. The Court explained:

> x x x. The fraud contemplated by law is actual and not constructive. **It must be intentional fraud, consisting of deception willfully and deliberately done or resorted to in order to induce another to give up some legal right.** Negligence, whether slight or gross, is not equivalent to fraud with intent to evade the tax contemplated by law. **It must amount to intentional wrong-doing with the sole object of avoiding the tax.** x x x." *(Emphases supplied)*

Thus, considering that fraud is not duly proven in this case, the period of limitation is three (3) years from the filing of the return, pursuant to Section 203 of the NIRC of 1997.[37]

Correspondingly, anent the subject deficiency income tax, respondent's right to assess the same is only up to April 15, 2011, *i.e.*, the end of the three-year period from the filing of petitioner's Income Tax Return for fiscal year 2007 on April 15, 2008.[38]

And as for the deficiency expanded withholding tax, the period of limitation on respondent's right to assess is respectively shown below:

Period covered	**Date of actual filing of BIR Form 1601-E**	**Last day prescribed by law to file the return[39]**	**Last day to assess under Section 203 of the NIRC of 1997**
January 2007	February 3, 2007[40]	February 10, 2007	February 10, 2010
February 2007	March 10, 2007[41]	March 10, 2007	March 10, 2010
March 2007	April 12, 2007[42]	April 10, 2007	April 12, 2010
April 2007	May 10, 2007[43]	May 10, 2007	May 10, 2010
May 2007	June 9, 2007[44]	June 10, 2007	June 10, 2010

---

[37] Refer to *Republic of the Philippines vs. Lim De Yu*, G.R. No. L-17438, April 30, 1964.
[38] Par. 3, Petition for Review, vis-à-vis Par. 1, Answer, Docket, pp. 15 and 63; Exhibit "P-6", BIR Records, p. 79.
[39] Section 58(A), NIRC of 1997; Cf.: Section 2.58(A)(2), Revenue Regulations No. 2-98.
[40] BIR Records, p. 344.
[41] BIR Records, p. 343.
[42] BIR Records, p. 342.
[43] BIR Records, p. 341.

June 2007	July 6, 2007[45]	July 10, 2007	July 10, 2010
July 2007	August 10, 2007[46]	August 10, 2007	August 10, 2010
August 2007	September 13, 2007[47]	September 10, 2007	September 13, 2010
September 2007	October 11, 2007[48]	October 10, 2007	October 11, 2010
October 2007	November 3, 2007[49]	November 10, 2007	November 10, 2010
November 2007	December 10, 2007[50]	December 10, 2007	December 10, 2010
December 2007	January 10, 2008[51]	January 25, 2008	January 25, 2011

Considering that petitioner received the FLD No. 39-B08-0 dated March 11, 2013[52] **only on March 12, 2013**[53], the subject deficiency income tax and deficiency expanded withholding tax assessments have prescribed. Correspondingly, the Petition for Review must necessarily be granted.

WHEREFORE, in light of the foregoing considerations, the instant *Petition for Review* is **GRANTED** on the ground of prescription. Accordingly, the Final Assessment Notice/Demand Letter No. 39-B08-07 dated March 11, 2013 issued by respondent is hereby declared **VOID**, and thereby, **CANCELLED** and **SET ASIDE**.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

ROMAN G. DEL ROSARIO
Presiding Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

---

44 BIR Records, p. 340.
45 BIR Records, p. 339.
46 BIR Records, p. 337.
47 BIR Records, p. 336.
48 BIR Records, p. 335.
49 BIR Records, p. 334.
50 BIR Records, p. 333.
51 BIR Records, p. 332.
52 Exhibits "P-4" and "R-3-a"; BIR Records, pp. 570 to 580.
53 Exhibits "P-11", Docket, pp. 225 to 226.

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.

ROMAN G. DEL ROSARIO
Chairperson
Presiding Justice