Republic of the Philippines
COURT OF TAX APPEALS
Quezon City

En Banc

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

- versus -

GALLARDO AND ASSOCIATES,

Respondent.

CTA EB Case No. 1043
(CTA Case No. 7920)

Members:
DEL ROSARIO, *P.J.*,
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
COTANGCO-MANALASTAS, and
RINGPIS-LIBAN, *JJ.*

Promulgated:
JUN 1 0 2014 9:00 a.m.

x- -x

DECISION

CASANOVA, J.:

This is an appeal, by way of Petition for Review,[1] filed on July 25, 2013, by petitioner- Commissioner of Internal Revenue, seeking the reversal of the November 12, 2012 Decision[2] (Assailed Decision) and June 13, 2013 Resolution[3] (Assailed Resolution) of the Court of Tax Appeals (CTA) Special First Division in CTA Case No.7920, entitled *"Gallardo and Associates vs. Commissioner of Internal Revenue"*.

The factual antecedents of the case as found by the CTA Special First Division are as follows:

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[1] CTA En Banc Rollo, pp. 5-16.
[2] Annex "A" to the Petition for Review, Ibid, pp. 17-31.
[3] Annex "B" to the Petition for Review, Id, pp. 32-35.

"Petitioner (respondent herein) is a domestic corporation duly organized and existing under the laws of the Philippines, while respondent (petitioner herein) is the duly appointed Commissioner of the Bureau of Internal Revenue (BIR), who is vested with the power to decide tax cases, including disputed assessment of internal revenue taxes.

On 03 January 2007, petitioner received a Preliminary Assessment Notice (PAN) dated 29 December 2006, wherein the BIR informed petitioner that it had a tax liability of P24,074,674.44, inclusive of surcharge and interests, for taxable year 2003, representing deficiency income, value-added tax, expanded withholding taxes and withholding taxes on compensation.

On 18 January 2007, petitioner timely filed a protest to the PAN. Three days prior to the filing of the protest, however, or on 15 January 2007, a Final Assessment Notice (FAN) was issued by the BIR and was attempted to be served on said date on Ms. Sheryl Lim, the petitioner's Accounting and Administrative Assistant, which service was not effected due to Ms. Lim's refusal to receive the copy of the FAN. As a consequence of the failed attempt to serve the same, a copy of the FAN was left in the premises of petitioner by Revenue Officer Ryan Dagalangit, with notation on said FAN of 'refused to receive by Sheryl Lim, Accounting Admin Assistant'.

On 02 March 2007, petitioner received a letter from the BIR, which stated that a FAN has already been issued as early as 15 January 2007 and that the BIR is considering petitioner's protest to the PAN as its protest against the issued FAN.

On 07 March 2008, petitioner availed of the benefits of the Tax Amnesty Program under Republic Act No. 9480.

On 19 March 2009, petitioner received the Final Decision on Disputed Assessment (FDDA) from the BIR, which acknowledged petitioner's availment of the benefits of the tax amnesty program but nevertheless still found it liable to deficiency expanded withholding tax, as follows:

EXPANDED WITHHOLDING TAX

Income Payment	Per FS	Per Alphalist	Discre-pancy	Tax Rate	Tax Due
Security and Janitorial	62,856.88	-	62,856.88	2%	1,257.14
Repairs and Maintenance	321,186.36	-	321,186.36	2%	6,423.73
Rental	1,627,761.25	1,502,464.00	125,297.25	5%	6,264.86
Payment to Mass Media Provider	-	-	107,047,096.87	2%	2,140,941.94
Total					**2,154,887.67**

Basic Tax Due	**P2,154,887.67**
Add: Interest (1.16.04 to 4.13.09)	**2,258,794.58**
	P4,413,682.25

As the last paragraph of the FDDA expressly stated that —

> *[t]his is our Final decision. If you are not agreeable, you may appeal this final decision with the Court of Tax Appeals within thirty (30) days from date of receipt hereof, otherwise, this decision shall become final, executory and demandable.*

petitioner timely filed its Petition for Review with the Court on 17 April 2009.

On 26 May 2009, petitioner filed an Urgent Motion for Suspension of Collection of Tax. Respondent, in answer thereto, filed a Manifestation with Comment/Opposition (Re: Urgent Motion for the Suspension of Collection of Tax dated May 25, 2009) on 19 June 2009, and to which petitioner filed its Comment (Re: Respondent's Manifestation with Comment/Opposition) on 29 June 2009.

The Court in a Resolution promulgated on 29 July 2009 denied the Motion for Suspension of Collection of Tax for lack of merit.

The Answer to the Petition for Review was filed by the respondent on 24 June 2009. Respondent's special and affirmative defenses that were raised therein may be summed up into:

1. The Petition for Review states no cause of action since there is no disputed assessment to speak of considering that the amount being collected by the BIR has long become final, executory and demandable. Petitioner failed to substantiate by evidence its protest within the sixty (60) day period provided by the 1997 National Internal Revenue Code (NIRC). For such failure of petitioner to submit supporting documents within the reglementary period, the assessment from the BIR has become final and executory.

2. Petitioner's allegations that the formal assessment is void for failure to state the facts, the law, rules and regulations or jurisprudence is totally false because the notice that was sent to the petitioner contained the following, to wit:

   'Verification disclosed that you failed to withhold the required expanded withholding tax on some of your income payments as shown in Schedule 1, together with the payments made to mass media providers and others, in clear violation of Section 57 of the NIRC, as amended, as implemented by Section 2.57.2 of Revenue Regulations No. 2-98.'

   Clearly, the respondent was able to apprise the petitioner of the nature and the basis of the assessment. This was evident in the way the petitioner was able to discuss the same in its answer to the PAN, which was eventually treated as its protest to the FAN.

3. The letter that was supposed to be the answer or protest of the petitioner to the FAN did not even mention that it is requesting either a reinvestigation or a reconsideration as required by Revenue Regulations 12-85 hence the same

is not a valid protest and shall render the FAN <u>final and unappealable.</u>

4. The argument of petitioner that the FAN is void for having been issued contrary to the due process requirements, because the fifteen (15) day reglementary period given the petitioner to file its answer or protest was not followed, is not totally true because the petitioner was not deprived of its right to protest the assessment. In citing the case of *Security Bank Corporation vs. Commissioner of Internal Revenue, CTA Case No. 6564, 28 November 2006,* the respondent claims that a PAN may or may not even be protested by the taxpayer and failure to protest the same shall not make the PAN final and unappealable. Such failure only paves the way for the issuance of a FAN.

Petitioner filed a Reply (Re: Respondent's Answer dated 11 June 2009) on 26 June 2009. The Reply reiterated that the FAN was not received by the petitioner from the BIR, whether actually or constructively. Thus because of respondent's failure to validly serve the FAN, the assessments therein never became final and executory. Moreover, respondent's right to assess the deficiency tax for taxable year 2003 has already prescribed.

In the meantime, petitioner filed a Motion for Reconsideration of the Court's Resolution dated 29 July 2009 (not 30 July 2009) on 07 August 2009, seeking for the Reconsideration and reversal of the said Resolution of the Court that denied petitioner's Urgent Motion to Suspend Collection. A Comment/Opposition thereto and a corresponding Reply to such Comment/Opposition were filed by the respondent on 14 October 2009 and by petitioner on 19 October 2009, respectively.

On 27 November 2009, the Court promulgated a Resolution lifting and setting aside its earlier 29 July 2009 Resolution, thereby granting petitioner's motion to suspend any collection by the BIR of the assessed deficiency taxes.

During the pendency of the motion to reconsider the Court's denial of petitioner's motion to suspend the collection of tax, the parties filed a Joint Stipulation of Facts and Issues on 17 September 2009, which the Court approved in a Resolution dated 22 September 2009.

During trial and before resting its case, petitioner filed on 21 May 2010 a Motion for Summary Judgment and/or Early Resolution, submitting as grounds:

A. The Final Assessment Notice is void for failure to state the facts and the law on which the assessment on deficiency withholding taxes is based.

B. The FAN is void as it was issued in violation of petitioner's right to due process. It was issued even before the expiration of the period to file a protest.

C. The action to assess and collect deficiency withholding taxes for 2003 is barred by prescription.

After the Court received a copy of the Manifestation with Comment/Opposition, posted through registered mail by respondent on 16 June 2010, the Court resolved to deny petitioner's motion for lack of merit.

Upon a Motion for Reconsideration by petitioner and an opposition by respondent, the Court affirmed its earlier Resolution and denied petitioner's Motion for Reconsideration. In a Resolution dated 15 October 2012, the Court explained that —

> Perusal alone of the grounds relied upon by petitioner reveals that there are genuine issues that need to be resolved in a full blown trial. Summary judgment is improper and cannot take the place of a trial since the facts as pleaded by the parties are contested. Obviously, the lack of valid receipt of the FAN by petitioner which respondent claimed to have been constructively delivered in accordance with Section 3.1.7 of [Revenue Regulations (RR)] 12-99, is a factual issue that

needs presentation of evidence not only by petitioner but also by respondent.

Trial thereafter continued with petitioner filing its Formal Offer of Evidence on 25 May 2011 and the respondent via registered mail on 19 January 2012.

Petitioner submitted its Memorandum on 08 May 2012 and the case was submitted for decision on 11 July 2012, sans any Memorandum from respondent despite notice.

In a Decision promulgated on November 12, 2012, the Special First Division granted herein respondent Gallardo and Associates' Petition for Review in this wise:

> "**WHEREFORE,** the instant Petition for Review is hereby GRANTED. Accordingly, the assessment for deficiency withholding tax for taxable year 2003, inclusive of interest thereon, in the total amount of P4,413,682.25 is hereby CANCELLED and SET ASIDE for being issued beyond the three-year prescriptive period under Section 203 of the NIRC of 1997.
>
> **SO ORDERED.**"

Petitioner herein filed her Motion for Reconsideration[4] on December 7, 2012, but the same was denied for lack of merit in a Resolution[5] promulgated on June 13, 2013. Thus, this Petition for Review filed before the Court En Banc on July 25, 2013.

On November 5, 2013, respondent filed its Comment/Opposition (Re: Petition for Review dated 24 July 2013).[6] Thereafter, the case was submitted for Decision taking into consideration the Memorandum for the Respondent, filed on January 21, 2014, sans petitioner's Memorandum per Records Verification[7] dated March 4, 2014.

Hence, this Decision.

[4]Annex "C" to the Petition for Review, Id, pp. 36-42.
[5] See Footnote No. 3.
[6] Id, pp. 61-69.
[7] Id, p. 94.

In this Petition, petitioner raised the following grounds for the resolution of this Court:

1. **THE CTA -1ST DIVISION ERRED IN HOLDING THAT PETITIONER'S RIGHT TO COLLECT THE SUBJECT DEFICIENCY WITHHOLDING TAX ASSESSMENT HAS ALREADY PRESCRIBED.**

2. **THE CTA-1ST DIVISION ERRED IN HOLDING THAT THERE WAS IMPROPER CONSTRUCTIVE SERVICE OF THE FORMAL ASSESSMENT NOTICE (FAN) DATED 15 JANUARY 2007 TO HEREIN RESPONDENT.**

3. **THE CTA-1ST DIVISION ERRED IN NOT HOLDING THAT PETITIONER ACTUALLY GRANTED THE REQUEST FOR REINVESTIGATION AND THE RESPONDENT WAS MADE AWARE OF THE ACTION TAKEN ON ITS REQUEST; HENCE, IT EFFECTIVELY SUSPENDED THE RUNNING OF THE PRESCRIPTIVE PERIOD FOR THE COLLECTION OF TAXES.**

Anent the first issue, petitioner posits that she treated respondent's letter-protest to the PAN as protest to the FAN and, the same was, likewise, considered as a request for reinvestigation. Accordingly, the grant of said request for reinvestigation resulted in the issuance of the Final Decision on Disputed Assessment and also in the suspension of the running of the prescriptive period provided under Section 203 of the 1997 NIRC, as amended. Thus, she is of the considered view that the withholding tax assessment issued by petitioner against respondent has not yet prescribed.

However, upon perusal of the records, the Court *En Banc* observed that it was only in this appeal that petitioner argued for the first time the suspension of the prescriptive period on account of the grant of respondent's alleged request for reinvestigation. From the very beginning, petitioner's position on the foregoing matter was this: "x x x the <u>letter</u> that was supposed to be the answer or protest of the petitioner to the Formal Assessment notice (FAN) <u>did not even mention that they are requesting either a reinvestigation or reconsideration</u> as required by **<u>Revenue Regulation 12-85</u>** hence the same is not a valid protest and shall render the FAN **<u>final and unappealable</u>** ***(Security***

Bank Corporation vs. Commissioner of Internal Revenue, CTA Case No. 6564, November 28, 2006)."[8]

Jurisprudence provides that a party is bound by the theory he adopts and by the cause of action he stands on. He cannot be permitted, after having lost thereon, to repudiate his theory and cause of action, and, thereafter, adopt another and seek to re-litigate the matter anew either in the same forum or on appeal. Having pursued one theory and lost thereon, petitioner may no longer pursue another inconsistent theory without thereby trifling with court processes and burdening the courts with endless litigation.[9]

Anent the allegation of false returns filed by respondent, suffice it to say that the same has already been passed upon in the assailed Decision in this wise:

> " x x x. Unfortunately, neither did respondent submit any proof that the return filed by petitioner was false or fraudulent with an intention to evade tax. The Court cannot conclude as true what the respondent merely alleges without anything to support such conclusion. Mere conjectures as to fraud will not be upheld by this Court. The fraud contemplated by law must be actual and not constructive. It must be intentional, consisting of deception willfully and deliberately done or resorted to in order to induce another to give up some right.
>
> Thus, finding no reason to apply the exception, petitioner's case falls under the general rule and should therefore be assessed within three years from the last day prescribed by law for the filing of the return."

Lastly, with regard to petitioner's argument that there was a valid constructive service of the FAN and that respondent is already estopped from raising the issue of failure to receive the FAN, the same had been squarely settled by the Court in Division when they aptly stated in the Assailed Decision the following findings:

> "However, evidence prove that the FAN was not personally served on the taxpayer or any duly authorized representative. The FAN was attempted to be served on Ms. Sheryl Lim, an Accounting Admin Assistant of petitioner,

[8] Par. 20 of CIR's Answer filed on June 15, 2009, Division Docket (Vol. I), pp. 94-95.

[9] British American Tobacco vs. Jose Isidro N. Camacho, et al., G.R. No. 163583, April 15, 2009, citing the case of Bashier v. Commission on Elections, G.R. No. L-33692, February 24, 1972.

and indisputably not an authorized representative of the taxpayer. This fact remained uncontroverted. Thus, her refusal to acknowledge receipt of the FAN will not give rise to the occasion for respondent to be able to constructively serve the FAN by *leaving the same in the premises of petitioner with this fact of constructive service being attested to, witnessed and signed by at least two (2) revenue officers other than the revenue officer who constructively served the same.* Needless to state, the act of Revenue Officer Dagalangit in leaving the FAN with Ms. Lim, witnessed by two other revenue officers, is immaterial given the basis thereof.

Further, granting that respondent believes that the constructive service on petitioner was valid, she still failed to adduce evidence that Revenue Officer Dagalangit, who constructively served the FAN, made a written report of the matter in accordance with Annex D of RR 12-99.

All circumstances of the alleged constructive service of the FAN point to the fact that the same was tainted with irregularities and, hence, cannot be held valid.

Not having validly served the FAN on petitioner on the last day of the period to assess for December 2003, respondent's right to assess petitioner of deficient withholding taxes for the taxable period 2003 has already prescribed."

Finding no reversible error, We affirm the assailed Decision dated November 12, 2012 and the Assailed Resolution dated June 13, 2013 rendered by the CTA Special First Division.

WHEREFORE, premises considered, the present Petition for Review is hereby **DENIED**, and accordingly, **DISMISSED** for lack of merit.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

(With Concurring Opinion)
ROMAN G. DEL ROSARIO
Presiding Justice

JUANITO C. CASTAÑEDA, JR.
Associate Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *en banc* before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	**CTA EB NO. 1043** (CTA Case No.7920)
	Present:
- versus -	**DEL ROSARIO,** *PJ,* **CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, COTANGCO-MANALASTAS RINGPIS-LIBAN,** *JJ.*
GALLARDO AND ASSOCIATES, Respondent.	Promulgated: JUN 10 2014 9:00 a.m.

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CONCURRING OPINION

DEL ROSARIO, PJ:

I concur in the *ponencia* of my esteemed colleague, the Honorable Associate Justice Caesar A. Casanova, which affirmed the assailed Decision of the then First Division[1] of this Court dated November 12, 2012 and the assailed Resolution of the Special First Division[2] of this Court dated June 13, 2013.

I wish, however, to expound on the issue raised by petitioner regarding the suspension of her right to collect the subject deficiency expanded withholding tax.

[1] Composed of the then Presiding Justice Ernesto D. Acosta, Associate Justice Erlinda P. Uy and Associate Justice Esperanza R. Fabon-Victorino.
[2] Composed of Associate Justice Erlinda P. Uy and Associate Justice Esperanza R. Fabon-Victorino.

Petitioner argues that respondent's request for reinvestigation and the granting of the same by petitioner effectively suspended the running of the prescriptive period to collect.

Although this argument is being raised by petitioner for the first time before the Court *En Banc*, I find it necessary to address the same to achieve an orderly disposition of the present case.[3]

The right of the Bureau of Internal Revenue (BIR) to collect under Section 223 of the National Internal Revenue Code (NIRC) of 1997, as amended, is premised on the existence of a valid Final Assessment Notice (FAN). In **Bank of the Philippine Islands vs. Commissioner of Internal Revenue**,[4] the Supreme Court clarified:

> "**When the BIR validly issues *an assessment, within either* the three-year or ten-year period**, whichever is appropriate, then the BIR has another three years [now five years] **after the assessment** within which to collect the national internal revenue tax due thereon by distraint, levy, and/or court proceeding." *(Emphases added)*

As emphasized in the assailed Decision as well as in the *ponencia* of Associate Justice Casanova, no FAN was validly served on respondent on the last day of the three-year period to assess, which was on January 15, 2007. In the absence of a valid FAN, there is no basis for the BIR to collect deficiency expanded withholding tax against petitioner for the taxable year 2003. In fine, the issue on the suspension of the BIR's right to collect is irrelevant.

In view of the foregoing, I VOTE to DENY the present Petition for Review.

ROMAN G. DEL ROSARIO
Presiding Justice

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[3] See Rule 14, Section 1(last paragraph) of the Revised Rules of the Court of Tax Appeals which states: *"In deciding the case, the Court may not limit itself to the issues stipulated by the parties but may also rule upon related issues necessary to achieve an order disposition of the case."*

[4] G.R. No. 139736, October 17, 2005.