REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

SOLID-ONE MILLS, PHILS., INC.,
Petitioner,

CTA EB NO. 1234
(CTA Case No. 8507)

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

x-------------------------------------x

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

CTA EB NO. 1235
(CTA Case No. 8507)

Present:

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

- versus -

SOLID-ONE MILLS, PHILS., INC.,
Respondent.

Promulgated:

AUG 10 2016 3:45 p.m.

x- x

DECISION

Fabon-Victorino, J.:

Submitted for decision is the consolidated *Petitions for Review* filed by Solid-One Mills, Phils., Inc. (SMPI) and the Commissioner of Internal Revenue (CIR) assailing the

Decision [1] and the Resolution [2] dated May 29, 2014 and September 23, 2014, respectively, the dispositive portions of which read as follows:

Assailed Decision of May 29, 2014:

> **WHEREFORE**, premises considered, the instant Petition for Review is hereby **GRANTED**. Accordingly, the Formal Letter of Demand (FLD) and Final Assessment Notices (FAN) No. 59/2003 dated May 31, 2007, assessing petitioner for alleged deficiency VAT, EWT and compromise penalties for taxable year 2003, in the total amount of P12,800,114.98, as well as the Notice of Tax Lien dated June 7, 2012, the Warrant of Distraint and/or Levy dated June 7, 2012, and the Warrants of Garnishment dated June 7, 2012 are hereby **CANCELLED**.
>
> **SO ORDERED.**

Assailed Resolution of September 23, 2014:

> **WHEREFORE**, premises considered, petitioner's Partial Motion for Reconsideration filed on June 18, 2014 and respondent's Motion for Reconsideration filed on June 19, 2014 are hereby both **DENIED** for lack of merit.
>
> **SO ORDERED.**

In its *Petition for Review*[3] filed on October 31, 2014, SMPI prays that the assailed Decision of May 29, 2014 be modified by ruling that its toll feedmilling activity is exempt from value-added tax (VAT); or, in the alternative, if it be deemed liable for VAT, the assailed ruling be applied prospectively upon finality of the present action.

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[1] *Rollo*, pp. 806-822.
[2] *Rollo*, pp. 880-882.
[3] *En Banc* docket, CTA EB Case No. 1234, pp. 5-15.

On the other hand, in her *Petition for Review*[4] filed through registered mail on November 3, 2014, the CIR prays that both the assailed Decision and Resolution be set aside and a new one issued ordering SMPI to pay the amount of ₱12,800,114.98, representing deficiency value added tax (VAT), Expanded Withholding Tax (EWT), and compromise penalties for taxable year 2003.

THE FACTS AND THE PROCEEDINGS

The pertinent facts, as culled from the record, are as follows:

SMPI is a domestic corporation with address at Km. 68 Laurel Highway, Barangay Darasa, Tanauan City, Batangas. It is engaged in the business of producing prepared animal feeds as evidenced by its Bureau of Animal Industry (BAI) Registration Certificate No. M-535. Per its Certificate of Registration No. OCN 2002-059-0390,[5] it is a Non-VAT taxpayer.

On the other hand, the CIR is vested with the authority to decide disputed assessments and cancel or abate tax liabilities pursuant to the provisions of the National Internal Revenue Code (NIRC) of 1997, as amended, and other tax laws, rules, and regulations. Her office address is at the Bureau of Internal Revenue (BIR) National Office Building, BIR Road, Diliman, Quezon City.

On March 7, 2002, SMPI entered into a contract with San Miguel Foods, Inc. (SMFI) denominated as a "Toll Feedmilling Agreement"[6] whereby the former would provide feedmill processing services to the latter for its animal feeds B-Meg.

On April 15, 2004, SMPI filed its Annual Income Tax Return (ITR) for taxable year 2003.[7]

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[4] *En Banc* docket, CTA EB No. 1235, pp. 48-60.
[5] Exhibit I, *Rollo*, p. 230.
[6] Exhibit P-20, *Rollo*, pp. 750-758.
[7] Exhibit P-7, *Rollo*, pp. 723-728.

On February 14, 2005, BIR Revenue Region No. 9, San Pablo City issued Letter of Authority (LOA) No. 97528 to the president of SMPI for the examination of SMPI's books of accounts and other accounting records for all internal revenue taxes for the year 2003.[8]

On July 20, 2005, BIR RDO No. 59, Lipa City issued a Preliminary Assessment Notice (First PAN) informing SMPI that after investigation, it was found liable for deficiency income tax (IT), VAT and compromise penalties in the aggregate amount of ₱14,525,821.92, for taxable year 2003.[9]

On November 20, 2005, BIR Revenue Region No. 9, San Pablo City issued another Preliminary Assessment Notice (Second PAN) informing SMPI that after investigation, it was found liable for deficiency IT, EWT, VAT and compromise penalties for taxable year 2003 in the total amount of ₱14,795,990.74.[10]

On April 12, 2006, in reply to SMPI's letter-request for ruling dated March 15, 2006, the OIC-Head Revenue Executive Assistant of the Legal Service issued BIR Ruling No. DA-245-2006, holding that *"[i]n view of the foregoing, the sale or importation of prepared animal feeds by Solid whether on its own or for and in behalf of SMFI or another entity is exempt from VAT."*[11]

On June 8, 2007, SMPI received a Formal Letter of Demand (FLD) and Final Assessment Notices (FAN) No. 59/2003[12] dated May 31, 2007, issued by the OIC-Regional Director assessing SMPI for the following deficiency taxes for the year 2003:

I.	Expanded Withholding Tax	₱ 158,355.20
II.	Value Added Tax	12,628,759.78
III.	Compromise Penalties	13,000.00
	Total Amount Due	₱ 12,800,114.98

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[8] Exhibit P-8, *Rollo*, p. 729.
[9] Exhibit P-9, *Rollo*, pp. 730-731.
[10] Exhibit P-10, *Rollo*, pp. 732-734.
[11] Exhibit P-19, *Rollo*, pp. 747-749.
[12] Exhibit P-2, *Rollo*, pp. 559-563.

SMPI protested[13] the FLD/FAN but it was denied in a letter[14] dated July 9, 2007.

On September 4, 2007, SMPI appealed[15] the denial of its protest. Such denial was effectively sustained in the Decision[16] dated June 6, 2012, affirming SMPI's liability as stated in the FLD/FAN.

To effect collection, the CIR issued: (1) a Notice of Tax Lien dated June 7, 2012 addressed to the Register of Deeds of Tanauan City who received it on June 14, 2012;[17] (2) a Warrant of Distraint and/or Levy dated June 7, 2012, received by SMPI on June 14, 2012;[18] and (3) Warrants of Garnishment dated June 7, 2012, served to SMFI[19] and Metropolitan Bank & Trust Co.[20] on June 15, 2012 and to Union Bank of the Philippines,[21] on June 18, 2012.

The foregoing prompted SMPI to file a Petition for Review[22] with the Court in Division on June 25, 2012.

In her belatedly filed *Answer*[23], CIR countered that SMPI could not rely on BIR Ruling No. DA 245-2006 dated April 12, 2006, exempting it from VAT on its sale or importation of prepared animal feeds, whether on its own or for or on behalf of SMFI since the assessment for deficiency VAT was for services rendered to SMFI and for providing it technology and expertise for purposes of converting SMFI's raw material to finished feeds. Further, the period to assess SMPI has not yet prescribed as the period to assess petitioner for deficiency VAT and EWT for taxable year 2003 is ten (10) years counted from the date the CIR discovered SMPI's non-filing of VAT and EWT returns. The period for collection was also suspended when SMPI elevated the case to her office until it was acted upon through the Decision dated June, 2012.

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[13] Rollo, pp. 59-60.
[14] Exhibit P-3, *Rollo*, pp. 564-566.
[15] Exhibit P-4, *Rollo*, pp. 567-570.
[16] BIR Record, pp. 738-744.
[17] BIR Record, pp. 756-758.
[18] BIR Record, pp. 759-761.
[19] BIR Record, pp. 766-767.
[20] BIR Record, pp. 768-769.
[21] BIR Record, pp. 770-771.
[22] *Rollo*, pp. 6-38.
[23] *Rollo*, pp. 301-316.

On May 29, 2014, the Court in Division promulgated the assailed Decision granting SMPI's *Petition for Review*. While the Court in Division was in agreement with the CIR's conclusions that SMPI's Toll Feedmilling Agreement with SMFI involves sale of service and not sale of animal feeds thus, not one of the VAT exempt transactions contemplated in BIR Ruling No. DA-245-2006; and that the FLD and FAN for taxable year 2003 were validly issued against SMPI within the ten-year prescriptive period, it found that the CIR's right to collect from SMPI for the alleged deficiency EWT, VAT, and compromise penalties for taxable year 2003 had already prescribed. To explain the ruling, the Court in Division cited the case of *Bank of the Philippine Islands vs. Commissioner of Internal Revenue*[24], saying that when an assessment is timely issued, the BIR has a period of five (5) years to effect collection of the tax assessed, reckoned from the date of the release, mailing or sending by the BIR of the assessment notice to the taxpayer. Although the subject Warrant of Distraint and/or Levy was issued on June 7, 2012, it was served on SMPI only on June 14, 2012, or six (6) days after the five-year prescriptive period to collect expired on June 8, 2012.

Unconvinced, both SMPI and the CIR moved for reconsideration of the assailed Decision but they were denied in the similarly assailed Resolution of September 23, 2014.

Hence, the present consolidated cases pursuant to Section 1, Rule 31 of the Revised Rules of Court.

In its Petition for Review, SMPI asserts that its toll feedmilling activity is not subject to VAT. It argues that: (1) BIR Ruling No. DA-245-2006 was sought to settle the issue of whether its sole business activity was subject to VAT; (2) in support of such request for ruling, it submitted a description of its feedmill operations as well as a copy of its Toll Feedmilling Agreement with SMFI; (3) the request for BIR Ruling was very clear, to wit, whether its feedmill toll processing operations providing feedmill toll processing services to SMFI for the production of its animal feeds B-Meg, was also VAT exempt; (4) BIR Ruling No. DA-245-2006,

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

answered SMPI's query favorably, albeit obliquely; and (5) SMPI represented itself to the BIR in good faith in obtaining and in relying on the said BIR Ruling declaring its activity VAT exempt. However, should the Court *En Banc* finds it liable for VAT, it should be applied prospectively reckoned from the finality of the present case. SMPI claims that it should not be made to suffer for relying in good faith on the said BIR Ruling, citing the case of *Team Energy Corporation vs. Commissioner of Internal Revenue*[25].

For her part, the CIR insists in her Petition for Review that prescription in the collection of the subject deficiency taxes from SMPI has not yet set in. She argues that while the period to collect commenced to run on June 8, 2007, it was interrupted when SMPI's request for reinvestigation was given due course. Further, the assessment for withholding tax issued against SMPI is imprescriptible as the period of limitation under Section 203 of the NIRC of 1997 applies only to assessment of taxes and not to penalties. According to the CIR, SMPI, the withholding agent, held in trust the amount of tax withheld with the corresponding obligation to remit it to the BIR. Thus, for failure to perform its legal obligation, SMPI was assessed penalty for failure to comply with provision of the Tax Code. That being the case, the period of limitation provided in Section 203 finds no application.

In its *Comment*[26], SMPI submits that there is nothing in CIR's arguments that has not been discussed or passed upon by the Court in Division to merit a change in its ruling.

On October 8, 2015, considering that both parties failed to file their respective memoranda per report of Judicial Records Division dated September 10, 2015, the consolidated cases were submitted for decision.[27]

RULING OF THE COURT EN BANC

Both *Petitions for Review* lack merit.

[25] G.R. No. 197760, January 13, 2014.
[26] *En Banc* docket, CTA EB No. 1234, pp. 74-78.
[27] Resolution, *En Banc* docket, CTA EB No. 1234, pp. 95-96.

Evident from its *Petition for Review* that SMPI merely reiterates its previous arguments which had been thoroughly discussed and passed upon by the Court in Division in its assailed Decision of May 29, 2014.

As ruled by the Court in Division, to be exempted from VAT, SMPI's transaction should pertain to the **sale or importation of animal feeds** and such certainly does not include its rendition of "feedmilling services" to SMFI or to another entity. We agree on the following disquisition on the matter by the Court in Division, *viz.*:

> There is nothing in BIR Ruling No. DA-245-2006 which shows that the BIR declared petitioner as a VAT-exempt entity. Instead, under BIR Ruling No. DA-245-2006, only the "sale or importation of animal feeds by petitioner, whether on its own or for and in behalf of SMFI or another entity, is exempt from VAT". In other words, in order for petitioner's transaction to be exempted from VAT, the same should pertain to "sale or importation" of animal feeds. The VAT exemption contemplated in BIR Ruling No. DA-245-2006 does not include the rendition of "feedmilling services" by petitioner to SMFI or to another entity.
>
> This Court agrees with the findings of respondent in her Decision. As aptly emphasized by respondent, petitioner actually rendered services to SMFI as a feedmill toll processor. The Toll Feedmilling Agreement between SMFI and petitioner clearly provides that Solid One as feedmill toll processor represents itself to possess the expertise, competence, qualifications and facilities required by SMFI and offers its services to the latter. Petitioner is a service-oriented enterprise, which renders its services solely to SMFI as provided in the Toll Feedmilling Agreement. Article II.1 of the Toll Feedmilling Agreement disclosed that the premixes, raw materials, packaging materials, tags, thread and

> other supplies necessary for the manufacture of feeds were provided by SMFI. Since all necessary materials for production were supplied by SMFI, petitioner, as a feedmill toll processor, was contracted by SMFI to provide the needed technology and expertise to convert the materials provided by SMFI into finished feeds. Article II.3 and Article II.4 of the Toll Feedmilling Agreement affirm petitioner's obligation to render services to SMFI in consideration for a tolling fee.
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> It is clear from the foregoing that the Toll Feedmilling Agreement between petitioner and SMFI involves sale of service by petitioner to SMFI and not sale of animal feeds. Since sale of service is not one of the VAT exempt transactions contemplated in BIR Ruling No. DA-245-2006 and in Section 109 of the 1997 NIRC, as amended, the tolling fees derived by petitioner therefrom, for taxable year 2003, are appropriately subject to 10% VAT under Section 108 (A) of the 1997 NIRC, as amended.

Anent SMPI's submission that should it be found liable to VAT for its business activity, the ruling should be applied prospectively alleging reliance in good faith in the BIR Ruling No. DA-245-2006, suffice it to say that good faith is not a matter of defense to avoid a clear provision of the law.

Moreover, Section 109(B) of the NIRC of 1997, as amended, categorically provides that only the sale or importation of fish, prawn, livestock and poultry feeds is exempt from VAT, to wit:

> SEC. 109. *Exempt Transactions.* — (1) Subject to the provisions of Subsection (2) hereof, **the following transactions shall be exempt from the value-added tax**:
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> xxx xxx xxx

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> (B) **Sale or importation of** fertilizers; seeds, seedlings and fingerlings; fish, prawn, livestock and **poultry feeds**, including ingredients, whether locally produced or imported, used in the manufacture of finished feeds (except specialty feeds for race horses, fighting cocks, aquarium fish, zoo animals and other animals generally considered as pets); (*Emphasis supplied*)

Indeed, "*there is nothing in BIR Ruling No. DA-245-2006 which shows that the BIR declared SMPI as a VAT exempt entity. Instead, under BIR Ruling No. DA-245-2006, **only the 'sale or importation of animal feeds** by petitioner, whether on its own or for and in behalf of SMFI or another entity, **is exempt from VAT'***".

Besides, every BIR ruling contains a caveat, to wit: "*[t]his ruling is being issued on the basis of the foregoing facts as represented. However, if upon investigation, it will be disclosed that the facts are different, then this ruling shall be considered null and void*" which means that the cited ruling was issued based on representations made by the taxpayer at the time the request for ruling was made.

As regards CIR's *Petition for Review*, a review of the arguments set forth therein readily shows that they are mere restatement of the arguments in her previous pleadings which were exhaustively considered and discussed by the Court in Division in the assailed Decision of May 29, 2014 and affirmed in the subsequent Resolution of September 23, 2014. The Court *En Banc* sees no compelling reason to deviate from the findings of the Court in Division based on the evidence presented that the CIR's right to collect from SMPI the alleged deficiency EWT, VAT and compromise penalties for taxable year 2003 had prescribed. The said ruling is in consonance with the law and jurisprudence on the matter. There is no reason or rhyme to reinvent the wheel.

Be that as it may and if only to put the CIR's mind to rest, the Court *En Banc* quotes with approval the findings of the Court in Division on the issue, thus:

II. Prescription of the Commissioner's right to collect from petitioner ("SMPI" herein) the deficiency EWT, VAT and compromise penalties for taxable year 2003.

As afore-quoted, Section 222 (c) states that internal revenue taxes which are assessed within the period of limitation may be collected within five (5) years **following the assessment**. In **Bank of the Philippine Islands vs. Commissioner of Internal Revenue**, (*BPI*) the Supreme Court clarified:

xxx xxx xxx

Hence, when an assessment is timely issued, the BIR is given a period of five years within which to collect the tax assessed, reckoned from the date the assessment notice had been released, mailed or sent by the BIR to the taxpayer. This five-year prescriptive period to collect applies to internal revenue tax assessments, including EWT assessments.

Here, although it was established that petitioner received the FLD and FAN, both dated May 31, 2007, on June 8, 2007, it was not established when the FLD and FAN were released, mailed or sent by the BIR to petitioner. As held in *BPI*, in such a case, the **date of receipt** by petitioner of the FLD and FAN should be regarded as the date when the FLD and FAN were released, mailed or sent to petitioner. Since petitioner received the FLD and FAN on June 8, 2007, the BIR had until **June 8, 2012** within which to collect the deficiency taxes.

Although the Notice of Tax Lien, Warrant of Distraint and/or Levy and Warrants of Garnishment were issued by the BIR on June 7, 2012 or one (1) day before the expiration of the period for collection on June 8, 2012, the Notice of Tax Lien was served on the Register of Deeds of Tanauan City on **June 14, 2012**, the Warrant of Distraint and/or Levy was received by petitioner on June 14, 2012, and the Warrants of Garnishment were received by SMFI and Metropolitan Bank & Trust Co. on June 15, 2012, and by Union Bank of the Philippines on June 18, 2012.

Following the pronouncement of the Supreme Court in *BPI*, distraint and levy proceedings did not validly begin or commence with the mere issuance of the Warrant of Distraint and/or Levy. The Warrant of Distraint and/or Levy must be served upon the taxpayer, within the prescriptive period to collect, in order to suspend the running of the prescriptive period for collection of the deficiency taxes. Since the Warrant of Distraint and/or Levy was served on petitioner only on June 14, 2012 or six (6) days beyond the expiration of the five-year prescriptive period, the government lost its right to collect the assessed deficiency taxes and penalties.

Respondent insists that the five-year period to collect was extended pursuant to Section 222 (d) of the 1997 NIRC, as amended, or was, at the very least, suspended under Section 223 of the same Code.

As afore-stated, under Section 222 (d) of the 1997 NIRC, as amended, the *five-year period to collect may be extended in writing before its expiration*. In the present case, there is nothing on record which shows that petitioner executed a waiver extending the five-year period to collect pursuant to Section 222 (d) of the 1997 NIRC, as amended. In the absence of said waiver, the Court finds that the five-year period to collect from petitioner the deficiency VAT, EWT and compromise penalties (non-filing of VAT returns and non-filing of alphalist of payees subject to EWT) for the year 2003 had already prescribed on **June 8, 2012**.

It may be that under Section 223 of the 1997 NIRC, as amended, the running of the statute of limitations on the making of assessment and the beginning of distraint or levy or a proceeding in court for collection of deficiency taxes shall be suspended for the period during which the Commissioner is (1) *prohibited from making the assessment or beginning distraint or levy or a proceeding in court;* (2) *when the taxpayer requests a reinvestigation which is granted by the Commissioner;* and, (3) *when the taxpayer cannot be located in the address given by him in the return filed upon which a tax is being assessed or collected*.

After a painstaking review of the records of the case, the Court finds that there is nothing therein which indicates, even remotely, that the five-year period to collect the deficiency tax assessment was suspended.

With regard to the first cause for suspension of the five-year period to collect, **Protector Services, Inc. vs. Court of Appeals** indeed elucidates that the filing of action before the courts validly suspended the running of the prescriptive period to collect taxes, *viz.*:

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As afore-stated, the present case was filed before this Court on June 25, 2012, which was way beyond the five-year period to collect, counted from petitioner's receipt of the FLD and FAN on June 8, 2007. Thus, it cannot be said that the filing of the present petition before this Court suspended the five-year prescriptive period

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to collect because at the time of its filing, there was no more period to suspend.

Anent the second basis for the suspension of the five-year period to collect, there is nothing on record which shows that petitioner requested for a reinvestigation of the subject deficiency tax assessment. Stated differently, there is no evidence to show that by the acts of petitioner, respondent was convinced to postpone the collection of the taxes because of petitioner's request for reinvestigation. Truth to tell, a perusal of the protest letter filed by petitioner reveals that it did not actually request for a reinvestigation of the FLD and FAN. Petitioner categorically requested for the withdrawal of the FAN for lack of basis. In fact, based on BIR Records, the BIR itself recognized that petitioner was not requesting for a reinvestigation.

Finally, as to the third ground for the suspension of collection, there is also nothing on record which shows that petitioner could not be located by the BIR. There is no dispute that petitioner received the two PANs, FLD and FAN, the letter dated July 9, 2007 issued by OIC-Regional Director Araceli which denied petitioner's protest, and the CIR's Decision dated June 6, 2012.

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All told, the running of the prescriptive period for collection was never extended, interrupted or suspended by any of the instances mentioned under Sections 222 (d) and 223 of the 1997 NIRC, as amended. Although the Warrant of Distraint and/or Levy was issued on June 7, 2012, it was served on petitioner only on **June 14, 2012 or six (6) days beyond the expiration of the five-year prescriptive period to collect on June 8, 2012**. The right of respondent to collect the deficiency taxes as indicated in the

> subject FLD and FAN has by then prescribed. Thus, the cancellation of the subject FLD and FAN as well as the Notice of Tax Lien, Warrant of Distraint and/or Levy and Warrants of Garnishment issued by the BIR on June 7, 2012 is, therefore, warranted. (*Citations omitted*)

WHEREFORE, the *Petitions for Review* filed on October 31, 2014 and November 3, 2014 by Solid-One Mills, Phils., Inc. and the Commissioner of Internal Revenue, respectively, are hereby **DENIED,** for lack of merit. Accordingly, the assailed Decision and Resolution dated May 29, 2014 and September 23, 2014, respectively, are **AFFIRMED**.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We Concur:

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

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

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

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

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

Ma. Belen
MA. BELEN RINGPIS-LIBAN
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the conclusions in the above Decision were reached in consultation before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

SOLID-ONE MILLS, PHILS., INC., *Petitioner,*	**CTA EB No. 1234** (CTA Case No. 8507)
-versus-	
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	

x---x

COMMISSIONER OF INTERNAL REVENUE, *Petitioner,*	**CTA EB No. 1235** (CTA Case No. 8507)
	Present:
-versus-	DEL ROSARIO, *PJ,* CASTANEDA, JR., BAUTISTA, UY, CASANOVA, FABON-VICTORINO, MINDARO-GRULLA, COTANGCO-MANALASTAS, and RINGPIS-LIBAN, *JJ.*
SOLID-ONE MILLS, PHILS., INC., *Respondent.*	Promulgated: AUG 10 2016 3:45 p.m.

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CONCURRING OPINION

DEL ROSARIO, P.J.:

I concur with the findings of the *ponencia* in denying the consolidated Petitions for Review filed by Solid-One Mills, Phils., Inc. (SMPI) and the Commissioner of Internal Revenue (CIR) which assail the Court in Division's Decision dated May 29, 2014 and its Resolution dated September 23, 2014.

I find it necessary, however, to further address the following arguments raised by the CIR, *viz.*: (a) the right of the CIR to collect the deficiency taxes from SMPI has not prescribed as **SMPI's request for reinvestigation was given due course**; and (b) the withholding tax assessment issued against SMPI is **imprescriptible**.

The BIR's right to collect the deficiency taxes has already prescribed

In support of her contention that the Bureau of Internal Revenue's (BIR) right to collect from SMPI the deficiency taxes has not prescribed, the CIR avers the following: (i) SMPI, in a Letter dated January 9, 2006, requested for a reinvestigation of the assessments issued against it; (ii) that the CIR had given SMPI ample time to submit the necessary documents to justify its position; (iii) SMPI's protest letters were all given due course by the CIR; (iv) in BIR's Letter dated February 15, 2006, SMPI was informed that its request for reinvestigation with regard to its tax liabilities for the year 2003 has been transferred for review to the revenue district office; (v) SMPI appealed the decision of the Regional Director with the CIR, which was acted upon by the latter through its Final Decision dated June 6, 2012; and, (vi) while the period to collect the deficiency taxes commenced to run on June 8, 2007, the same was interrupted when SMPI protested the assessments on July 2, 2007.

The CIR claims that SMPI requested for a **reinvestigation through its Letter dated January 9, 2006**.[1] A close scrutiny of said letter would show that the same was submitted by SMPI in **reply to the second Preliminary Assessment Notice (Second PAN)** issued by the BIR on November 20, 2005. There is nothing therein which, however, indicates that SMPI requested for a reinvestigation. Moreover, even assuming that a request for reinvestigation was made by SMPI in said letter, and that the same was granted per the

[1] BIR Records, pp. 634-635.

February 15, 2006 Letter[2] of the BIR to SMPI, **the same would have extended the period to issue the FAN and FLD, but not the period to enforce collection**. As extensively discussed in the assailed Decision, **the five-year period to enforce collection is reckoned from the date of the issuance of the Formal Letter of Demand[3] (FLD) and Final Assessment Notices[4] (FAN) No. 59/2003 dated May 31, 2007 on June 8, 2007, and not from the issuance of the PAN**.

Here, SMPI never requested for a reinvestigation after receiving the FLD and FAN No. 59/2003 dated May 31, 2007 on June 8, 2007. To be sure, in its protest letter[5] against the FLD and FAN, SMPI did not make any request for reinvestigation but instead, **categorically insisted on the withdrawal of the FAN for lack of basis**.

It is settled that the mere filing of a protest letter does not operate to suspend the running of the period to collect taxes. In truth, even a request for reinvestigation alone will not suspend the statute of limitations. Instead, **two things must concur before the period may be suspended --- <u>first</u>, there must be a request for reinvestigation; and <u>second</u>, the CIR must have granted it**.[6]

A thorough review of the records of this case reveals that the BIR itself recognized that SMPI requested for a reconsideration and not for reinvestigation and that the BIR's right to collect would **prescribe on June 8, 2012** as evidenced by the June 4, 2012 Letter[7] of the then Deputy Commissioner of Internal Revenue (DCIR), Legal and Inspection Group to the Chief of the Appellate Division, with the subject: **"In the Matter of the Request for Reconsideration of Solid-One Mills Philippines, Inc.,"** which reads:

> "It does not escape this Office's attention that the docket of the case was only submitted to this Office on June 4, 2012 **barely four**

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[2] BIR Records, p. 641.
[3] CTA Division Docket, p. 515; BIR Records, p. 715.
[4] BIR Records, pp. 716-718.
[5] Exhibit "P-15", CTA Division Docket, pp. 741-742; BIR Records, pp. 722-723.
[6] China Banking Corporation vs. Commissioner of Internal Revenue, G.R. No. 172509, February 4, 2015.
[7] BIR Records, p. 745.

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> **(4) days before the BIR's right to collect prescribes on June 8, 2012 per your computation.** This practice should not be countenanced if only to protect the interest of the Government. Accordingly, you are advised to avoid similar cases in the future." (Emphasis supplied)

Since the Warrant of Distraint and/or Levy was served on SMPI only on June 14, 2012 or six (6) days beyond the expiration of the five-year prescriptive period to collect taxes, the government lost its right to collect the assessed deficiency taxes and penalties as contained in the FAN and FLD.

Indubitably, there was failure on the part of the BIR to act promptly in resolving SMPI's protest letter and in enforcing collection of the deficiency tax assessment. It took the BIR more than five (5) years from the issuance of the FAN and FLD and from the filing of SMPI's protest thereto to take steps to collect the deficiency taxes. By its own acts, it has unduly delayed the collection of the taxes due to the government.

At this point, it is worthy to reiterate that the statute of limitations imposed by the NIRC of 1997, as amended, obliges tax officers to act promptly in making the assessment and in collecting the same. In the same manner, it intends to protect taxpayers from prolonged and unreasonable assessment and investigation by the BIR. Although the power of taxation is deemed inherent in order to support the government, tax provisions are not all about raising revenue. Appropriate legislations provide safeguards and remedies beneficial to both the taxpayer and the government, for the former to be protected against abuse and for the latter to promptly act for the availability and recovery of revenues.[8]

In view of the BIR's failure to discharge its duty to collect the deficiency taxes in a timely manner, the collection of the deficiency taxes covered by the subject FAN and FLD is barred by prescription.

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[8] Commissioner of Internal Revenue vs. Stanley Works Sales (Phils.), Inc. G.R. No. 187589, December 3, 2014.

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Applicability of the statute of limitations to withholding taxes

The CIR posits that the withholding tax is not an internal revenue tax but is only a system used to collect income tax. It is more in the nature of a penalty against the withholding agent for its failure to withhold and remit the taxes to the government. Hence, the CIR is of the view that the prescriptive periods to assess and collect internal revenue taxes find no application on withholding taxes.

The proposition is flawed. A withholding tax is a tax that is imposed and collected from the withholding agent, separate and distinct from the liability of the taxpayer from whom the withholding is made. It necessarily falls within the ambit of paragraph (g), Section 21 of the NIRC of 1997, as amended, that is -- "other taxes" as may be imposed and collected by the BIR, *viz.*:

> "SEC. 21. Sources of Revenue. — The following taxes, fees and charges are deemed to be national internal revenue taxes:
>
> (a) Income tax;
>
> (b) Estate and donor's taxes;
>
> (c) Value-added tax;
>
> (d) Other percentage taxes;
>
> (e) Excise taxes;
>
> (f) Documentary stamp taxes;
>
> **(g) Such other taxes as are or hereafter may be imposed and collected by the Bureau of Internal Revenue."** (Emphasis supplied)

While it is true that withholding agents are made personally liable for their failure to withhold correct taxes on income payments made to their suppliers, the same is not sufficient justification to remove them from the ambit of the statute of limitations with regard to issuance of deficiency withholding taxes. Besides, no less than the Supreme Court, in a number of cases, has recognized the

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applicability of the statute of limitations under Sections 203 and 222 of the NIRC of 1997, as amended to withholding tax assessments, and has ordered the cancellation of deficiency withholding taxes on the ground of prescription.[9]

In view of the foregoing, I find the CIR's argument that a withholding tax is not covered by the statute of limitations under Section 203 and 222 of the NIRC of 1997, as amended, bereft of merit.

All told, I **VOTE** to **DENY** the Petition for Review filed by SMPI on October 31, 2014 and the Petition for Review filed by the CIR on November 3, 2014; **UPHOLD** the Court in Division's Decision dated May 29, 2014 and its Resolution dated September 23, 2014.

ROMAN G. DEL ROSARIO
Presiding Justice

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[9] Commissioner of Internal Revenue vs. Wyeth Suaco Laboratories, Inc., G.R. No. 76281, September 30, 1991; Philippine Journalists, Inc. vs. Commissioner of Internal Revenue, R.R. No. 162852, December 16, 2004; Commissioner of Internal Revenue vs. FMF Development Corporation, G.R. No. 167765, June 30, 2008; Commissioner of Internal Revenue vs. Kudos Metal Corp., G.R. No. 178087, May 5, 2010; Commissioner of Internal Revenue vs. Hambrecht & Quist Philippines, Inc., G.R. No. 169225, November 17, 2010; Samar-I Electric Cooperative vs. Commissioner of Internal Revenue, G.R. No. 193100, December 10, 2014.