REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

MODERN IMAGING SOLUTIONS, INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 8987

Members:

CASTAÑEDA, JR., *Chairperson,*
CASANOVA, *and*
MANAHAN, *JJ.*

Promulgated:

JUN 06 2017 10:18Am

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RESOLUTION

CASANOVA, *J.*:

For resolution are the following:

1. petitioner's **Notice of Change of Firm Name**, filed through registered mail on April 24, 2017 and received by the Court on May 12, 2017;

2. petitioner's **Motion for Extension of Time to File Comment**, filed through registered mail on April 24, 2017 and received by the Court on May 12, 2017; and

3. respondent's **Motion for Reconsideration**, filed through registered mail on March 31, 2017 and received by the Court on April 5, 2017, with petitioner's **Comment/Opposition (to Motion for Reconsideration dated March 31, 2017)** filed through registered mail on April 27, 2017 and received by the Court on May 11, 2017.

The **Notice of Change of Firm Name**, filed by petitioner's counsel, informing the Court that it has changed its name to **CUSTODIO ACORDA SICAM & DE CASTRO LAW OFFICES** and praying that all pleadings, notices, resolutions and other legal processes be addressed to the new firm name, is **NOTED**.

On the other hand, for reasons cited by petitioner and in the interest of substantial justice, its **Motion for Extension of Time to File Comment,** praying that petitioner be given an additional period of five (5) days from April 22, 2017 or until April 27, 2017 within which to file its comment, is **GRANTED**. Accordingly, petitioner's **Comment/Opposition (to Motion for Reconsideration dated March 31, 2017)**, filed through registered mail on April 27, 2017, is **ADMITTED**.

Considering the foregoing, the Court shall proceed to resolve respondent's Motion for Reconsideration.

Respondent moves for the reconsideration of the Court's Decision promulgated on March 21, 2017 (assailed Decision), the dispositive portion of which reads:

> "**WHEREFORE**, the instant Petition for Review is **GRANTED**. Accordingly, the Final Assessment Notice dated June 24, 2014 assessing petitioner for deficiency Income Tax, EWT, and DST for taxable year 2009 in the total amount of ₱3,104,954.00, inclusive of surcharge, interests and compromise penalty, is **CANCELLED** for lack of legal and factual bases.
>
> **SO ORDERED**."

Respondent anchors its motion on the following grounds:

1. The disallowance of rental expense is correct;

2. The amount received from petitioner's home/head office under the "Due to Home Office" account is subject to Documentary Stamp Tax (DST);

3. The Certification issued on December 4, 2014 is inadmissible in evidence for being hearsay; and

4. Petitioner is subject to 2% tax on withholding for payment made to contractors.

In its comment/opposition, petitioner contends that respondent's motion should be dismissed outright for being pro-forma as it contains a defective notice of hearing. Petitioner adds that respondent's motion should be denied since all of his arguments have already been addressed and passed upon by the Court. Petitioner further claims that:

1. The alleged undeclared income from unaccounted rent is based on a mere presumption and not on actual facts;

2. The funds received by petitioner from its home/head office is not subject to DST;

3. The Certification dated December 4, 2014 is admissible; and

4. Respondent's assessment for the alleged deficiency expanded withholding tax (EWT) is a void assessment.

The Court shall address respondent's grounds in *seriatim.*

On the disallowance of rental expense of ₱11,116.75, respondent stresses that petitioner did not present the prescribed form which is BIR Form No. 2307 or the Withholding Tax Remittance Return (BIR Form No. 1606) which is essential in establishing the withholding by the payor and the remittance/payment thereof to the Bureau of Internal Revenue (BIR). The failure of petitioner to present BIR Form No. 2307 is fatal. Further, the examiner's finding that rent payments per Alphalist were not accounted/reflected in the Financial Statements (FS)/Income Tax Return (ITR) should be given weight and credence. The discrepancy resulting from the comparison of the Alphalist and FS cannot be simply set aside.

For its part, petitioner clarifies that it was assessed the amount of ₱11,116.75 because of the BIR examiner's finding that rent payments were neither accounted for nor reflected in petitioner's FS/ITR. In other words, the said assessment arose because respondent treated the said amount as undeclared income from unaccounted rent, and not because the BIR disallowed the rental expense. Thus, petitioner could not be expected to present BIR Form 2307 in connection with rental income that was merely presumed by respondent.

As observed by petitioner, the amount of ₱11,116.75 was not disallowed due to non-withholding rather it was considered as undeclared income supposedly from unaccounted rent brought about by the difference between petitioner's rent payments per Alphalist and rent per FS/ITR. Thus, the Court is at a loss why respondent is now arguing that petitioner should have presented its BIR Form No. 2307 in establishing the fact of withholding.

Moreover, respondent must have confused this case with that of a claim for refund of excess creditable withholding taxes where presentation of BIR Form No. 2307 is essential. In a claim for refund of excess creditable withholding taxes, the Supreme Court held that the certificate of creditable tax withheld at source (or BIR Form No. 2307) is the competent proof to establish the fact that taxes are withheld. It is not necessary for the person who executed and prepared the certificate of creditable tax withheld at source to be presented and to testify personally to prove the authenticity of the certificates.[1] As this case involves an assessment, the said ruling is not applicable to the instant case.

Considering that the Court already discussed in detail the reason for the cancellation of this item of assessment in the assailed Decision and respondent did not raise new arguments on this matter, the cancellation of the deficiency income tax assessment arising from petitioner's "Undeclared income from unaccounted source of cash/rent" in the amount of ₱11,116.75 stays.

Anent the DST assessment, respondent, citing the case of *Commissioner of Internal Revenue vs. Filinvest Development Corporation*[2] (*Filinvest*), contends that advances by a corporation to its affiliates need not be covered by debt instruments in order to be subjected to DST. The non-presentation of the journal vouchers evidencing intercompany advances should be taken against the petitioner not against respondent. The burden of proving that the transaction is not within the purview of "debt instruments" under Section 179 lies with petitioner.

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[1] *Commissioner of Internal Revenue vs. Philippine National Bank*, G.R. No. 180290, September 29, 2014.

[2] G.R. Nos. 163653 and 167689, July 19, 2011.

On the other hand, petitioner contends that respondent's reliance on the *Filinvest* case is misplaced. In *Filinvest*, the parties involved are affiliated corporations with separate juridical personalities. In this case, petitioner is a Philippine Branch Office of a foreign corporation. The branch office and "Home Office" do not have separate juridical personalities.

The Court agrees with petitioner's comment. Respondent must be reminded that petitioner is not an affiliate but rather a branch office. As respondent argues, citing the *Filinvest* case, advances by corporation to its "affiliates" need not be covered by debt instruments in order to be subjected to DST. Clearly, the *Filinvest* case is not applicable.

As the resolution of this issue was already extensively explained in the assailed Decision, the Court will no longer expound on this matter.

Respondent also argues that petitioner failed to present a competent witness who could testify on the veracity and authenticity of the Certification issued on December 4, 2014. Respondent asserts that petitioner's witness, Ms. Bambam L. Caraan, was neither the signatory of the said certification nor the person who had a hand in the preparation thereof. Hence, the said certification should not have been given probative value by the Court for being hearsay evidence.

For its part, petitioner asserts that respondent's objection to petitioner's documentary exhibits is improper at this late stage of the proceedings. The Certification was included by petitioner in its Formal Offer of Evidence dated October 13, 2015. All of petitioner's documentary exhibits were admitted by the Court in its Resolution dated November 25, 2015. Moreover, petitioner avers that considering that the Certification was issued by a public officer, it is an exception to the hearsay rule and thus, admissible even if the public officer who made them was not presented in court.

Based on the records, the certification being referred to by respondent is the BIR Certification[3] issued on December 4, 2014 stating that petitioner is not included in the List of Top 20,000 Corporations. However, the Court noted that respondent did not file

[3] Exhibit "P-7".

a motion for reconsideration of the Court's Resolution[4] dated November 25, 2015 admitting petitioner's evidence. Besides, this piece of evidence was not taken into consideration anymore in view of the cancellation of the said assessment due to lack of legal basis.

Furthermore, considering that the Certification was issued by a public officer in the performance of his official duty, the same is an exception to the hearsay rule by virtue of Section 44, Rule 130 of the Rules of Court. In *Fullero vs. People of the Philippines*[5], the Supreme Court held that:

> "The law, however, provides for specific exceptions to the hearsay rule. One of the exceptions is the entries in official records made in the performance of duty by a public officer. In other words, official entries are admissible in evidence regardless of whether the officer or person who made them was presented and testified in court, since these entries are considered *prima facie* evidence of the facts stated therein. Other recognized reasons for this exception are necessity and trustworthiness. The necessity consists in the inconvenience and difficulty of requiring the official's attendance as a witness to testify to innumerable transactions in the course of his duty. This will also unduly hamper public business. The trustworthiness consists in the presumption of regularity of performance of official duty by a public officer."

Finally, respondent contends that petitioner, as being one of the top 10,000 corporations for purposes of the EWT regulations under Revenue Regulations (RR) No. 17-2003 is immaterial considering that payments to contractors are subject to 2% tax under Section 2.57.2 of RR No. 2-98. According to respondent, the mistake in the citation of the revenue examiner of the applicable BIR regulation or circular should not prejudice the government. Besides, petitioner allegedly failed to raise the particular issue in its protest during the administrative proceedings before the BIR.

On the other hand, petitioner avers that what respondent stated in the Details of Discrepancies attached to its Formal Assessment Notice (FAN) was that petitioner is still liable to pay the

[4] Docket, (Vol. I), pp. 392-393.
[5] G.R. No. 170583, September 12, 2007.

deficiency withholding tax for purchases of services or payments to contractors pursuant to Section 2.57.1 of RR No. 2-98, as amended. Responding through its Protest Letter, petitioner argued that the purchases and payments allegedly required to be withheld are not even subject to withholding tax under Section 2.57.2 of RR 2-98. Thus, it is incorrect for respondent to say that the issue was not raised.

Contrary to respondent's contention, petitioner did raise in its Protest Letter[6] to the FAN the argument that the EWT assessment on the listed purchase of services/contractors pursuant to Section 2.57.1 of RR No. 2-98 has no basis. Quoted below are the pertinent portions of petitioner's protest:

> "The assessment on above listed purchase of service/contractors which require to be withheld based on Section 2.57.1 of Revenue Regulations No. 2-98 has no basis. xxx
>
> The above listed purchase of service/contractors totaling to P5,270,485.00 are not subject to final tax stated in Section 2.57.1 of Revenue Regulations No. 2-98. Section 228 of the National Internal Revenue Code (NIRC) requires that the assessment notice shall state the factual and legal basis of the assessment. It was implemented by Section 3 of Revenue Regulations No. 12-99, is unequivocal in requiring that the assessment notice and demand letter should state the facts and the law on which they are bases; otherwise, such assessment and demand letter '**shall be void.**' xxx
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> In this assessment it is clear that the above listed expenses is not subject to final tax as required in Section 2.57.1 of Revenue Regulations 2-98 as amended that have a rate of 2%."

Hence, as early as July 23, 2014, when petitioner filed its protest, respondent was already made aware that petitioner was questioning the legal basis for the imposition of deficiency EWT. Respondent could have clarified its legal basis for the imposition of deficiency EWT after receiving the protest. But respondent remained

[6] Exhibit "P-6".

silent. Even respondent's Answer[7] did not address petitioner's allegation that the deficiency EWT has no basis. Neither did respondent file a Memorandum to address the same. Now, respondent is belatedly explaining that the citation made in the FAN, particularly in the Details of Discrepancies, was a mistake by the revenue examiner.

To reiterate, the law requires that the legal and factual bases of the assessment be stated in the formal letter of demand and assessment notice. Thus, such cannot be presumed.[8]

The reason for such requirement is obvious: to ensure that taxpayers are duly apprised of the basis of the tax assessments against them. This is in keeping with the settled doctrine that before a person can be deprived of his property, he should first be informed of the claim against him and the theory on which such claim is premised. The requirement of stating the facts and law, which are the basis of the tax assessment, is not merely a procedural pre-requisite. It is a substantive requirement which determines the taxpayer's ability to effectively protest the assessment against him.[9]

In view of the foregoing, the Court finds no cogent reason to reverse, amend or modify the Court's Decision dated March 21, 2017.

WHEREFORE, premises considered, respondent's **Motion for Reconsideration** is **DENIED** for lack of merit.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

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

Catherine T. Manahan
CATHERINE T. MANAHAN
Associate Justice

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[7] Docket, (Vol. I), pp. 45-50.
[8] *Commissioner of Internal Revenue vs. Enron Subic Power Corporation*, G.R. No. 166387, January 19, 2009.
[9] *Reyes vs. Commissioner of Internal Revenue*, CA-G.R. SP No. 71392, August 8, 2003.