4594



REPUBLIC OF THE PHILIPPINES
COURT OF APPEALS
MANILA

**FIFTEENTH DIVISION**

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

- versus -

AVON PRODUCTS MANUFACTURING CORPORATION AND THE COURT OF TAX APPEALS,
Respondents,

CA-G.R. SP. NO.28740

Members:

*HERRERA, O.,*
*ABAD SANTOS, &*
*LAGAMON, JJ*

*Promulgated:*
SEP 13 1993
10:25 a.m.

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**DECISION**

HERRERA, O., J.:

The Commissioner of Internal Revenue in this "PETITION FOR REVIEW ON CERTIORARI" seeks the review and reversal of the resolution dated July 21, 1992 of public respondent Court of Tax Appeals issued in C.T.A. Case No. 4594, entitled "Avon Products Manufacturing Corporation vs. Commissioner of Internal Revenue", the dispositive portion of which reads:

> "ACCORDINGLY, the Court, acting on petitioner's Motion to Cancel Assessments On The Ground Of Prescription' which it finds meritorious, resolves to grant the same.
>
> "Respondent is hereby ordered to cancel Assessment No. FAS-1-1984-88-001765 and Assessment No. FAS-4-88-0017666 for deficiency income and sales tax for taxable year 1988, both issued against petitioner on May 15, 1988, beyond the period allowed under Section 223 of the Tax Code."

The background facts are succintly recited in the resolution subject of the review as follows:

Petitioner moves the Court to cancel and declare null and void assessments numbered FAS-1-1984-88-001765 and FAS-4-1984-88-0017666 "for having been issued after the Government's right to collect the taxes covered by said assessments had expired." (Motion To Cancel Assessments On The Ground of Prescription, p. 11; CTA Records, p. 131).

Respondent, on May 15, 1988 issued to petitioner, a duly organized Philippine corporation, the questioned assessments for deficiency income and sales taxes for taxable year 1984 in the amount of P/13,053,182.64 and P/111,705, 222.98, respectively (Annex "A", Petition for Review; CTA Records, p. 19). These assessments were protested by petitioner through a letter-protest dated June 17, 1988 and received by respondent on June 20, 1988.

On March 1, 1992, respondent issued a Warrant of Distraint and/or Levy (addressed to the Chief of the BIR's Collection Enforcement Division, or his duly authorized representative) and a Warrant of Garnishment (addressed to the President, Manager and/or Treasurer of the Bank of the Philippine Islands), both numbered N-B-1849-91, against petitioner in connection with the questioned assessments. Construing the issuance by respondent of such warrants as an implied denial by him of its protest, petitioner filed on April 5, 1991 the instant petition for review with this Court.

During the scheduled hearing on February 28, 1992, the Court, upon joint manifestation by the parties, directed them to submit for resolution (in a written motion by petitioner and comment's thereto by respondent) the prejudicial issue of prescription in the instant case. Pursuant to this, petitioner, on March 10, 1992 submitted to the Court the instant motion, which the Court deemed submitted for resolution on April 8, 1992, upon respondent's failure to file his comment thereto within ten days from receipt thereof (Order dated April 8, 1992; CTA Records, p. 144).

Respondent Court agreed with petitioner's allegation that the questioned assessments were issued after the period of limitation set forth under Sec. 203 of the Tax Code, which reads:

> "Sec. 203. <u>Period of limitation upon assessment and collection</u>. -- Except as provided in the succeeding section, internal revenue taxes shall be assessed within three 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-year period shall be counted from the day the return was filed. For the purposes of this section, a return filed before the last day prescribed by law for the filing of thereof shall be considered as filed on such last day. (As amended by BP 700)

For, it is unquestionably true that, as petitioner argues:

> "For the year in question, petitioner filed its income tax return for the calendar year 1984 on April 15, 1985 and its 1985 sales tax return on February 20, 1985. Thus, the government had only until April 15, 1988 and February 20, 1988 to assess petitioner for deficiency income and sales taxes, respectively.
>
> It is undisputed that respondent issued the assessments for deficiency income and sales taxes only on May 12, 1988. Respondent, in Paragraph 1 of his answer dated August 14, 1991, admitted that Annexes A and B of the Petition (which were marked as Exhibits A and B during the hearing on February 1992) are authentic copies of the Notices of the subject assessments. Respondent, likewise, through counsel, admitted in open court during the hearing of February 28. 1992 that the same were mailed in the envelope which was then marked as Exhibit D. xxx.

> Since for purposes of computing the three-year statute of limitations, the assessment is deemed issued when released, mailed or sent by the Commissioner of Internal Revenue to the taxpayer (Basilan Estates, Inc. v Commissioner, 21 SCRA 17; Collector v. Bautista, 105 Phils. 1326) and since, as shown above, the notice of the assessments in question was mailed by respondent on May 12, 1988, it is incontrovertible that the assessment for deficiency income tax for 1984 was issued after more than three years and twenty seven-days (sic) after petitioner filed its income tax return on April 15, 1985. Likewise, the assessment for deficiency sales tax for the same year was issued after more than three years and eighty-four days from the time petitioner filed its sales tax return on February 20, 1985. The assessments are thus invalid" (Motion To Cancel Assessments On The Ground Of Prescription, pp. 2-3; CTA Records, pp. 122-123)

Resolving the question of whether fraud can be imputed to petitioner so as to make the ten-year prescriptive period provided under Section 223 of the Tax Code, instead of the three-year period of limitations under Section 203 thereof, apply to the case at bar, Respondent Court held:

> Section 223(a) of the Tax Code, which is relevant to the instant case, reads as follows:
>
> > Sec. 223. **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 proceeding in court after the collection of such tax may be begun without assessment, at any time within ten years after the discovery of the falsity, fraud, or ommision: 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." (Underscoring supplied)

In his June 6, 1989 memorandum to the Chief of the BIR's Industry Audit Division (BIR Records, pp. 272-273), Revenue Enforcement Officer Gabriel U. Villaluz, partly had this to say regarding petitioner's June 17, 1988 protest-letter:

"xxx xxx xxx

Based on the above recital of facts, it is undisputed that the assessment notice was sent to and received by the taxpayer beyond the 3 year period prescribed by law.

COMMENTS AND RECOMMENDATIONS

It will be noted that in computing the total amount of deficiency assessments for income and sales taxes, a surcharge of 50% was imposed. Based on this action, it will be infered that the returns filed by taxpayer were considered false and fraudulent although there were no expressed findings on this issue in the examiner's report of investigation.

On the other hand, subject taxpayer and its sister company, Avon Cosmetics, Inc., were considered but one corporate entity for internal revenue tax purposes based on the findings of the enforcement officer. This position can be used as basis in attributing an attempt to commit fraud on the part of the taxpayer.

Because of the legal issues involved in this case, it is hereby recommended that the attached docket be forwarded to the Law Division for appropriate action. Pending resolution of such issues, the reinvestigation of the factual basis of the assessment should be deferred."

This stand was adopted, in part, by respondent in his Answer (CTA Records, pp. 40-43), when he alleged that:

"7. Moreover, the 50% surcharge was imposed in view of the factual findings clearly showing that a fraudulent return had been filed by petitioner with intent to evade payment of the correct taxes."

The court finds respondent's position flawed as it fails to consider the well-settled principle that fraud (which is a question of fact which must be alleged and proved) is never lightly to be presumed, and in order to be sustained must be supported by clear and convincing proof, because it is a serious charge. Respondent, in his pleadings, merely alleged that "the 50% surcharge was imposed in view of the factual findings clearly showing that a fraudulent return had been filed by petitioner with intent to evade payment of the correct taxes (sic)", and did not bother to present any evidence to prove the same.

Even a thorough perusal of the BIR records by the Court fails to produce any proof of petitioner's alleged fraudulent intent in filing its 1984 income and sales tax returns. All that is to be found in said records relevant to the issue of fraud is the earlier partly-quoted June 6, 1989 memorandum addressed to the Chief of the BIR's Audit Division, wherein Revenue Enforcement Officer Villaluz himself stated that "there were no expressed (sic) findings on this issue (that is, the issue of falsity/fraudulence of petitioner's 1984 income and sales tax returns) in

> the examiner's report of investigation," although he maintains that "(b)ased on this action (that is, the examiner's action of imposing a surcharge of 50% in computing the total amount of deficiency assessments for income and sales taxes), it will be inferred that the returns filed by taxpayer (petitioner herein) were considered false and fraudelent." Clearly, this does not help respondent's cause." (pp. 3-7, Resolution (Annex A)

Petitioner in this petition maintains that petitioner grossly erred in holding that the questions assessments were issued after the period of limitation set forth under section 203 as amended, which provided for a three year period within which internal revenue taxes will be assessed.

It is petitioner's submission that although private respondent's 1984 income tax returns were not fraudulent that the same, were, however, false because of the findings of huge discrepancy and under declaration not to mention the findings that private respondent and its sister company Avon cosmetics, Inc., were considered one corporate entity for the purpose of ascertining the business tax liabilities for the taxable year 1984. Thus, the ten-year prescriptive period provided for under Section 223 of the Tax code applied to the case at bar.

Petitioner thus proceeds to explain and its falsity thereof as follows:

> There is falsity in the case at bar with intent to evade taxes. This is clearly shown by the fact that the 1984 income tax and business tax returns filed by private respondent were false considering the large scale discrepancy committed resulting into a deficiency income tax amounting to more that 13 million pesos.
>
> The deficiency was based on the findings that (1) the finished goods of private respondent amounting to P/564,953.00 were excluded from its domestic sales; (2) the raw materials issued amounting to P/591,791.22

> were excluded from its production; and (3) there was an overstatement of beginning inventory due to the revaluation of raw materials and finished goods amounting to P/11,348,669.83 and P/3,086,968.77. These findings are clear and convincing evidence of falsity with intent to evade taxes undertaken by private respondent.
>
> On the other hand, the deficiency business tax assessment in the amount of P/111,725,222.98 was issued because there are legal and factual basis to consider private respondent and Avon Cosmetics, Inc. as one corporate entity for internal revenue tax purposes, hence, the application of the doctrine of "piercing the veil of corporate fiction" resulting in the attribution of the taxable sales of Avon Cosmetics, Inc.

We are not impressed.

The respondent correctly pointed out the ground of falsity as distinguished from fraud with intent to evade tax was not raised in the court below and therefore may not be raised for the first time on appeal. To justify the imposition of the 50% surcharge, petitioner in its answer to the petition for review before respondent court pointed the alleged factual finding's clearly showing that a fraudulent return had been filed by petitioner to evade payment of taxes. (p. 7 of answer). There is no pretense of falsity with intent to evade payment of taxes.

As pointed out by the Supreme Court in Commissioner of Internal Revenue v. Wander Philippines, Inc. and the Court of Tax Appeal 160 SCRA 573.

> It will be noted, however, that Petitioner's above-entitled argument is being raised for the first time in this Court. It was never raised at the administrative level, or at the Court of Tax Appeals. To allow a litigant to assume a different posture when he comes before the court and challenge the position he had accepted at the administrative level, would be to sanction a procedure whereby the Court - which is supposed to review administrative determinations - would not

> review, but determine and decide for the first time, a question not raised at the administrative forum. Thus, it is well settled that under the same underlying principle of prior exhaustion of administrative remedies, on the judicial level, issues not raised in the lower court cannot be raised for the first time on appeal (Aguinaldo Industries Corporation vs. Commissioner of Internal Revenue, 112 SCRA 136; Pampanga Sugar Dev. Co., Inc. vs. CIR, 114 SCRA 725; Garcia vs. Court of Appeals, 102 SCRA 597; Matialonzo vs. Servidad, 107 SCRA 726.

Moreover, petitioner's claim of falsity with intent ot evade taxes has not been clearly shown. Falsity is merely assumed from the supposed discrepancy in the 1984 income tax and business tax returns filed by respondent resulting into an alleged deficiency income tax amounting to more than 13 million pesos. No rule or doctrine was cited by petitioner to support its conclusion that falsity to evade payment of taxes may be established on the basis merely of a discrepancy in the return and the supposed deficiency.

In any event, the same considerations relied upon by the Court of Tax Appeals in rejecting petitioner's theory of fraud with intent to evade payment of taxes applies with equal force and vigor to petitioner's theory of falsity with intend to evade payment of taxes. For like fraud, falsity (is also a question of fact) which is services is never lightly to be pressumed, and in order to be sustained must be supported by clear and convincing proof because it is a serious charge. It imputes the commission of a crime which in criminal law must have to be established beyond reasonable doubt.

Thus the same reasons advanced by the Court of Tax Appeals in refusing to accept petitionner theory of fraudulent intent may properly be cited to reject the claim of falsity. The Court of Tax Appeals observed that even a thorough perusal of the BIR Records fails to produce any proof of petitioner's alleged fraudelent intent in filing its 1984 income and sales tax returns. For all that is to be found in said records relevant to the issue of fraud and falsity is the June 6, 1989 memorandum addressed to the Chief of the BIR Audit Division, wherein Revenue Enforcement Officer Villaluz firmly stated that "there were no expressed (sic) findings on this issue (that is, the issue of falsity/fraudulence of petitioner's 1984 income and sales tax returns) in the examiner's report of investigation," although he maintains that "(b)ased on this action (that is, the examiner's action of imposing a surcharge of 50% in computing the total amount of deficiency assessments for income and sales taxes), it will be <u>inferred</u> that the returns filed by taxpayer (petitioner herein) were considered false and fraudelent." (pp. 3-7, Resolution (Annex A)

While petitioner claims that, the deficiency business tax assessment in the amount of P/111,725,222.98 was issued because there are legal and factual basis to consider private respondent and Avon Cosmetics, Inc. as one corporate entity for internal revenue tax purposes, hence, the application of the doctrine of 'piercing the veil of corporate fiction' resulting in the attribution of the taxable sales of Avon Cosmetics, Inc, the petitioner has not pointed what the legal and factual basis are. Upon the other hand, petitioner commissioner ruled on February 3, 1978 that the two entities are separate and distinct and the sales of Avon Cosmetics, Inc. (formerly Beautifont) could not be legally considered sales of Avon Products Manufacturing Inc. (formerly Aura) (Annex D of respondent's answer p. 95 null)

The Court of Tax Appeals concluded with the following findings:

> On the other hand, the facts of the case augur well for petitioner's case. As stated by petitioner in its instant motion, and as borne out by an examination of the BIR records:
>
> > "The <u>original report</u> of the investigating examiner contained in a Memorandum to the Commissioner dated <u>June 18, 1987</u> (see page 207, BIR Records) contained no factual finding of fraud on the part of petitioner when it filed its income and sales tax returns for the year 1984.' On the contrary, the investigating examiner in computing the alleged deficiency income tax of petitioner merely imposed only a twenty-five percent (25%) surcharge thereon for late payment (see page

 

> 205, BIR Records). The <u>original report</u> of the investigating examiner remained unchanged for more than nine (9) months until april 15, 1988 when the right of the government. to assess petitioner for deficiency income tax for the year 1984 expired. It likewise remained unchanged for more thatn eight (8) months until February 20, 1988 when the right of the government ot assess petitioner for deficiency sales tax for the year 1984 expired. Thus, when the <u>original report</u> of the investigating examiner was and up to the time the right of the government to assess petitioner for deficiency internal revenue taxes had expired, no fraud was imputed on the petitioner (sic).
>
> However, after the three-year statute of limitations xxx had expired on April 15, 1988 or February 20, 1988, as the case may be, the investigating examiner started singing an entirely different tune. This time changing theory, the investigating examiner, in a <u>subsequent report</u> contained in a Memorandum to the Chief of the industry Division dated June 6, 1989 (see page 273, BIR Records), came out with unsubstantiated and inconclusive finding of fraud. It will be noted that said change of stance was made <u>only after petitioner filed its protest on June 20, 1988</u>." (Motion To Cancel Assessment On The Gound of PRescription, pp. 5-6; CTA Records, pp. 125-126)

In addition, the Court emphasizes the fact that petitioner, in making its 1984 income and sales tax returns, relied on BIR opinion dated February 3, 1978, w hich states that:

"2. Since Aura (Laboratories, Inc.) & Beautifont (Inc) remain corporations having distinct and separate personalities despite the fact that they will be wholly-owned by Avon (Products, Inc.), the sales of manufactured cosmetics and toiletries by Aura to Beautifont shall be the basis of the percentage sales tax due on the manufactured articles, said sales being considered the original sales thereof."

Such fact, if anything, shows that petitioner did not have any fraudulent intent in making the questioned returns; and, together with the other facts and circumstances already discussed, negate the applicability of the ten-year prescriptive period under Section 223(a) of the Tax Code.

Finally, the Court finds it worth noting that even respondent's own Legislative, Ruling & Research Division is of the opinion that the Government's right to assess petitioner for alleged deficiency sales and income taxes for 1984, as is clearly shown in a *memorandum* dated December 19, 1989 for respondent from the chief of said division, Alicia P. Clemeno, and concurred in by BIR's Assistant Commissioner (Legal Services), Jaime M. Maza, which reads in part:

xxx xxx xxx

Moreover, under then Section 318 (now Section 203) of the Tax Code as amended by Batas Pambansa Blg. 700, internal revenue taxes shall be assessed within three years after the last days 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 case where a return is filed beyong the period prescribed by law, the three-year period shall be counted from the day the return filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day.

xxx xxx xxx

In the instant case, the taxpayer respectively filed its 1984 Income Tax Return and Sales TAx Return on April 15, 1985 and February 20, 1985, the last day prescribed for their filing [then Section 87(b) and Section 193(a)(1)(ii), Tax Code], while the assessment notices for deficiency were mailed by this Office on May 12, 1988. Such being the case, the right of the government to assess the taxpayer has already been barred by prescription.

Furthermore, to warrant the imposition of the 50% surcharge pursuant to then Seciton 72 [now Section 248(b)] of the Tax Code, or to warrant the longer period of prescription for the assessment of the tax under then Section 319(a) [now Section 223(a)] of the Tax Code, in case of a false or fraudulent return or list is willfully made, fraud should be actual, not merely constructive. (Aznar vs. Court of Tax Appeals, 58 SCRA 519) <u>In the instant case, fraud was never alleged nor proved by this Office. Accordingly, the imposition of the 50% surcharge against the taxpayer as well as the availment of the longer period of prescription for the assessment of the aforesaid taxes on the ground of fraud has no legal bases.</u>

<u>In view of the foregoing considerations, it is considerations, it is respectfully recommended that the aforementioned assessments issued against the</u>

> taxpayer involving the respective amounts of P/13,053,182.64 and P/111,705,222.98 as deficiency income tax and deficiency sales tax be cancelled and this case considered closed." (Undescoring supplied) (Resolution pp. 8-11)

Findings of fact of the Court of Tax Appeals are entitled to the highest respect and can only be disturbed on appeal if they are not supported by substantial evidence or if there is a showing of gross error or abuse on the part of the Tax Court (Nasiad, et al., vs. Court of Tax Appeals, 61 SCRA 238 (1974); Raymundo vs. de Joya, et al., 101 SCRA 495 (1980); Commissioner of Internal Revenue vs. Arnoldus Carpentry Shop, Inc., et al., 159 SCRA 199 (1988). As succinctly stated by the Supreme Court: "Moreover, it has been the long standing policy and practice of this Court to respect the conclusions of quasi-judicial agencies and, with more reason, those of a Court such as the Court of Tax Appeals, which, by the nature of its functions, is dedicated exclusively to the study and consideration of tax problems and has necessarily developed an expertise on the subject, unless there has been an abuse or improvident exercise of its authority." (Commissioner of Internal Revenue vs. Court of Tax Appeals, et al., G. R. No. 86785, November 21, 1991, 204 SCRA 182)

WHEREFORE, finding no such abuse or improvident exercise of authority or discretion, the decision of the court of Tax Appeals must be as it is hereby AFFIRMED.

SO ORDERED.

OSCAR M. HERRERA
Associate Justice

WE CONCUR:

QUIRINO D. ABAD SANTOS
Associate Justice

ALFREDO J. LAGAMON
Associate Justice

## C E R T I F I C A T I O N

I, HEREBY CERTIFY that this Decision was reached after due consultation among the members of this Division in accordance with the provisions of Section 13, Article VIII of the Constitution.

OSCAR M. HERRERA
Associate Justice
Chairman, Fifteenth Division