REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION
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PEOPLE OF THE PHILIPPINES,
Plaintiff,

-versus-

TESS S. VALERIANO,
VALENTINO D. QUEBEC,
WILBUR F. MAGLEO,
c/o Capital Insurance & Surety Co., Inc.
Penthouse I, Prestige Tower,
Emerald Avenue, Ortigas Ave., Pasig City,
Accused.

CTA CRIM. CASE No. O- 052
(I.S. No. 06G – 13498)

For: Violation of Sec. 255 In relation to Section 253 (d) and 256, Tax Code of 1997, as amended by RA 8424

Members:

Acosta, Chairman,
Bautista, and
Casanova, *JJ.*

Promulgated:

JUL 24 2007; 1:05 PM

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RESOLUTION

Tess S. Valeriano, Valentino D. Quebec, and Wilbur F. Magleo, are charged before this Court **with the violation of Sec. 255 in relation to Section 253 (d) and 256, of the National Internal Revenue Code of 1997, as amended by RA 8424**, in an Information alleging the following:

"That on or about April 14, 2004, in the City of Manila, Philippines, the said accused, being then the responsible officers of The Capital Insurance Surety Co., Inc., with business address at Penthouse I, Prestige Tower, Emerald Avenue, Ortigas Center, Pasig City, having filed their internal revenue tax for the year 1999, and after an examination and audit of the same, it has been found tha *(sic)* there is due and collectible from said accused, to wit:

Kind of Tax	Year	Date	Amount
Def. Income Tax	1999	04-14-04	Php259,983.40
Def. VaT *(sic)*	1999	04-14-04	14,896,421.11
Def. EWT	1999	04-14-04	3,372,623.82
Def. DST	1999	04-14-04	21,708,878.43

under BIR Assessneb*(sic)*/Demand Notice No. 34-99, did then and there willfully and unlawfully fail, refuse and neglect to pay said deficiency income tax and deficiency value added tax (VAT), and without formally protesting against or appealing the same, despite due assessment, notice and demand to do so, to the damage and prejudice of the Republic of the Philippines, in the total amount of Php40,237,906.76, Philippine Currency."

Attached to the Information are the:

(1) Resolution of Asst. City Prosecutor, John Erick R. Flordeliza, with approval of Hon. Antonio R. Rebaay, 2nd Assistant City Prosecutor, and Hon. Jhosep Y. Lopez, City Prosecutor, recommending the filing of an Information against the accused;

(2) Letter signed by Alfredo V. Misajon, Regional Director of the Bureau of Internal Revenue (BIR), recommending the immediate prosecution of the accused;

(3) Affidavit executed by Atty. Gerlo C. Cacatian, witness for the BIR, with:

Annexes "A to H" consisting of photocopies of Assessment Notices and Demand Letters;

Annexes "I" "J" "K" Capital Insurance & Surety Co., Inc., (CAPITAL) alleged pro forma letter to the BIR, the latter's denial of the protest and the Preliminary Collection Letter;

Annex "L" Atty. Rosario Bernaldo's Letter informing the BIR that CAPITAL has been under conservatorship since June 3, 2004;

Annex "M" BIR's Warrant of Distraint and Levy; and,

Annexes "N" "O" "P" documents showing the accused to be the responsible officers of CAPITAL.

(4) The Commissioner of Internal Revenue's approval of the criminal actions filed individual taxpayers and responsible officers of corporate taxpayers, included in the enumeration is Capital Insurance & Surety Co., Inc.

The Court is now tasked to evaluate the Information, as well as, the supporting documents/evidence filed by the State Prosecutor to determine if there is probable cause to go on with the prosecution of the case.

Section 6(a) Rule 112 of the Rules of Court provides that:

> "**Sec. 6. When warrant of arrest may issue**. – (a) By the Regional Trial Court.- Within ten (10) days from the filing of the complaint or information, the judge shall personally evaluate the resolution of the prosecutor and its supporting evidence. **He may immediately dismiss the case if the evidence on record clearly fails to establish probable cause**. If he finds probable cause, he shall issue a warrant of arrest, or a commitment order if the accused has already been arrested pursuant to a warrant of arrest issued by a judge who conducted the preliminary investigation or when the complaint or information was filed pursuant to section 7 of this Rule. In case of doubt on the existence of probable cause, the judge may order the prosecutor to present additional evidence within five (5) days from notice and the issue must be resolved by the court within thirty (30) days from filing of the complaint or information."

Rule 9 of the Revised Rules of the Court of Tax Appeals likewise reads:

> SEC.4. *Warrant of arrest.*- Within ten days from the filing of the information, the Division of the Court to which the case was raffled shall evaluate the resolution of the public prosecutor and its supporting evidence. **The division may immediately dismiss the case if it finds that the evidence on record clearly fails to establish probable cause**. If the Division finds probable cause, it shall issue a warrant of arrest signed by the Chairman of the Division. In case of doubt on the existence of probable cause, the Division may order the prosecutor to present additional evidence, *ex parte*, within five days from notice.

Probable cause is the knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that there are lawful grounds to arrest the accused.[1] And once the Information is filed, the determination of the presence or absence of probable cause for the issuance of a warrant of arrest against the accused, or for the withdrawal of the Information, or for the dismissal of the case, is addressed to the sound discretion of the Court.[2]

In this case, the Information charges the responsible officers of Capital Insurance & Surety Co., Inc. for violation of Section 255 of the NIRC brought about by their alleged willful failure and refusal to pay taxes for the year 1999, to the damage and prejudice of the Government in the amount of P21,708,878.43.

The Court after due deliberation and careful examination of the Information and the above-enumerated documents appended thereto, finds that the evidence on record clearly failed to establish probable cause.

Note should be taken of the fact that what the National Internal Revenue Code penalizes under Section 255 is the "**willful failure to pay tax.**" In other words, what the

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[1] *Allado vs. Diokno, 232 SCRA 192*
[2] *Sarigumba, et. al. vs. Sandiganbayan, 451 SCRA 533*

law makes criminal is the willful intent of non-payment of taxes. Thus, non-payment *per se,* does not warrant the institution of a criminal case against a taxpayer.

The Black's Law Dictionary defines the word willful as, "Proceeding from a conscious motion of the will; **voluntary; knowingly; deliberate**. Intending the result which actually comes to pass; designed; intentional; purposeful; not accidental or involuntary. Premeditated; malicious; done with evil intent, or with a bad motive or purpose, or with indifference to the natural consequences; unlawful; without legal justification."

In this case, the fact that CAPITAL is under conservatorship is undisputed. In fact, by BIR's own allegation, the civil and penal liability of CAPITAL may be affected by the conservatorship. Likewise, records show that after the issuance of the preliminary collection letter dated May 4, 2005,[3] the Insurance Commission's appointed conservator, Atty. Rosario S. Bernaldo, already explained that the corporation's operations have ceased since June 3, 2004, following an order from the Insurance Commission.[4] The said letter in part reads:

> "In response to the preliminary collection letters issued by your office on May 4, 2005 and June 30, 2005, please be advised that at present the company is under conservatorship. Operations have ceased since June 3, 2004 upon the issuance of a cease and decease *(sic)* order from the Insurance Commission. **To this date, the company's financial position is actually nil and the Company is bankrupt**. Collection and collation of receivables are on going however responses to collection letters are slow. We are trying our best to collect and produce cash, so that the company may be able to address its possible tax liabilities. But before that, we would like to review that basis of your assessment in order to determine what is the actual liability of the company. We are not aware of the extent

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[3] *Annex "K"*
[4] *Annex "L"*

of the tax investigation conducted, hence we would like to meet with the tax examiners." *(Emphasis Supplied)*

Since the company is bankrupt, there could not have been any willful refusal to pay taxes on its part. The charges against the responsible officers of CAPITAL for the non-payment of the company's alleged tax liabilities cannot stand because prosecution under Section 255 of the NIRC is based on willful non-payment of taxes. What the BIR should have done was to bring to the conservator, as requested by the latter, the alleged tax liabilities; taxes being given preferential treatment in the settlement of distressed companies under conservatorship. A collection letter addressed to the conservator would have been a more appropriate action on the part of BIR, instead of filing a criminal action against the principal officers.

Accordingly, the Information against the accused, Tess S. Valeriano, Valentino D. Quebec, and Wilbur F. Magleo, as the responsible officers of Capital Insurance & Surety Co., Inc. is hereby **DISMISSED** for lack of probable cause.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

(On Leave)
CAESAR A. CASANOVA
Associate Justice