REPUBLIC OF THE PHILIPPINES
COURT OF TEAX APPEALS
QUEZON CITY

SECOND DIVISION

BUREAU OF INTERNAL REVENUE represented by COMMISSIONER CAESAR R. DULAY, Petitioner,	**CTA CASE NO. 10298**
	Members:
-versus-	**CASTAÑEDA, JR.**, *Chairperson,* **BACORRO-VILLENA**, *JJ.*
HON. MENARDO I. GUEVARRA in his capacity as SECRETARY OF JUSTICE and FERDINAND SANTOS in his capacity as President of Camp John Hay Hotel Corp., Respondents.	Promulgated: OCT 15 2021 11:50 a.

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DECISION

CASTAÑEDA, JR., J.:

Before the Court is a Petition for Certiorari filed on July 1, 2020 by the Bureau of Internal Revenue (BIR) against the Secretary of Justice, as public respondent, and Mr. Ferdinand Santos, as private respondent),[1] praying that: (1) public respondent's resolution be reversed and set aside; and (2) a resolution be issued, directing public respondent and his State Prosecutors to file an Information indicting private respondent, for violation of Section 266, in relation

[1] Docket, pp. 5 to 26.

to Section 5(C), both of the National Internal Revenue Code (NIRC) of 1997, as amended.

Specifically, petitioner seeks to annul and set aside the Resolutions dated June 20, 2017 and February 5, 2020 of the Department of Justice (DOJ), the dispositive portions of which respectively read:

Resolution dated June 20, 2017:[2]

"**WHEREFORE**, premises considered, the Petition for Review is hereby **DENIED**. Accordingly, the assailed Resolution is hereby **AFFIRMED**.

SO ORDERED."

Resolution dated February 5, 2020:[3]

"**WHEREFORE**, the instant motion for reconsideration is hereby **DENIED**.

SO ORDERED."

THE PARTIES

The instant *Petition for Certiorari* states that:

"...Petitioner BIR ('Petitioner') is the government agency mandated to collect national internal revenue taxes for nation building with office address c/o Prosecution Division, Room 704, 7th Floor, Bureau of Internal Revenue, National Office Building, BIR Road, Diliman, Quezon City, xxx.

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...The Secretary of Finance ('Public respondent') is the official who issued the assailed resolutions in NPS Docket No. XV-03-INV-15C-03555. xxx.

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[2] Annex "C", *Petition for Certiorari*, Docket, pp. 49 to 52.
[3] Annex "A", *Petition for Certiorari*, Docket, pp. 33 to 35.

...Private respondent is the President of CJHHC [*i.e.*, Camp John Hay Hotel Corp.] with registered business address at 7/F Renaissance Tower, Meralco Avenue, Ugon, Pasig City, xxx."[4]

THE FACTS

The undisputed antecedents in this case are as follows:

"...petitioner filed on March 26, 2015 a Joint Complaint-Affidavit[5] against [private respondent] for violation under Section 266 of the NIRC in relation to Section 5(C) of the same Code...The case was assigned for preliminary investigation to Honorable Assistant City Prosecutor Reuben Ritzuko T. Veradio of Quezon City.

16. On June 23, 2015, private respondent submitted his Counter Affidavit[6] claiming that he exerted efforts to comply with the various requests of the petitioner for the presentation and examination of records. He likewise maintained that after the last examination, he was never advised that there were still additional documents or records to be submitted prior to issuing SDT [*i.e., Subpoena Duces Tecum*][7] and filing of complaint.

17. On July 21, 2015, petitioner submitted its Joint Reply-Affidavit[8] while private respondent submitted his Rejoinder Affidavit[9] on September 8, 2015.

18. On February 24, 2016, Petitioner received a copy of the Investigating Prosecutor's Resolution dated January 26, 2016[10] recommending the dismissal of the complaint against private respondent. In said resolution, the Investigating Prosecutor resolved as follows:

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[4] Pars. 2, 4, and 5, *Petition for Certiorari*, Docket, pp. 6 to 7.
[5] Docket, pp. 81 to 83.
[6] Docket, pp. 106 to 111.
[7] Docket, pp. 98 to 100.
[8] Docket, pp. 138 to 142.
[9] Docket, pp. 143 to 146.
[10] Annex "E", *Petition for Certiorari*, Docket, pp. 68 to 69.

> *'After the last audit, there is no evidence that respondent was still required to submit additional documents or that the books presented were still insufficient. Viewed from the foregoing, there appears to be no evidence that respondent 'neglected to appear or produce books' as provided for under the above-quoted provision' (Footnote supplied)*

19. On March 10, 2016, Petitioner filed a Motion for Reconsideration[11] of the Investigating Prosecutor's Resolution dated January 26, 2016.

20. On June 1, 2014, this Honorable Office issued a Review Resolution[12] [on] even date denying the petitioner's Motion for Reconsideration, the dispositive portion of which states:

> *'WHEREFORE, premises considered, this Office resolves to DENY the present Motion for Reconsideration filed by herein complainant.'*

21. On July 12, 2016, petitioner filed a Petition for Review[13] on the dismissal of the case and denial of the motion for reconsideration before public respondent in DOJ-Manila Office of the Secretary of Justice.

22. On July 12, 2017, Petitioner received a copy of public respondent's Resolution promulgated June 20, 2017[14], dismissing the above-mentioned Petition for Review. The dispositive portion reads as follows:

> *'WHEREFORE, premises considered, the Petition for Review is hereby DENIED. Accordingly, the assailed Resolution is hereby AFFIRMED.'* qz

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[11] Annex "F", *Petition for Certiorari*, Docket, pp. 70 to 74.
[12] Annex "G", *Petition for Certiorari*, Docket, pp. 75 to 76.
[13] Annex "D", *Petition for Certiorari*, Docket, pp. 53 to 67.
[14] Annex "C", *Petition for Certiorari*, Docket, pp. 49 to 52.

23. Petition filed a Motion for Reconsideration[15] dated July 26, 2017 on the Resolution issued by public respondent, dismissing the Petition for Review.

24. On February 05, 2020, public respondent promulgated the assailed Resolution[16] denying petitioner's motion for reconsideration, which reads as:

> '*WHEREFORE, the instant Motion for Reconsideration is hereby DENIED.*'

25. In resolving the criminal complaint, the public respondent ruled as follows:

> '*In fact, appellant (now petitioner) failed to provide evidence that appellee (now private respondent) was* [apprised] *and informed of whatever records and documents that needed to be presented and submitted by him to the appellant. As correctly observed by the assailed resolution, the accusation of the appellant that the appellee failed to comply with the subpoena duces tecum (SDT) is sweeping and misleading because the appellee, as shown from the records, actually appeared and produced the books of accounts and accounting records of the company.*'"[17]

Petitioner then filed the instant *Petition for Certiorari* on July 1, 2020.[18]

On October 13, 2020, private respondent filed his *Comment (on Petition for Certiorari dated 10 June 2020)* on October 13, 2020.[19]

Thereafter, on November 3, 2020, the instant case was submitted for decision.[20]

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[15] Annex "B", *Petition for Certiorari*, Docket, pp. 36 to 48.
[16] Annex "A", *Petition for Certiorari*, Docket, pp. 33 to 35.
[17] Pars. 15 to 25, *Petition for Certiorari*, Docket, pp. 8 to 10.
[18] Docket, pp. 5 to 27.
[19] Docket, pp. 219 to 249.
[20] Resolution dated November 3, 2020, Docket, p. 278.

Petitioner filed a *Manifestation* on November 26, 2020, informing the Court, *inter alia*, that it is yet to receive from the DOJ the requested certified copies of the assailed Resolutions. The same was noted by the Court in the Resolution dated January 7, 2021.

On February 1, 2021, petitioner filed its *Submission (of Attached DOJ Resolutions).* Subsequently, the Court issued the Resolution dated February 9, 2021, wherein the said **Submission** was noted.

THE ISSUES

As culled from the instant *Petition for Certiorari* vis-à-vis private respondent's *Comment*, the issues for this Court's resolution are as follows:

1. Whether this Court has jurisdiction to entertain the said *Petition for Certiorari*;

2. Whether there is a plain, speedy and adequate remedy as contemplated under Rule 65 of the 1997 Rules of Court available to petitioner; and

3. Whether public respondent committed grave abuse of discretion by way of dismissing the criminal complaint for violation of Section 266, in relation to Section 5(C), both of the NIRC of 1997.

THE COURT'S RULING

The instant *Petition for Certiorari* must be dismissed.

Petitioner argues that this Court has jurisdiction to look into whether public respondent committed grave abuse of discretion in affirming the investigating prosecutor's Resolution on appeal; that public respondent committed grave abuse of discretion by way of dismissing the criminal complaint for violation under Section 266, in relation to Section 5(C), of the NIRC of 1997, against private respondent; that private respondent neglected to appear and produce documents required of him; that he is liable for violation under the said provisions or failure to obey summons; that factual determination by the DOJ should be meted out during trial, instead of during the preliminary investigation; that there is no plain, speedy and adequate remedy available to petitioner, as contemplated under Rule 65 of the 1997 Rules of Court; and that petitioner's resort to a *Petition for Certiorari* is proper.

In his *Comment*, private respondent contends that this Court has no original jurisdiction over *Petitions for Certiorari* assailing a resolution of the public respondent, dismissing a criminal complaint even if the same involves a tax law; that only the Supreme Court, Court of Appeals, and Regional Trial Courts, were vested with concurrent and original jurisdiction over the said *Petitions*; that the Investigating Prosecutor's Resolution dated January 26, 2016 was already final and executory, since March 11, 2016; and that the public respondent did not commit grave abuse of discretion in affirming the dismissal of petitioner's *Complaint* against private respondent, on the ground that there was no probable cause.

This Court has jurisdiction over petitions for certiorari.

The issue of whether this Court jurisdiction over petitions for *certiorari* has already been settled by the Supreme Court.

In *The Philippine American Life and General Insurance Company vs. The Secretary of Finance, et al.*,[21] the High Court said:

> "In the recent case of *City of Manila v. Grecia-Cuerdo*,[22] the Court en banc has ruled that **the CTA now has the power of certiorari in cases within its appellate jurisdiction.** To elucidate:
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> > The prevailing doctrine is that the authority to issue writs of certiorari involves the exercise of original jurisdiction which must be expressly conferred by the Constitution or by law and cannot be implied from the mere existence of appellate jurisdiction. Thus, x x x this Court has ruled against the jurisdiction of courts or tribunals

[21] G.R. No. 210987, November 24, 2014.
[22] G.R. No. 175723, February 4, 2014.

over petitions for certiorari on the ground that there is no law which expressly gives these tribunals such power. It must be observed, however, that x x x these rulings pertain not to regular courts but to tribunals exercising quasi-judicial powers. With respect to the Sandiganbayan, Republic Act No. 8429 now provides that the special criminal court has exclusive original jurisdiction over petitions for the issuance of the writs of mandamus, prohibition, certiorari, habeas corpus, injunctions, and other ancillary writs and processes in aid of its appellate jurisdiction.

In the same manner, Section 5 (1), Article VIII of the 1987 Constitution grants power to the Supreme Court, in the exercise of its original jurisdiction, to issue writs of certiorari, prohibition and mandamus. With respect to the Court of Appeals, Section 9 (1) of Batas Pambansa Blg. 129 (BP 129) gives appellate court, also in the exercise of its original jurisdiction, the power to issue, among others, a writ of certiorari, whether or not in aid of its appellate jurisdiction. As to Regional Trial Courts, the power to issue a writ of certiorari, in the exercise of their original jurisdiction, is provided under Section 21 of BP 129.

The foregoing notwithstanding, while there is no express grant of such power, with respect to the CTA, Section 1, Article VIII of the 1987 Constitution provides, nonetheless, that judicial power shall be vested in one Supreme Court and in such lower courts as may be established by law and that judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government.

On the strength of the above constitutional provisions, it can be fairly interpreted that **the power of the CTA includes that of determining whether or not there has been**

> **grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the RTC in issuing an interlocutory order in cases falling within the exclusive appellate jurisdiction of the tax court. It, thus, follows that the CTA, by constitutional mandate, is vested with jurisdiction to issue writs of certiorari in these cases.**
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> **Indeed, in order for any appellate court to effectively exercise its appellate jurisdiction, it must have the authority to issue, among others, a writ of certiorari. In transferring exclusive jurisdiction over appealed tax cases to the CTA, it can reasonably be assumed that the law intended to transfer also such power as is deemed necessary, if not indispensable, in aid of such appellate jurisdiction. There is no perceivable reason why the transfer should only be considered a partial, not total.** (emphasis added)

Subsequently, the jurisdiction of this Court over petitions for *certiorari* over the resolution of the Secretary of Justice was even made clear in *Bureau of Customs vs. The Honorable Agnes VST Devanadera, et al.*,[23] wherein the Supreme Court *En Banc* ruled:

> "On the issue of whether or not the CA[24] has *certiorari* jurisdiction over the resolution of the Acting Secretary of Justice, affirming the dismissal of the complaint-affidavit for violation of provisions of the TCCP due to lack of probable cause, the Court rules in the negative.
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> The elementary rule is that the CA has jurisdiction to review the resolution of the DOJ through a petition for certiorari under Rule 65 of the Rules of Court on the ground that the Secretary of Justice committed grave abuse of his discretion amounting to excess or lack of jurisdiction. **However, with the enactment of Republic Act (*R.A.*) No. 9282, amending R.A. No. 1125 by expanding the jurisdiction of the CTA,**

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[23] G.R. No. 193253, September 8, 2015.

[24] That is, the Court of Appeals.

enlarging its membership and elevating its rank to the level of a collegiate court with special jurisdiction, it is no longer clear which between the CA and the CTA has jurisdiction to review through a petition for *certiorari* the DOJ resolution in preliminary investigation involving tax and tariff **offenses.**

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Since the Court ruled in *City of Manila v. Hon. Grecia-Cuerdo* that the CTA has jurisdiction over a special civil action for certiorari questioning an interlocutory order of the RTC in a local tax case *via* express constitutional mandate and for being inherent in the exercise of its appellate jurisdiction, **it can also be reasonably concluded based on the same premise that the CTA has original jurisdiction over a petition for *certiorari* assailing the DOJ resolution in a preliminary investigation involving tax** and tariff **offenses**.

If the Court were to rule that jurisdiction over a petition for certiorari assailing such DOJ resolution lies with the CA, it would be confirming the exercise by two judicial bodies, the CA and the CTA, of jurisdiction over basically the same subject matter – precisely the split-jurisdiction situation which is anathema to the orderly administration of justice. The Court cannot accept that such was the legislative intent, especially considering that R.A. No. 9282 expressly confers on the CTA, the tribunal with the specialized competence over tax and tariff matters, the role of judicial review over local tax cases without mention of any other court that may exercise such power.

Concededly, there is no clear statement under R.A. No. 1125, the amendatory R.A. No. 9282, let alone in the Constitution, that the CTA has original jurisdiction over a petition for *certiorari*. **By virtue of Section 1, Article VIII of the 1987 Constitution, vesting judicial power in the Supreme Court and such lower courts as may be established by law, to determine whether or not there has been a grave abuse of**

> **discretion on the part of any branch or instrumentality of the Government, in relation to Section 5(5), Article VIII thereof, vesting upon it the power to promulgate rules concerning practice and procedure in all courts, the Court thus declares that <u>the CA's original jurisdiction over a petition for *certiorari* assailing the DOJ resolution in a preliminary investigation involving tax</u> and tariff <u>offenses was necessarily transferred to the CTA pursuant to Section 7 of R.A. No. 9282, and that such petition shall be governed by Rule 65 of the Rules of Court, as amended</u>.** Accordingly, it is the CTA, not the CA, which has jurisdiction over the petition for certiorari assailing the DOJ resolution of dismissal of the BOC's complaint-affidavit against private respondents for violation of the TCCP.
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> As the CA dismissed the petition for certiorari solely due to a procedural defect without resolving the issue of whether or not the Acting Secretary of Justice gravely abused her discretion in affirming the dismissal of the BOC's complaint-affidavit for lack of probable cause, the Court ought to reinstate the petition and refer it to the CTA for proper disposition. For one, as a highly specialized court specifically created for the purpose of reviewing tax and customs cases, the CTA is dedicated exclusively to the study and consideration of revenue-related problems, and has necessarily developed an expertise on the subject. For another, the referral of the petition to the CTA is in line with the policy of hierarchy of courts in order to prevent inordinate demands upon the Court's time and attention which are better devoted to those matters within its exclusive jurisdiction, and to prevent further overcrowding of its docket." *(Emphases and underscoring added)*

Based on the foregoing jurisprudential pronouncements, it is plain that this Court has jurisdiction over petition for *certiorari* assailing the DOJ resolutions, affirming the dismissal of the complaint-affidavit for tax offenses, or specifically, for violations of the provisions of the NIRC of 1997, due to lack of probable cause

Correspondingly, this Court may validly entertain the present *Petition for Certiorari*, since it questions the DOJ Resolutions dated June 20, 2017 and February 5, 2020, affirming the dismissal of the complaint-affidavit in NPS Docket No. XV-03-INV-15C-03555.

Nevertheless, the instant case should not prosper because the remedy of appeal was available to petitioner.

Section 1, Rule 65 of the Rules of Court reads:

> "SECTION 1. ***Petition for certiorari.*** – **When any tribunal, board or officer exercising judicial or quasi-judicial functions has acted without or in excess its or his jurisdiction, or with grave abuse of discretion amount to lack or excess of jurisdiction, <u>and there is no appeal</u>,** or any plain, speedy, and adequate remedy in the ordinary course of law, **a person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered annulling or modifying the proceedings of such tribunal, board or officer, and granting such incidental reliefs as law and justice may require.**
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> The petition shall be accompanied by a certified true copy of the judgment, order or resolution subject thereof, copies of all pleadings and documents relevant and pertinent thereto, and a sworn certification of non-forum shopping as provided in the third paragraph of section 3, Rule 46." *(Emphasis and underscoring added)*

Based on the foregoing provision, it is clear that a petition for *certiorari* is proper only when there is no appeal, or any plain, speedy, and adequate remedy in the ordinary course of law.

The writ of *certiorari* is not issued to correct every error that may have been committed by lower courts and tribunals. It is a remedy specifically to keep lower courts and tribunals within the bounds of their jurisdiction. In our judicial system, the writ is issued to prevent lower courts and tribunals from committing grave abuse of discretion in excess of their jurisdiction. Further, the writ requires that there is no appeal or other plain, speedy, and adequate remedy available to correct the error. **Thus, *certiorari* may not be issued if the error can be the subject of an ordinary appeal.**[25]

In this case, the remedy of appeal was available to petitioner.

Section 25, Chapter 4, Book VII, of the Administrative Code of 1987 (Executive Order No. 292, Series of 1987), reads:

> "SECTION. 25. *Judicial Review.* – (1) Agency decisions shall be subject to judicial review in accordance with this chapter and applicable laws.
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> (2) **Any party aggrieved or adversely affected by an agency[26] decision[27] may seek judicial review.**
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> (3) The action for judicial review may be brought against the agency, or its officers, and all indispensable and necessary parties as defined in the Rules of Court.
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> (4) **Appeal from an agency decision shall be perfected by filing with the agency within fifteen (15) days from receipt of a copy thereof a notice of appeal, and with the reviewing court a petition for review of the order.** Copies of the petition shall be served upon the agency and all parties of record. The petition shall contain a concise statement of the issues involved and the grounds relied upon for the review, and shall be accompanied with a true copy of the order appealed from, together with copies of such material portions of the records as are referred to therein and other supporting papers. The petition shall be under oath

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[25] *Cruz, et al. vs. People of the Philippines*, G.R. No. 224974, July 3, 2017.

[26] As used in Book VII of the Administrative Code of 1987, the term "agency" includes "**any department,** bureau, office, commission, authority or officer **of the National Government authorized by law** or executive order **to** make rules, issues licenses, grant rights or privileges, and **adjudicate cases**..." [Section 2(1), Chapter 1, Book VII, of the Administrative Code of 1987].

[27] As used in Book VII of the Administrative Code of 1987, the term "decision" means "**the whole or any part of the final disposition**, not of an interlocutory character, whether affirmative, negative, or injunctive in form, of an agency **in any matter...**" [Section 2(8), Chapter 1, Book VII, of the Administrative Code of 1987].

and shall how, by stating the specific material dates, that it was filed within the period fixed in this chapter.

(5) **The petition for review shall be perfected within fifteen (15) days from receipt of the final administrative decision. One (1) motion for reconsideration may be allowed. If the motion is denied, the movant shall perfect his appeal during the remaining period for appeal reckoned from receipt of the resolution of denial.** If the decision is reversed on reconsideration, the appellant shall have fifteen (15) days from receipt of the resolution to perfect his appeal.

(6) The review proceeding shall be filed in the court specified by statute or, in the absence thereof, in any court of competent jurisdiction in accordance with the provisions on venue of the Rules of Court.

(7) Review shall be made on the basis of the record taken as a whole. The findings of fact of the agency when supported by substantial evidence shall be final except when specifically provided otherwise by law." *(Emphases added)*

Based on the foregoing provision, a decision of an agency of the National Government, which necessarily includes the DOJ, may be appealed within fifteen (15) days from receipt of a copy thereof. Such appeal shall be perfected by filing a notice of appeal and a petition for review with the reviewing court. Nevertheless, the aggrieved party may file one (1) motion for reconsideration, and in case the same is denied, such movant must perfect his appeal during the remaining period for appeal reckoned from receipt of the resolution of denial.

As alleged, on July 12, 2017, petitioner received public respondent's Resolution dated June 20, 2017.[28] Thus, computing the 15-day reglementary period from such date of receipt, petitioner had until July 27, 2017. However, petitioner opted to file instead a *Motion for Reconsideration* on the said date or on such 15[th] day with the DOJ.[29] Thus, upon receipt of the latter's Resolution dated ge

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[28] Par. 22, *Petition for Certiorari*, Docket, p. 9.
[29] Annex "B", *Petition for Certiorari*, Docket, pp. 36 to 48.

February 5, 2020, on February 21, 2020,[30] petitioner had only one (1) day or until February 22, 2020 to file its appeal. Nevertheless, since February 22, 2020 fell on a Saturday, petitioner had until February 24, 2020 to perfect such appeal, pursuant to Section 1, Rule 22 of the Rules of Court.[31] In any event, no appeal was filed by petitioner. Such being the case, the appeal available to petitioner has been lost.

As already intimated, a writ of *certiorari* is not a substitute for a lost appeal. When an appeal is available, *certiorari* will not prosper especially if the appeal was lost because of one's own negligence or error in the choice of remedy, even if the ground is grave abuse of discretion.[32]

But even granting that the instant *Petition for Certiorari* should prosper because there was no appeal or other remedy available under the law, We still find no grave abuse of discretion on the part of public respondent.

There was no grave abuse of discretion.

Generally, the public prosecutor is afforded a wide latitude of discretion in the conduct of a preliminary investigation. Consequently, it is a sound judicial policy to refrain from interfering in the conduct of preliminary investigation, and to just leave to the DOJ the ample latitude of discretion in the determination of what constitutes sufficient evidence to establish probable cause for the prosecution of supposed offenders. Consistent with this policy, courts do not reverse the Secretary of Justice's findings and conclusions on the matter of probable cause except in clear cases of grave abuse of discretion.[33] It is settled that grave abuse of discretion is committed when the public prosecutor has exercised his discretion in an arbitrary, capricious, whimsical or despotic manner by

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[30] Annex "A", *Petition for Certiorari*, Docket, pp. 33 to 35.

[31] "SECTION 1. *How to compute time.* – In computing any period of time prescribed or allowed by these Rules, or by order of the court, or by any applicable statute, the day of the act or event from which the designated period of time begins to run is to be excluded and the date of performance included. **If the last day of the period, as thus computed, falls on a Saturday a Sunday, or a legal holiday in the place where the court sits, the time shall not run until the next working day.**" *(Emphasis added)*

[32] *Bureau of Internal Revenue vs. Hon. Ernesto D. Acosta, et al.*, G.R. No. 195320, April 23, 2018.

[33] *Callo-Claridad vs. Esteban, et al.*, G.R. No. 191567, March 20, 2013.

reason of passion or personal hostility, patent and gross enough as to amount to an evasion of a positive duty or virtual refusal to perform a duty enjoined by law.[34]

In the instant case, the specific action being assailed by petitioner is the dismissal of its *Petition for Review* by the public respondent, and the latter's affirmance of the duly approved Investigating Prosecutor's Resolution dated January 26, 2016 recommending the dismissal of the criminal complaint filed by petitioner against private respondent in NPS Docket No. XV-03-INV-15C-03555, for the latter's supposed violation of Section 266 of the NIRC of 1997. Simply put, petitioner does not agree with the result of the preliminary investigation conducted by the said Investigating Prosecutor, and with the affirmance by the public respondent thereof; and now alleges grave abuse of discretion committed on the part of the latter in doing so.

We disagree with petitioner.

In *Sales vs. Adapon, et al.*,[35] the Supreme Court discussed the nature of preliminary investigations conducted by DOJ prosecutors, *viz.*:

> "Preliminary investigation is an inquiry or proceeding to determine whether or not there is sufficient ground to engender a well-founded belief that a crime has been committed; and that the respondent, who is probably guilty thereof, should be held for trial. The nature and purpose of the preliminary investigation have been expounded in *Ang-Abaya v. Ang*,[36] *viz.*:
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>> **A preliminary investigation is in effect <u>a realistic judicial appraisal of the merits of the case</u>; sufficient proof of the guilt of the criminal respondent must be adduced so that when the case is tried, the trial court may not be bound, as a matter of law, to order an acquittal.** Although a preliminary investigation is not a trial and is not intended to usurp the function of the trial court, it is not a

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[34] Refer to *Callo-Claridad vs. Esteban, et al.*, supra.
[35] G.R. No. 171420, October 5, 2016.
[36] G.R. No. 178511, December 4, 2008.

> casual affair; **the officer conducting the same investigates or inquires into the facts concerning the commission of the crime with the end in view of determining whether or not an information may be prepared against the accused.** After all, **the purpose of preliminary investigation is not only to determine whether there is sufficient ground to engender a well-founded belief that a crime has been committed and the respondent therein is probably guilty thereof and should be held for trial; it is just as well for the purpose of securing the innocent against hasty, malicious and oppressive prosecution, and to protect him from an open and public accusation of a crime, from the trouble, expense and anxiety of a public trial. More importantly, in the appraisal of the case presented to him for resolution, the duty of a prosecutor is more to do justice and less to prosecute.**
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> **A preliminary investigation is the crucial sieve in the criminal justice system which spells for an individual the difference between months if not years of agonizing trial and possibly jail term, on the one hand, and peace of mind and liberty, on the other. Thus, we have characterized the right to a preliminary investigation as not a mere formal or technical right but a substantive one, forming part of due process in criminal justice.** [Bold emphasis supplied]

As can be seen, **the most important purpose of the preliminary investigation is to determine whether or not a crime has been committed, and whether or not the respondent is probably guilty of the crime.** Probable cause has been defined as the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted. It is a reasonable ground of presumption that a matter is, or may be, well founded on such a state of facts in the mind of the prosecutor as would lead a person of ordinary caution and prudence to believe, or entertain an honest or strong suspicion, that a thing is so. The term does not mean actual or positive cause; nor does it import absolute certainty. **It is merely based on opinion and <u>reasonable belief</u>.** Thus, **a finding of probable cause does not require an inquiry into whether or not there is sufficient evidence to procure conviction. That it is believed that the act or omission complained of constitutes the offense charged is enough. Precisely, <u>there is a trial for the reception of evidence of the prosecution in support of the charge</u>.**"

Based on the foregoing jurisprudential pronouncements, while it is clear that in a preliminary investigation, a finding of probable cause does not require an inquiry into whether or not there is sufficient evidence to procure conviction, there must still be a realistic judicial appraisal of the merits of the case. Specifically, **sufficient proof** of the guilt of the criminal respondent must still be adduced so that when the case is tried, the trial court may not be bound to order an acquittal, as a matter of law. As a corollary, it is just as well the purpose of a preliminary investigation to secure the innocent against hasty, malicious and oppressive prosecution, and to protect him or her from an open and public accusation of a crime, from the trouble, expense and anxiety of a public trial. The duty of the prosecutor is more to do justice and less to prosecute.

Logically, as to what constitutes sufficient proof of the guilt of a respondent of a criminal complaint, the law which was allegedly violated vis-à-vis the evidence presented by the complainant in the preliminary investigation must be inquired into and appraised by the Investigating Prosecutor.

Indeed, the Commissioner of Internal Revenue (CIR) is authorized, *inter alia*, to summon the person liable for tax or required to file a return or any officer or employee of such person, pursuant to Section 5(C) of the National Internal Revenue Code (NIRC) of 1997, to wit: ℘

"SEC. 5. *Power of the Commissioner to Obtain Information, and to Summon, Examine, and Take Testimony of Persons.* – **In ascertaining the correctness of any return, or in making a return when none has been made, or in determining the liability of any person for any internal revenue tax, or in collecting any such liability, or in evaluating tax compliance, the Commissioner is authorized:**

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(C) **To summon the person liable for tax or required to file a return, or any officer or employee of such person**, or any person having possession, custody, or care of the books of accounts and other accounting records containing entries relating to the business of the person liable for tax, or any other person, to appear before the Commissioner or his duly authorized representative at a time and place specified in the summons and to produce such books, papers, records, or other data, and to give testimony;" *(Emphases added)*

Relative thereto, Section 266 of the NIRC of 1997 provides:

"Sec. 266. *Failure to Obey Summons.* – Any person who, being duly summoned to appear to testify, or to appear and produce books of accounts, records, memoranda or other papers, or to furnish information as required under the pertinent provisions of this Code, **neglects** to appear or to produce such books of accounts, records, memoranda or other papers, or to furnish such information, shall, upon conviction, be punished by a fine of not less than Five thousand pesos (₱5,000) but not more than Ten thousand pesos (₱10,000) and suffer imprisonment of not less than one (1) year but not more than two (2) years." *(Emphasis added)*

Based on the foregoing provision, to constitute a violation thereof, the following elements must be present, to wit:

1. The offender was duly summoned to appear to testify, or to appear and produce books of accounts, records, memoranda or

other papers, or to furnish such information, as required under the pertinent provisions of this Code; and

2. The person summoned **neglected** to appear or to produce such books of accounts, records, memoranda or other papers, or to furnish such information.

In the duly approved Resolution dated January 26, 2016 issued by Assistant City Prosecutor Reuben Ritzuko T. Veradio in NPS Docket No. XV-03-INV-15C-03555, recommending the dismissal of petitioner's complaint-affidavit, it is stated that:

> "[a]fter a careful review of the evidence submitted by the complainant, namely: Letter of Authority, Subpoena Duces Tecum and the Affidavit of Service, the undersigned finds no probable cause against the respondent for violation of the afore-quoted provision of the Tax Reform Act. It appears that after the issuance of the Letter of Authority, respondent or his representative submitted documents as shown by the Letter dated July 9, 2013 and April 10, 2014 (Annexes '1' and '2' of Counter-affidavit). When respondent was required to appear on July 9, 2014, pursuant to the subpoena duces tecum, he sent a representative in the person of Emily Falco to submit additional documents and to confer with the BIR officers. A subsequent audit and examination was conducted on August 11, 12, 13 and 22, 2014 at the office of the respondent in Renaissance Tower in Pasig City. After the last audit, there is no evidence that respondent was still required to submit additional documents or that the books presented were still insufficient. Viewed from the foregoing, there appears to be no evidence that respondent 'neglected to appear or produce books' as provided for under the above-quoted provision."[37]

The foregoing finding was sustained by the DOJ as follows:

Resolution dated June 20, 2017:[38] *Je*

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[37] Docket, pp. 68 to 69.

[38] Annex "C", *Petition for Certiorari*, Docket, pp. 49 to 52.

"Complainant admitted that Respondent appeared before them through its representative Rodeen Corpuz and presented the books of accounts and other accounting records of the company. Both parties even agreed that the voluminous documents be examined at the Renaissance office provided by the Respondent. The books of account, financial records and other documents were made available to th[e] complainant which they examined in four different dates: August 11, 12, 13 and 22 of 2014.

xxx xxx xxx

In fact, even after the series of examination of the books of account and accounting records, there was no advice from Complainant on whatever documents are still needed to comply with the SDT. The accusation of the Complainant that the Respondent failed to comply with the SDT is sweeping and misleading because the Respondent, as shown from the records, actually appeared and produced the books of account and accounting records of the company.

Lastly, even in the filing of this Petition, Complainant still failed to specify what documents were submitted and what documents are still needed to complete in order to comply with the SDT."[39]

Resolution dated February 5, 2020:[40]

"In fact, appellant failed to provide evidence that appellee was [apprised] and informed of whatever records and documents that needed to be presented and submitted by him to the appellant. As correctly observed by the assailed resolution, the accusation of the appellant that the appellee failed to comply with the *subpoena duces tecum* (SDT) is sweeping and misleading because the appellee, as shown from the records, actually prepared and produced the books of account and accounting records of the company."

[39] Annex "C", *Petition for Certiorari*, Docket, pp. 49 to 52.
[40] Annex "A", *Petition for Certiorari*, Docket, pp. 33 to 35.

Thus, what is clear is that from the perspective of the Investigating Prosecutor and the DOJ, petitioner has not given sufficient proof to warrant the filing of an Information against private respondent. In other words, the prosecuting arm of the government opines that there is no evidence to support petitioner's allegation that there was a violation of Section 266 of the NIRC of 1997 on the part of private respondent. Furthermore, it is likewise noted by the same Investigating Prosecutor and the DOJ that there is no evidence that private respondent was apprised and informed of whatever records and documents which are still needed to be presented and submitted by him to petitioner to comply with the subject *subpoena duces tecum*.

Without presenting evidence or proof, however, petitioner maintained, in the proceedings *a quo*, that "[f]or failure of private respondent to submit the other subpoenaed documents, he is deemed to have failed to obey the same."

We agree with public respondent.

As already pointed out, the *second* element to constitute violation of Section 266 of the NIRC of 1997 is that the person summoned neglected to appear or to produce the pertinent books of accounts, records, memoranda or other papers, or to furnish such information. Based on the records of this case, however, there is no convincing evidence to show that the said *second* element is present.

Indeed, the subject *subpoena duces tecum* (SDT No. M-2014-00033 dated June 25, 2014) required private respondent, as an officer or employee of CJHHC, to appear before Assistant Commissioner James H. Roldan at the BIR National Office Building, Diliman, Quezon City, on July 9, 2014, and to bring with him and submit certain documents.[41] Thus on July 9, 2014, private respondent's authorized representative, namely, Mr. Rodeen Corpuz, CJHHC's Financial Controller, proceeded to the said venue and submitted some documents as well as met with certain BIR personnel.[42] In the meeting, private respondent was given until August 8, 2014 to submit the lacking documents; and the BIR personnel present requested for a venue to conduct the audit due to

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[41] Docket, pp. 98 to 99, and 119 to 120.
[42] Docket, pp. 101 to 104.

voluminous files, preferably near the CJHHC's office.[43] While there is no information whether private respondent submitted the lacking documents from the said meeting held on July 9, 2014 until August 8, 2014, it is clear, however, that certain BIR personnel went to CJHHC's office on four (4) separate dates, *i.e.*, on August 11, 12, 13, and 22, 2014, to conduct an audit and examination.[44] What happened next is the filing of a Complaint-Affidavit against private respondent for violation of Section 266 of NIRC of 1997.

Since petitioner, through its representatives who were armed with a Letter of Authority, was able to conduct an audit and examination of petitioner's records at CJHHC's office on the above-stated dates, without any indication that it was prevented from doing so, it can reasonably be inferred that it was able to access and examine whatever is lacking in the submitted documents as of July 9, 2014. If after such audit and examination there are still documents which have not been submitted or presented, prudence dictates that private respondent should have been informed thereof by petitioner.

Thus, We cannot agree with petitioner that there was failure on the part of private respondent to submit the other subpoenaed documents. Without other convincing evidence to show such failure, We agree with the Investigating Prosecutor and the DOJ that petitioner has not given sufficient proof to warrant the filing of an Information against private respondent.

At any rate, it must be stated that to consider private respondent to have "neglected" to appear or to produce the documents required under the subject *subpoena duces tecum*, We further agree with the Investigating Prosecutor and the DOJ that petitioner should have first informed private respondent of whatever is lacking in the submitted documents, if any, and failing which, it is only then that the filing of a criminal complaint for violation of the subject provision should follow. Such procedure is, as already pointed out, prudent. It is also crucial, nonetheless, not only for the reason that some of the documents were already identified as "N/A" or "Not Applicable"[45] or may not be existing at all, and thus, could not be submitted nor presented; but more importantly, because it is required that "[t]he person summoned shall be accorded **full notice**

[43] Minutes of the Meeting held on July 9, 2014, Docket, pp. 105 and 121.
[44] Docket, pp. 123 to 125.
[45] Docket, pp. 103 to 104.

and opportunity to comply with the SDT"[46] or *subpoena duces tecum*. The requirement of full notice and opportunity is ***not*** fulfilled by the simple issuance of the *subpoena duces tecum*, and in case of partial compliance thereof from the perspective of petitioner, the filing of a criminal case for failure to comply thereto should already follow, especially so that an audit and examination of the taxpayer's records happened in the interim.

Moreover, We do not agree with the contention of petitioner that it *"cannot properly conduct its assessment if none or few documents were only given"* and "[t]*hus, compliance requires full obedience to the SDT and nothing less."*[47]

That petitioner *cannot* properly conduct its assessment if none or few documents were only given is belied by the Supreme Court's jurisprudential pronouncement in *Commission of Internal Revenue vs. Hantex Trading Co., Inc.*,[48] as follows:

> **"The rule is that in the absence of the accounting records of a taxpayer, his tax liability may be determined by estimation. The petitioner is not required to compute such tax liabilities with mathematical exactness. Approximation in the calculation of the taxes due is justified.** To hold otherwise would be tantamount to holding that skillful concealment is an invincible barrier to proof. However, the rule does not apply where the estimation is arrived at arbitrarily and capriciously." *(Emphasis added)*

Thus, even in the absence of accounting records, a taxpayer's liability may be determined by estimation. In such case, petitioner is not prevented from issuing a tax assessment against CJHHC, even granting that private respondent has not submitted all of the subpoenaed documents. Furthermore, if the tax liabilities of CJHHC are later determined by estimation, *i.e.*, based on the records audited and examined by petitioner, the same cannot be necessarily considered to have been arrived at arbitrarily and capriciously, since it would be the result of petitioner's audit and examination of the records of CJHHC in the latter's office.

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[46] Part. IV, Revenue Memorandum Order No. 10-2013.
[47] Par. 38, *Petition for Certiorari*, Docket, p. 14.
[48] G.R. No. 136975, 31 March 2005.

Also, that the compliance requires full obedience to the *subpoena duces tecum* and nothing less *cannot* be adopted as the controlling principle. Petitioner must make room for the possibility that the documents being required to be submitted or presented may not be available or not existing, at all. Otherwise, a taxpayer will be at the mercy of petitioner, which may require the production of documents that a taxpayer cannot submit. *Apropos*, the law does not require the impossible.[49] Correspondingly, to inform private respondent of the documents that are still lacking is indeed called for.

Lastly, just as in the proceedings at the DOJ, it must be pointed out that even in the instant *Petition for Certiorari*, petitioner has failed to identify which of the documents subpoenaed are still not submitted by private respondent. This failure of petitioner casts doubt as to its assertion that there are still unsubmitted documents. If at the administrative level there is already doubt as to the commission of the alleged crime, what more at the judicial level. The case would then, if filed with the appropriate court, is bound to be dismissed, and as a matter of law, an acquittal would have to be ordered. Correspondingly, public respondent was correct in affirming the resolution of the Investigating Prosecutor in dismissing petitioner's complaint-affidavit against private respondent. Such being the case, public respondent has not committed grave abuse of discretion.

In sum, there being no grave abuse discretion on the part of public respondent in this case, and since We have found that the instant *Petition for Certiorari* should not prosper there being an appeal earlier available to petitioner, the same must perforce be dismissed.

WHEREFORE, in light of the foregoing considerations, the instant *Petition for Certiorari* is **DISMISSED**.

SO ORDERED.

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

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[49] *Biraogo vs. The Philippine Truth Commission of 2010, et seq.*, G.R. Nos. 192935 and 193036, 7 December 2010.

I CONCUR:

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

ATTESTATION

I attest 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's Division.

JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, and the Division Chairperson's Attestation, 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