LW

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EVA AIRWAYS CORPORATION,
Petitioner,

- versus -

C.T.A. CASE NO. 5692

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
SEP 20 2001

x - x

DECISION

The instant petition seeks the cancellation or withdrawal of the Pre-Assessment Notices dated March 27, 1998 and the Assessment Notices/Letters of Demand dated April 15, 1998, issued by Respondent against Petitioner for the aggregate amount of P21,978,474.19 for the taxable year 1994.

The facts are not disputed.

Petitioner is a resident foreign corporation engaged in the airline business. Being an international carrier, it is subject to tax on its gross Philippine billings pursuant to Section 25(2) of the Tax Code of 1993.

On April 17, 1995, Petitioner filed its 1994 Corporate Annual Income Tax Return, declaring a taxable income of P403,230,110.19 and the tax due thereon in the amount of

P10,080,752.75. Likewise, for the same taxable year, Petitioner filed its Quarterly Percentage Tax Returns, as follows:

Period Covered	Date Filed	Gross Sales/ Receipts/Earnings	Common Carrier's Tax (3%)
1st Qtr.	April 20, 1994	P102,302,385.00	P3,069,071.58
2nd Qtr.	July 20, 1994	129,989,541.00	3,899,686.23
3rd Qtr.	October 19, 1994	101,684,942.33	3,050,548.27
4th Qtr.	January 20, 1995	90,924,625.33	2,727,738.76

Pursuant to Letter of Authority No. 26868 dated November 27, 1995 and received by Petitioner on November 29, 1995, the latter's books of accounts and other pertinent records were subjected to investigation by Revenue District Office No. 48, West Makati. As a result thereof, Revenue Officer Ramila Columna and Group Supervisor Jaime Marzan submitted the following audit results (pp. 300 to 302, BIR records):

On Income Tax	
Undeclared Income	P360,841,680.87
On Percentage Tax	
Undeclared Income (Flown Revenue)	P152,403,926.49
On Documentary Stamp Tax	
Total Cargo Manifests 4,484 x P3.00/document	P 13,452.00

On March 27, 1998, pre-assessment notices were issued by Revenue Region No. 8 of the Bureau of Internal Revenue (BIR) informing Petitioner of the aforestated report of investigation together with the corresponding deficiency income, percentage and documentary stamp tax assessments amounting to P14,763,035.97, P7,178,224.95 and P16,815.00, respectively. The pre-assessment notices gave Petitioner ten (10) days to present its side, failing in which it will be presumed that it concurs with the findings of the review of the Assessment Division of the BIR and that final assessments will then follow.

On April 1, 1998, Petitioner received the subject pre-assessment notices and on April 3, 1998, protested the findings contained in the said notices. In its letter, Petitioner alleged that the legal issues it raised on the findings of the investigation conducted by BIR, West Makati have already been resolved by the Legal Division. Petitioner further argued that under Section 3(a) of Revenue Regulations No. 12-85, a taxpayer is given fifteen (15) days from receipt of the Pre-Assessment Notice to present its side and an extension of a period not to exceed ten (10) days may even be granted in meritorious cases upon written request of the taxpayer. Thus, according to Petitioner, Respondent arbitrarily shortened the period accorded to it by the said regulation, violative of its right to due process (p. 52, CTA records).

Through a letter dated April 6, 1998 but was received by Petitioner on April 14, 1998, the Assessment Division of Revenue Region No. 8 explained that the functions of its Legal Division are only recommendatory and its recommendations are still subject to the approval of the Regional Director. The said letter, however, admitted its mistake in giving Petitioner only ten (10) days to respond to its pre-assessment notice and accordingly changed its ten-day notice to fifteen (15) days (p. 43, BIR records).

The following day, April 15, 1998, Letters of Demand/Assessment Notices Nos. LA # 26868-94-419 for income tax, 02-191-94B-98-B2-419 for percentage tax and 02-191-94B-98-B2-419 for documentary stamp tax were issued against Petitioner, demanding payment of the total amount of P21,978,474.19 on or before May 15, 1998.

On April 21, 1998, Petitioner filed with the BIR its protest letter of April 20, 1998, denying its alleged tax liabilities due to the following defects/reasons:

> "1. The percentage tax deficiency amounting to P7,527,991.96 has already prescribed because your assessment notice issued on April 15, 1998 is past the three (3) year period from the last day for your office to assess under Section 203 of NIRC as amended. Since the last day to file and pay our 1994 percentage tax return for the fourth (4^{th}) quarter was on January 20, 1995, then the last day period of limitation if we count three (3) years therefrom is January 20, 1998. Clearly, the assessment notice issued is no longer effective and should be cancelled.
>
> 2. Assuming for the sake of argument that there is no prescription yet, please be informed that the assessments do not indicate with clarity the facts on which they are based. Please note that Section 228 of the 1997 Tax Code is very specific stating that "the taxpayer shall be informed in writing of the law and the ***facts*** on which the assessment is made; otherwise the assessment shall be ***void***." (emphasis supplied). Absent in your notice are the facts on which our alleged deficiency taxes were taken from. x x x
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> 3. Further, you did not comply with RR 12-85 regarding the 15-day period from receipt of the pre-assessment notice for the taxpayer to file its protest. x x x" (p. 60, CTA Records)

There being no action on the part of the Respondent, Petitioner elevated its case before Us on November 16, 1998.

In his Answer filed through registered mail on January 12, 1999, Respondent claimed by way of Special and Affirmative Defenses that:

> "8. Respondent has sufficiently complied with the requirements under Section 228(e) of the National Internal Revenue Code of 1997 (1997 NIRC) by informing the petitioner in writing and indicating therein that the basis of the assessment is the petitioner's undeclared income which is subject to tax under Section 25(2) of the old Tax Code [now Section 28(e)], hence, the assessments are valid;
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> 9. Respondent likewise sufficiently complied with the provisions of Revenue Regulations No. 12-85 as shown by the facts stated in the petition;

10. The petition is likewise premature on the ground that the respondent has not yet issued a final decision on the petitioner's protest;

11. The one hundred eighty (180)-day period under Section 228(e) of the 1997 NIRC is counted from the submission of the relevant supporting documents, which under the same section, are to be submitted within sixty (60) days from the filing of the protest, thus, in effect literally expanding the period of inaction to a maximum of two hundred forty (240) days and so, has also rendered the petition (filed on November 16, 1998) likewise premature since the same was filed within a period of only one hundred ninety six (196) days from the date of the protest letter;

12. No documents were submitted by the petitioner to the respondent but instead attached as annexes in its petition several quarterly tax returns which could have been vital in its protest against the assessments had petitioner bothered to scrutinize the details of the said assessments as contained in the Revenue Officer's Audit Report;

13. All presumptions are in favor of the correctness of the tax assessment (Interprovincial Autobus, Inc. vs. Collector of Internal Revenue, 68 Phil. 290)."

The issues submitted by the parties to this Court for resolution are:

1. Whether or not the percentage tax assessment has already prescribed.
2. Whether or not Pre-Assessment Notices (PANs) issued on March 27, 1998 complies (sic) with Revenue Regulations No. 12-85, for having been issued well within the period given to the Petitioner to file its protest.
3. Whether or not the Pre-Assessment Notices and the Assessment Notices/Letters of Demand were issued in compliance with Section 228 of the Tax Code.
4. Whether or not Petitioner is subject to the 1994 deficiency income and percentage taxes.

Before We proceed to the resolution of this case, it is appropriate to deal first with the issue raised by Respondent in his Answer that the instant petition is premature since

Respondent has not yet issued a final decision on Petitioner's protest and that the same was filed within a period of only 196 days from the date of the protest letter when the period of inaction is up to a maximum of 240 days.

We do not agree. A cursory reading of Petitioner's protest letter filed on April 21, 1998 would readily show that the arguments raised are legal and Petitioner may not be expected to submit documents in support of its protest. Respondent may even resolve the issues without waiting for supporting documents. Thus, the period within which BIR should rule on the protest is 180 days from April 21, 1998 or until October 18, 1998. Clearly, the present case was timely filed on November 16, 1998, as the same was made within thirty (30) days from the lapse of the 180-day period as mandated by Section 228 of the Tax Code of 1997. Furthermore, under the same section, the taxpayer adversely affected by the inaction of the Respondent is given the right to appeal to this Court within 30 days from the lapse of the 180-day period and need not wait for the decision of the BIR.

Now to the main issues.

As to whether or not the percentage tax assessment has already prescribed, We rule in the affirmative.

Section 125, in relation to Section 203, of the 1994 Tax Code, provide:

Section 125. ***Returns and Payment of Percentage Tax.***

(a) Return of gross sales, receipts or earnings and payment of tax. –

(1) Persons liable to pay percentage taxes. - Every person subject to the percentage taxes imposed under this Title shall file a quarterly return of the amount of his gross sales, receipts or earnings

> and pay the tax due thereon **within twenty (20) days after the end of each taxable quarter.** x x x.

> **Section 203.** ***Period of limitation upon assessment and collection.*** **–**
>
> Except as provided in the succeeding section, internal revenue taxes shall be assessed **within three years after the return was filed**, and no proceeding in court without assessment for the collection of such taxes shall be begun after 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 thereof shall be considered as filed on such last day. (Emphasis supplied)

Petitioner filed its fourth Quarterly Percentage Tax Return on January 20, 1995. Respondent, therefore, had until January 20, 1998 or three years to assess Petitioner of its percentage tax liabilities, commencing from the day Petitioner filed its fourth Quarterly Percentage Tax Return. Since Assessment Notice No. 02-191-94B-98-B2-419 relative to the alleged percentage tax liability of Petitioner was issued only on April 15, 1998, the same has clearly prescribed.

With reference to the second issue, this Court rules in the negative.

Section 3 of Revenue Regulations No. 12-85 gives the taxpayer a period of fifteen (15) days from receipt of the Pre-Assessment Notice within which to reply. Petitioner in this case was given by the Assessment Division of the BIR only ten (10) days from receipt of the Pre-Assessment Notice, that is, on April 1, 1998, to present its side. However, when the irregularity was brought to the attention of the said division on April 3, 1998, Respondent immediately tried to correct its error and granted the 15-day period to Petitioner in a letter dated April 6, 1998 but received by the latter on April 14, 1998. The following day, April 15, 1998, the subject Assessment Notices were issued.

Verily, since Petitioner received the Pre-Assessment Notices on April 1, 1998, it had until April 15, 1998 within which to present its side. Nonetheless, Respondent, after granting the 15-day period to Petitioner, issued the assessment notices also within the same period. What is even more ridiculous in this case is that Petitioner learned of the extension granted to it only on April 14, 1998 or three days after the original period has lapsed and one day before the new period expires. Considering that it only had one day left of the additional 5 days granted to it, Petitioner, therefore, can no longer be expected to give a more accurate and detailed explanation of its case. The extension granted to it served no purpose.

We move to the third issue.

Section 228 of the Tax Code states in part:

> "**Section 228.** ***Protesting of Assessment.*** - When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: Provided, however, That a pre-assessment notice shall not be required in the following cases:
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> (a) When the finding for any deficiency tax is the result of mathematical error in the computation of the tax as appearing on the fact of the return; or
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> (b) When a discrepancy has been determined between the tax withheld and the amount actually remitted by the withholding agent; or
>
> (c) When a taxpayer who opted to claim a refund or tax credit of excess creditable withholding tax for a taxable period was determined to have carried over and automatically applied the same amount claimed against the estimated tax liabilities for the taxable quarter or quarters of the succeeding taxable year; or
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> (d) When the excise tax due on excisable articles has not been paid; or

(e) When an article locally purchased or imported by an exempt person, such as, but not limited to, vehicles, capital equipment, machineries and spare parts, has been sold, traded or transferred to non-exempt persons.

The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void."

x x x x x x x x x

Thus, it is clear from the preceding provision that the law emphasizes the importance of informing the taxpayers of the law and the facts on which the assessment is made by rendering the same VOID in case of failure to indicate the basis of the assessment.

An examination of the Pre-assessment Notices and the Assessment Notices issued by Respondent against the Petitioner would disclose that the former failed to comply with the above requirement under Section 228 of the Tax Code. By merely informing Petitioner that it had an undeclared income of a particular amount under Section 25(2) of the NIRC, Respondent fell short of his obligation to apprise herein Petitioner how the underdeclaration of income was arrived at. The accompanying demand letters also failed to state the law and the facts on which the assessments were based. Consequently, the same are void in accordance with the aforequoted Section 228 of the Tax Code.

A perusal of the BIR Records likewise reveal that the working papers which could have been used by the Revenue Officers in coming up with the assessments are lacking. There were also missing pages in the records which Respondent was not able to retrieve until the termination of the trial. We, therefore, could not determine the propriety of the assessments made.

Thus, finding the Pre-assessment Notices and the Assessment Notices issued against the Petitioner to be void, herein Respondent cannot hold the Petitioner liable for its alleged 1994 deficiency income and percentage taxes.

WHEREFORE, in view of all the foregoing, the instant petition is hereby **GRANTED**. Accordingly, the Pre-Assessment Notices dated March 27, 1998 and the Assessment Notices/Letters of Demand dated April 15, 1998, particularly LA # 26868-94-419 for income tax, 02-191-94B-98-B2-419 for percentage tax and 02-191-94B-98-B2-419 for documentary stamp tax, issued by the Respondent against the Petitioner in the aggregate amount of P21,978,474.19 for the taxable year 1994 are hereby **CANCELLED** and **WITHDRAWN**.

SO ORDERED.

AMANCIO Q. SAGA
Associate Judge

I CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

CERTIFICATION

I hereby certify that the above decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge