REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EXPRESS TELECOMMUNICATION COMPANY, INC.,
Petitioner,

- versus -

C.T.A. CASE NO. 5687

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
APR 12 2000

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DECISION

Before Us for consideration is the decision of the Respondent denying Petitioner's protest on the deficiency assessment on withholding tax issued against it under Assessment Notice No. C-1-93-WT-154-97, dated September 11, 1997, in the amount of ₱6,512,789.92, inclusive of surcharge, interest and compromise penalty.

Petitioner is a corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, with principal address at 12/F, Octagon Centre, San Miguel Avenue, Ortigas Commercial Center, Pasig City, Metro Manila.

The facts are simple.

On September 22, 1997, Petitioner received from the Bureau of Internal Revenue ("BIR", for brevity) four assessment notices covering taxable year 1993. These were for deficiency income tax, value added tax, percentage tax and the one herein involved, that is, the matter of deficiency withholding tax.

A letter of protest on said notices was filed by the Petitioner on October 22, 1997 with Respondent's Intelligence & Investigation Service. Foremost in the argument of

Petitioner therein was the fact that the assessment notices had already prescribed for having been issued beyond three years reckoned from the last day fixed by law for the filing of tax returns as provided by Section 203 of the Tax Code, as amended.

In a letter, dated October 23, 1997 and received by the Petitioner on November 25, 1997, however, the Intelligence & Investigation Service of the BIR denied such protest on the ground that there being falsity in Petitioner's return, the prescriptive period should be ten years as provided by Section 223 of the same Code. Undaunted, Petitioner subsequently filed with Respondent's Appellate Division on December 5, 1997 a request for reconsideration of the aforementioned denial of its protest.

In a letter, dated July 6, 1998, and received by the Petitioner on October 1, 1998, Respondent found Petitioner's contention on the issue of prescription of the assessment notices to be meritorious, except for the deficiency assessment on withholding tax, which We quote in toto:

July 6, 1998

SYCIP GORRES VELAYO & CO.
6760 Ayala Avenue, Makati
Metro Manila

Gentlemen:

This refers to your administrative protest which you filed for and on behalf of your client, **EXPRESS TELECOMMUNICATIONS CO., INC.,** against the assessments of this Office involving the amounts of ₱36,167,129.62; ₱2,352,007.89; ₱6,512,789.92; and ₱106,457.20, respectively representing alleged deficiency income, value-added, withholding and percentage taxes for taxable year 1993, and covered by Assessment Nos. FAN C-1-93-IT-152-97; FAN C-1-93-VAT-153-97; FAN C-1-93-WT-154-97 and FAN 1-93-Perc.-155-97, all dated September 11, 1997.

After a careful review of the facts of the case as well as the law and jurisprudence involved, this Office finds merit in your contention that the right of the government to issue the following deficiency assessments has already been barred by prescription, viz:

a. 1993 Deficiency Income Tax	₱36,167,129.62
b. 1993 Deficiency Value- Added Tax	2,352,007.89
c. 1993 Deficiency Percentage Tax	106,457.29

With regard to the 1993 deficiency withholding tax assessment, we find your argument that the same has likewise been barred by prescription to be totally bereft of merit.

It is a well accepted principle in taxation that the withholding tax scheme is not a tax but just a manner of collecting in advance an internal revenue tax, i.e. income tax and value-added tax. The penalty for its violation is provided for under the then Section 251 of the Tax Code, as amended, which in essence states that "Any person required to collect, account for, and remit any tax imposed by this Code or who willfully fails to collect such tax, or account for and remit such tax, or willfully assists in any manner to evade any such tax or the payment thereof, shall, in addition to other penalties provided or under this Chapter, be liable to a penalty equal to the total amount of the tax not collected, or not accounted for and remitted."

Obviously, from the foregoing, deficiency withholding tax assessments are issued by the Bureau not for the purpose of collecting an internal revenue tax but as a penalty or as an imposition for violation of the above-cited Section of the Tax Code, as amended.

Since this is not an internal revenue tax assessment but in reality a penalty, its prescription is governed not by then Section 203 of the Tax Code, as amended, but by then Section 280 of the same. To apply therefore, the three-year prescriptive period on its imposition is indubitably erroneous.

In view thereof, you are hereby directed to advise your client to pay the amount of ₱6,512,789.92 as its 1993 Deficiency Withholding Tax, exclusive of increments that may accrue thereon, to the BIR District Office which has jurisdiction over their office within five (5) days from receipt hereof, otherwise, this Bureau will enforce collection thru the summary remedies provided by law.

This constitutes the final decision of this Office on the matter.

Very truly yours,

(Sgd.) BEETHOVEN L. RUALO
Commissioner of Internal Revenue

(Annex "I" of Petition; underscoring supplied)

On October 27, 1998, or before the lapse of thirty (30) days from receipt of the denial of the motion for reconsideration by the Respondent on October 1, 1998, Petitioner elevated its case before this Court, pursuant to the provisions of Section 229 of the Tax Code, as amended.

At bar, Petitioner submits that the deficiency assessment notice on its alleged 1993 withholding tax liability is devoid of merit inasmuch as it was sent and received by it only on September 22, 1998, which date is well beyond the three-year reglementary period for making an assessment under Section 203 of the Tax Code, as amended. Petitioner contends that its withholding tax liability for the twelve months of 1993 has all but prescribed. Reckoned from the 25th day of January 1994[1], it avers that the latest month of December, 1993 had prescribed beyond three years on January 24, 1997 (*should be January 25, 1997; 1996 being a leap year and in consonance with the rule in the computation of a period that the first day should be excluded and the last day included - Article 13 of the New Civil Code*).

Respondent, on the other hand, ripostes in his Answer the following special and affirmative defenses, to wit:

> 4. That for failure of Petitioner to withhold tax on payment such as professional fee, etc., respondent issued to petitioner Annex "C" of the Petition for Review demanding from Petitioner the remittance or

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[1]. Monthly withholding tax return for a large taxpayer is now required to be filed on or before the 25th day of the following month.

payment of the amount of ₱6,512,789.92 as withholding taxes for the year 1993;

5. That withholding tax is not a tax but just a manner of collecting in advance an internal revenue tax, that is income and value added taxes;

6. That such being the case, the law applicable is not Section 203 but Section 251 in relation to Section 280 of the National Internal Revenue Code, as amended, which is five (5) years and in this case from the discovery, which was on July 15, 1997;

7. That as Annex "C" was issued on September 11, 1997, it is clear that the right of respondent to demand payment of withholding taxes from petitioner has not as yet prescribed;

8 That the demand by respondent on petitioner to remit the amount stated in Annex "C" was timely and in accordance with law.

Based on the preceding facts and circumstances, this Court is solely confronted with a legal issue, as agreed upon by herein parties in their joint stipulation of facts, and that is, *whether or not the prescriptive period of three years under Section 203 of the Tax Code, as amended, applies to deficiency assessments on withholding tax.*

In order to arrive at a full understanding, the concerned provisions of the Tax Code, as amended, are reproduced hereunder, to wit:

A. Section 203, Chapter I, Title VIII on Remedies -

SEC. 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 last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection if 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 thereof shall be considered as filed on such last day. (As amended by B.P. Blg. 700)

B. Sections 247 & 251, Chapter I, Title X on Statutory Offenses and Penalties -

SEC. 247. ***General provisions.*** **-** (a) *The additions to the tax or deficiency tax prescribed in this Chapter shall apply to all taxes, fees and charges imposed in this Code. The amount so added to the tax shall be collected at the same time, in the same manner and as part of the tax.*

x x x x x x x x x

SEC. 251. ***Failure of a withholding agent to collect and remit tax.*** - Any person required to collect, account for, and remit any tax imposed by this Code who willfully fails to collect such tax, or account for and remit such tax, or willfully assists in any manner to evade any such tax or the payment thereof, shall, *in addition to other penalties provided for under this Chapter*, be liable to a penalty equal to the total amount of the tax not collected, or not accounted for and remitted.

x x x x x x x x x

C. Section 280, Chapter IV on Other Penal Provisions, ibid. -

SEC. 280. ***Prescription for violations of any provisions of this Code.*** - *All violations of any provision of this Code shall prescribe after five years.*

Prescription shall begin to run from the day of the commission of the violation of the law, and if the same be not known at the time, from the discovery thereof and the institution of judicial proceedings for its investigation and punishment.

The prescription shall be interrupted when proceedings are instituted against the guilty persons and shall begin to run again if the proceedings are dismissed for reasons not constituting jeopardy.

The term of prescription shall not run when the offender is absent from the Philippines.

(All italics and underscoring supplied)

After a circumspect analysis of the disquisition of the parties, the issue involved and the provisions of law and jurisprudence in point, this Court rules in favor of the Petitioner.

It is unfortunate that Respondent has virtually failed to grasp the true meaning and nature of the "penalty" that is imposed on a taxpayer under the above cited Section 251 of the Code (Letter of Denial, dated July 6, 1998; p. 4, supra). The "penalty" merely refers to a *civil penalty*, as can be inferred from the phrase *"in addition to other penalties provided for under this chapter"*. A reading of said chapter shows that it covers civil penalties, such as but not limited to, the 25% or 50% surcharge, 20% deficiency or delinquency interest. As a civil penalty, Section 251 describes in monetary terms that the same shall be EQUAL to the amount of the tax not collected, or not accounted for and remitted.

In the same manner, Respondent committed a grave error when he concluded that the questioned deficiency assessment on withholding tax it sent to the Petitioner is "not an internal revenue tax assessment but in reality a penalty" (Annexes "C" and "1" of Joint Stipulation of Facts).

It is unmistakably clear that the law intended such "penalty" to be an *additional part* of the deficiency withholding tax being assessed. This pronouncement can be gleaned from the general provisions contained in the aforecited Section 247 governing the chapter on additions to tax. It is categorically stated therein that "the additions to the tax or deficiency tax" prescribed in the chapter shall apply to "all" taxes, fees and charges imposed under the Code and likewise, "shall be collected at the same time, in the same manner and as part of the tax".

Considering therefore that a penalty under Section 251 is part and parcel of a deficiency tax to be collected, the assessment notice sent by the Respondent to the Petitioner is undeniably subject to the three-year prescriptive period as provided under Section 203 of the Code.

Likewise, it is very important to note that Section 51 of the Tax Code, as amended, requires taxes deducted and withheld to be covered by a *return* which by its provisions is to be *filed and paid* within 25 days from the close of each calendar quarter in the case of final withholding taxes, and not later than the last day of the month following the close of the quarter during which withholding was made.

The filing of a return being a mandatory requirement for withholding taxes, it is needless to say that the latter falls under the provisions of Section 203 of the Tax Code, as amended, *supra*, on the period of limitation upon assessment and collection of deficiency taxes whereby taxes are to be "assessed within three years *after the return was filed*". (Italics and underscoring supplied)

Undisputed facts of herein case readily reveal that the assessment notice sent by the Respondent has already prescribed because it was received by the Petitioner well beyond the three year-period.

By trying to differentiate between an assessment and a penalty, Respondent obviously wanted to extricate himself from the prescriptive period of three years applicable to assessments, as provided under Section 203 of the Code, *supra*, and thereby rely on Section 280 of the same Code, *supra*, which sets a five-year prescriptive period. With the latter period, the deficiency assessment sent by the Petitioner could still be within the five-year period covering the years 1993 to 1998, inasmuch as the assessments were all received by the Petitioner in 1997.

It is evident that Section 280 of the Tax Code applies only to criminal violations. Respondent should have noticed that the chapter upon which Section 280 is included, Chapter IV of Title X is entitled, "OTHER PENAL PROVISIONS". The word "penal" is too descriptive and precise to be misconstrued with other matters related to crimes. Most importantly, the provisions of Section 280 itself are full of tell-tale signs of the basic precepts of criminal law applicable to prescription. For instance, the mention of "jeopardy", "offender", the running and interruption of prescription, and the institution of judicial proceedings for investigation and punishment are terms exclusively used in criminal law.

After a careful examination of deficiency assessment on withholding tax issued against the Petitioner in the amount of P6,512,789.92 (Annex "C" of the Joint Stipulation of Facts), no civil penalty EQUAL to the total amount of the tax not collected, or not accounted for and remitted, as prescribed under Section 251 of the Code, has been ACTUALLY assessed together with the principal amount, 20% interest, 25% surcharge and compromise penalty (BIR records, p. 186; Memorandum for the Respondent, p. 3).

The aforesaid civil penalty cannot possibly be considered to be the one subject of the "compromise penalty" as stated in the assessment notice. Under Section 204 of the Code, Respondent can compromise the payment of any internal revenue tax only when a reasonable doubt as to the validity of the claim against the taxpayer exists; or the financial position of the taxpayer demonstrates a clear inability to pay the assessed tax. Court records reveal that neither of such conditions obtain in this case. Instead, what is evident is the predisposition of the Respondent to relate Section 251 with Section 280 which lays down prescriptive periods for penal violations of the Code. This leads the Court to no other conclusion than to see the "compromise penalty" as a substitute for criminal prosecution pursuant to the same Section 204 concerning compromise of criminal violations and Revenue Memorandum Order (RMO) No. 26-86, as amended by RMO No. 1-90 issued in accordance therewith.

Without such penalty, any discussion on Section 280 requiring a five-year prescriptive period. is futile. Everything is deemed moot and academic. This would mean also that the questioned deficiency assessment on withholding tax against the

Respondent is founded on facts and not established on informed grounds, thereof necessitating its invalidation by this Court.

WHEREFORE, in view of the foregoing, the instant Petition for Review is hereby **GRANTED**. **Assessment Notice No. C-1-93-WT-154-97** issued by the Respondent Commissioner against the Petitioner in the amount of **₱6,512,789.92**, dated September 11, 1997, has **PRESCRIBED**. **ACCORDINGLY**, the same is hereby ordered **CANCELLED AND DECLARED OF NO FORCE AND EFFECT**.

SO ORDERED.

RAMON O. DE VEYRA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

AMANCIO Q. SAGA
Associate 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