REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

SECOND DIVISION

PEOPLE OF THE PHILIPPINES,
Plaintiff,

-versus-

LITO S. GALERO,
Accused.

C.T.A. CRIM. CASE NO. O-055
For: Violation of Section 255 in relation to Section 253 (d) and 256 of 1997 Tax Code, as amended

Members:
CASTAÑEDA, JR., Chairperson
UY, and
PALANCA-ENRIQUEZ, JJ.

Promulgated:

SEP 3 0 2009
9:35 a.m.

x - x

DECISION

UY, *J.*:

In an Amended Information filed on December 28, 2007, accused Lito S. Galero is charged before this Court with the crime of "Violation of Section 255 in relation to Sections 253(d) and 256 of the 1997 Tax Code, as amended by RA 8424", which reads as follows:

> "'That on or about the January 9, 2001, in the City of Manila, Philippines, the said accused being then the responsible officer of REAL TELEPHONE TRADING CO. INC. located at G/F Isetann, C.M. Recto Avenue, Quiapo, this City, having filed their internal revenue tax for the year 1997, and after an examination and audit of the same, it has been found that there is due and collectible from said accused the amounts of P1,520,476.42 as deficiency value added tax (VAT), P19,128.00 as deficiency (EWT) and P53,000.00 as compromise penalty tax and without formally protesting against appealing the same, despite due assessment, notice and demand to do so, failed and refused to pay the aforesaid deficiency taxes, to the damage and prejudice of the Republic of the Philippines in the total amount of P2,550,298.14, Philippine Currency.'

CONTRARY TO LAW."

Accused voluntarily surrendered before this Court and posted the required bail bond for his provisional liberty by way of cash bond in the reduced amount of P10,000.00 on October 15, 2007[1].

Upon arraignment[2], accused assisted by defense counsel de parte, Atty. Eulogio S. Enriquez, entered a plea of "Not Guilty" to the crime charged. A Preliminary Conference was held before the Second Division Clerk of Court on February 18, 2008,[3] and the pre-trial was terminated on March 3, 2008.[4] Thereafter, the parties presented their respective evidence.

The prosecution presented four (4) witnesses to establish accused's culpability, namely: Ronaldo B. Jordan, Gloria Maliwanag, Teresita Maglunog and Atty. Ramon B. Lorenzo.

On the other hand, the defense presented the accused himself, Lito S. Galero, as its lone witness. Thereafter, both parties were ordered to file their simultaneous memoranda, within thirty (30) days from notice.[5] The prosecution filed its Memorandum on April 2, 2009[6], while the accused failed to file his memorandum as per report of the Records Division. Thus, this case was deemed submitted for decision on June 22, 2009.[7]

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[1] Official Receipt No. 2904512, Docket, p. 50.
[2] Certificate of Arraignment, Docket, p. 91, Resolution dated January 28, 2008, Docket, pp. 94-95.
[3] Minutes of Preliminary Conference, Docket, pp. 96-102
[4] Docket, p. 109.
[5] Ibid.
[6] Docket, pp. 669-675.
[7] Resolution dated June 22, 2009, Docket, p. 679.

Evidence of the Prosecution

On the basis of the 1997 Annual Income Tax Return filed by Real Telephone Trading Co., Inc. (RTTCI for brevity) on April 3, 1998[8], a Letter of Authority No. 00001103 dated February 16, 1999[9] was issued authorizing Ronaldo B. Jordan, Revenue Officer III-Assessment of the BIR, who was previously assigned at Revenue District Office No. 32, Revenue Region No. 6, Manila, and Group Supervisor Remedios Yorobe to examine the books of accounts and accounting records of the corporation. Said Letter of Authority was allegedly served upon the company on February 26, 1999 by a certain Jenevic Acdo[10].

As a result of the investigation conducted by Revenue Officer Talag thru the best evidence obtainable, a Memorandum Report[11] was prepared finding the company RTTCI liable for deficiency income tax, VAT and EWT, as well as compromise penalties. Upon final review of the tax docket of accused by Gloria S. Maliwarag, a Pre-Assessment Notice[12], Revenue Audit Reports on Income Tax, EWT and VAT,[13] all dated December 12, 2000, were issued.

On January 9, 2001, Assessment Notice No. 32-A-00044-97[14] with accompanying demand letters[15] for deficiency income tax, VAT, EWT and compromise penalties were issued by the Assessment Division to RTTCI and sent to its registered business address at SP-2 2/F New Farmers Plaza, Cubao, Quezon

[8] Exhibit "X".
[9] Exhibit "A".
[10] Exhibit "A-1".
[11] Exhibits "H" to "L", Docket, pp. 148-153
[12] Exhibit "M".
[13] Exhibits "N" and "O".
[14] Exhibits "P", "P-2" and "P-4".
[15] Exhibits "P-1", "P-3", "P-5" to "P-9".

City by registered mail on January 10, 2001.[16] On July 2003, the same docket was assigned to Atty. Lorenzo to enforce collection thereof.

On May 23, 2004, accused Lito S. Galero allegedly offered to pay the amount of P50,000.00 in a letter[17] addressed to the Regional Director, Revenue Region No. 7, Quezon City, in full settlement of the corporation's 1997 tax liabilities. The National Evaluation Board-Technical Working Group sent a letter to BIR Manila informing the latter of the accused's offer of compromise and requested for the docket of the case[18].

Considering however that the right of the government to collect is about to prescribe, Atty. Ramon B. Lorenzo filed a criminal complaint[19] with the Office of the City Prosecutor of Manila against accused for failure to pay the subject tax deficiencies, in violation of Section 255, in relation to Sections 253(d) and 256 of the 1997 Tax Code, as amended. Consequently, the above-captioned case was filed against accused Lito S. Galero, in his capacity as president of Real Telephone Trading Co., Inc.

Evidence of the Defense

For his defense, accused Lito S. Galero vehemently denies the allegations in the information that he failed to pay and refused to pay the assessed deficiency taxes for taxable year 1997 for his company Real Telephone Trading Co., Inc. (RTTCI). In his Judicial Affidavit,[20] accused admitted that on August 2, 1995, RTTCI was incorporated and registered with the Securities and exchange Commission

[16] Ibid.
[17] Exhibit "T".
[18] Exhibit "U".
[19] Exhibit "V".
[20] Docket, pp. 598-601.

(SEC)[21] with a paid up capital of P70,000.00, and was engaged in the business of selling cellular phone units which were acquired by the company through consignment from their suppliers from which it derived income on commission basis. The company allegedly ceased operations in 1999 due to bankruptcy. Accused also admitted that he served as the President of the said corporation during its business operations.

He also asserts that his failure to pay tax is not willful, but rather due to financial incapacity to pay the full amount.[22] And to show his good faith, he presented a letter dated March 23, 2004[23], where he made an offer of compromise for payment of deficiency tax assessments and subsequently paid portions[24] of the said offer despite the fact that it is still pending evaluation by the Technical Working Group, National Evaluation Board[25]. He also availed of the tax amnesty program and paid a total amount of P25,000.00, as amnesty payment.[26]

THE ISSUE

WHETHER OR NOT ACCUSED LITO S. GALERO, IS LIABLE FOR VIOLATION OF SECTION 255, IN RELATION TO SECTIONS 253 (D) AND 256 OF THE 1997 NATIONAL INTERNAL REVENUE CODE, AS AMENDED.

THE COURT'S FINDINGS AND RULING

Accused, Lito S. Galero, is charged before this Court with the crime of "Violation of *Section 255 in relation to Sections 253 (d) and 256, of the National Internal Revenue Code (NIRC) of 1997, as amended.*"

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[21] Exhibit "28".
[22] Counter-Affidavit of Lito S. Galero, Exhibit "10".
[23] Exhibit "11".
[24] Exhibit "17".
[25] Exhibit "27".
[26] Exhibis "12" to "16".

Sections 255, in relation to 253 (d) and 256 of the *NIRC of 1997, as amended*, provide as follows:

> "**SEC. 255.** ***Failure To File Return, Supply Correct and Accurate Information, Pay Tax, Withhold and Remit Tax and Refund Excess Taxes Withheld On Compensation.*** - **Any person required under this Code or by rules and regulations promulgated thereunder to pay any tax**, make a return, keep any record, or supply correct and accurate information, **who willfully fails to pay such tax,** make such return, keep such record, or supply such correct and accurate information, or withhold or remit taxes withheld on compensation, **at the time or times required by law or rules and regulations** shall, in addition to other penalties provided by law, upon conviction thereof, be punished by a fine of not less than Ten thousand pesos (P10, 000) and suffer imprisonment of not less than one (1) year but not more than ten (10) years." *(Emphasis and underscoring Ours)*
>
> "**SEC. 253. General Provisions.-**
>
> xxx xxx xxx
>
> (d) **In the case of associations, partnerships or corporations, the penalty shall be imposed on the** partner, **president,** general manager, branch manager, treasurer, officer-in-charge, and employees responsible for the violation." *(Emphasis and underscoring Ours)*
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> "**Section 256. Penal Liability of Corporations.** - Any corporation, association or general co-partnership liable for any of the acts or omissions penalized under this Code, in addition to the penalties imposed herein upon the responsible corporate officers, partners, or employees shall, upon conviction for each act or omission, be punished by a fine of not less than Fifty thousand pesos (P50,000) but not more than One hundred thousand pesos (P100,000)."

Section 255 of the *NIRC of 1997, as amended*, provides four (4) different situations, each of which constitutes the crime of failure to perform, in a timely manner, an obligation imposed by the *NIRC of 1997, as amended*, namely:

(1) To pay an estimated tax or taxes;
(2) To make (file) a return;
(3) To keep records; and
(4) To supply information.

To establish the offense of failure to pay any tax, the prosecution must prove three (3) essential elements, to wit:

(1) That the defendant-taxpayer had a duty to pay a tax;
(2) That the tax was not paid at the time required by law; and
(3) That the failure to pay was willful.

Accused is charged herein, in his capacity as the President of the Real Telephone Trading Co., Inc. (RTTCI), which was found by the Bureau of Internal Revenue to have failed to pay its corporate internal revenue tax obligations for taxable year 1997, to wit: deficiency income tax in the amount of P957,693.72; deficiency VAT in the amount of P1,520,476.42; deficiency EWT in the amount of P19,128.00; and compromise penalties in the amount of P53,000.00. Thus, the corporate act that is the subject matter of this criminal case is the failure of RTTCI to pay its internal revenue tax obligations for taxable year 1997. As RTTCI is a juridical person, Section 253 (d) of the NIRC of 1997, as amended, specifically provides that *in* ***the case of associations, partnerships or corporations, the penalty shall be imposed on the*** *partner,* ***president****, g*eneral manager, branch manager.

<u>Duty to Pay Tax</u>

The obligation of a corporation, such as RTTCI, to pay taxes on all its income derived from its business operations within this jurisdiction is provided under Section 23 of the *NIRC of 1997, as amended*, to wit:

> "**SEC. 23. General Principles of Income Taxation in the Philippines.** – Except when otherwise provided in this Code:
>
> xxx xxx xxx

(E) A domestic corporation is taxable on all income derived from sources within and without the Philippines;"

The evidence on record shows that RTTCI is engaged in business and earned income from sources within the Philippines and accused himself presented the corporation's Articles of Incorporation[27], as proof of the corporation's existence and registration with the SEC. As regards RTTCI's duty to pay tax, the corporation's 1997 Annual Income Tax Return filed on April 3, 1998[28] shows that it earned income from its business operations during the taxable year 1997. Hence, the corporation's duty to pay taxes has been sufficiently established.

The fact that the accused was the president of RTTCI was admitted and stipulated upon by the parties in the Statement of Facts in the Pre-Trial Order dated March 6, 2008[29], to wit:

"1. The accused Lito S. Galero was President of Real Telephone Trading Co., Inc. in 1997 with office then at G/F Isetann, C.M. Recto Avenue, Quiapo, Manila;"

Tax was not paid at the time required by law.

The prosecution has sufficiently established through the Memorandum Report and supporting documents prepared by Revenue Officer Tito Talag, Preliminary Assessment Notice and Assessment Notice No. 32-A-00044-97, that RTTCI has deficiency income tax, VAT and EWT which the defense failed to controvert. In fact, accused himself admitted in his Counter-Affidavit that "the failure to pay tax was not

[27] Exhibit "28", Docket, pp. 645-656.
[28] Pre-Trial Order, Docket p. 127; Exhibit "X", Docket p. 492.
[29] Docket p. 127.

willful but rather due to financial incapacity to pay the full amount".[30] Furthermore, the evidence adduced shows that the accused attempted to settle said deficiencies by making an offer of compromise, availment of tax amnesty, and paying the amount stated in his offer instead of protesting the said assessment, both administratively and judicially.

Willfulness in Failure to Pay Tax

The third essential element of the crime charged in this case requires that the "failure to pay the required tax" must be "*willful*".

A careful examination of the Amended Information shows a crucial omission in its averments of "willfulness" in the failure to pay the required taxes.

Instructive in this regard is Section 6 of Rule 110 of the Revised Rules of Criminal Procedure, to wit:

> "***SEC. 6. Sufficiency of Complaint or Information.*** – A complaint or information is sufficient if it states the name of the accused; the designation of the offense given by the statute; **the acts or omissions complained of as constituting the offense;** the name of the offended party; the approximate date of the commission of the offense; and the place where the offense was committed.
>
> When an offense is committed by more than one person, all of them shall be included in the complaint or information." *(Emphasis and underscoring Ours)*

Pursuant to the above provision, it is fundamental that every element constituting an offense charged must be alleged in the complaint or information. And a complaint is deemed sufficient if it describes the offense in the language of the statute whenever the statute contains all of the essential elements constituting

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[30] Exhibit "10", par. 6.

the particular offense. Thus, We look into the language of the statute violated, Section 255 of the *NIRC of 1997, as amended*, the pertinent part reading as follows:

> "Any person required under this Code or by rules and regulations promulgated thereunder to pay any tax, x x x **who willfully fails to pay such tax**, x x x at the time or times required by law or rules and regulations shall, in addition to other penalties provided by law, upon conviction thereof, be punished by a fine of not less than Ten thousand pesos (P10, 000) and suffer imprisonment of not less than one (1) year but not more than ten (10) years. x x x"

On the other hand, the Amended Information states as follows:

> "That on or about the January 9, 2001, in the City of Manila, Philippines, the said accused being then the responsible officer of REAL TELEPHONE TRADING CO. INC. located at G/F Isetann, C.M. Recto Avenue, Quiapo, this City, having filed their internal revenue tax for the year 1997, and after an examination and audit of the same, it has been found that there is due and collectible from said accused the amounts of P1,520,476.42 as deficiency value added tax (VAT), P19,128.00 as deficiency (EWT) and P53,000.00 as compromise penalty tax and without formally protesting against appealing the same, despite due assessment, notice and demand to do so, **failed and refused to pay the aforesaid deficiency taxes, to the damage and prejudice of the Republic of the Philippines** in the total amount of P2,550,298.14, Philippine Currency." *(Emphasis Ours)*

Evidently, the Amended Information does not allege "willful failure to pay taxes". Absent the allegation of this essential element, the accused cannot be convicted for violation of Section 255 of the *NIRC of 1997, as amended.* Well-settled is the rule that to warrant conviction, every element of the crime must be alleged and proved.[31]

Furthermore, the Court finds that, not only did the Amended Information fail to allege the essential element of "willfulness" in the manner of commission of the offense charged, the prosecution also did not present evidence to establish this

[31] People vs. Sy Gesiong, 60 Phil. 614, see also Sugay vs. Pamaran, 41 SCRA 260.

essential element of "willfulness". Although it was shown that accused knew about the assessment against RTTCI and the demand made to said corporation to pay its corporate tax obligations, as well as accused's subsequent failure to comply therewith, this failure was not shown to be intentional or deliberate.

Conversely, the evidence presented shows a pattern of affirmative acts on accused's attempt to pay the corporation's tax liabilities despite the alleged financial incapacity of the corporation to do so. Clearly, these acts negate voluntary or purposeful intention, on the part of the accused, not to pay the tax liabilities of the corporation. Thus, the Court finds insufficiency of evidence to hold accused criminally and civilly liable for the offense charged in this case.

WHEREFORE, in view of the foregoing considerations, accused LITO S. GALERO is hereby **ACQUITTED** for failure to charge an offense and on reasonable doubt. The cash bond posted is hereby **CANCELLED** and ordered **RELEASED** to its lawful owner upon presentation of proper documents in accordance with usual accounting rules and regulations.

No Costs.

SO ORDERED.

ERLINDA P. UY
Associate Justice

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

OLGA PALANCA-ENRIQUEZ
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.
JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson

CERTIFICATION

Pursuant to Article VIII, Section 13 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.

ERNESTO D. ACOSTA
Presiding Justice