REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

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CAP HEALTH MAINTENANCE ORGANIZATION, INC.,
Petitioner,

C.T.A. CASE NO. 6375

Members:

- versus -

ACOSTA, *Chairperson*
BAUTISTA, and
CASANOVA, *JJ.*

HON. RENE BAÑES, COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
OCT 02 2006, 4:00 PM

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DECISION

CASANOVA, C., J.:

This is a Petition for Review seeking the cancellation and/or withdrawal of the deficiency income and expanded withholding tax assessments in the amounts of **TWO MILLION SIX HUNDRED SIXTY SIX THOUSAND ONE HUNDRED SEVENTY TWO AND 93/100 PESOS (P2,666,172.93)** and **EIGHT HUNDRED NINETY SIX THOUSAND EIGHT HUNDRED SIXTY ONE AND 17/100 PESOS (P896,861.17)** covering the taxable year 1994.

Petitioner is a domestic corporation duly organized and existing under the laws of the Republic of the Philippines with principal address at Penthouse, Jaka II Building, 150 Legaspi

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St., Legaspi Village, Makati City.[1]

Respondent is the duly appointed Commissioner of Internal Revenue vested by law to decide disputed assessments and to enforce the provision of the NIRC, and other tax laws, with office address at BIR National Office Building, Diliman, Quezon City.[2]

A chronological summary of the various communications between petitioner and respondent as admitted by them, is as follows:

For the taxable year 1994, petitioner filed its Annual Income Tax Return on April 17, 1995.[3]

On July 2, 1998, respondent received petitioner's letter dated July 1, 1998 questioning Assessment Notice No. 000273-94-388 dated January 9, 1998. The letter, aside from informing the respondent that petitioner only received the subject assessment notice after it delivered its June 24, 1998 letter,[4] likewise, requested for a reinvestigation.

On May 14, 1999, petitioner received respondent's Demand Letter dated April 29, 1999[5], demanding from petitioner that it pay its deficiency taxes for the taxable year 1994 within fifteen (15) days from its receipt thereof.

On May 24, 1999, petitioner formally contested Assessment Notice No. 000273-94-388 through its letter of May 21, 1999.[6] However, on July 7, 1999, respondent received another protest letter dated July 5, 1999 from petitioner,[7] this time, explicitly explaining why it is protesting the subject assessment notice.

On January 3, 2001, petitioner received the Preliminary Collection Letter dated December 18, 2000.[8] Subsequently, on January 16, 2001, petitioner received a Final Notice

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[1] Par. 1, Summary of Admitted Facts
[2] Par. 2, Summary of Admitted Facts
[3] Exhibit "A"
[4] Exhibit "D"
[5] Exhibit "E"
[6] Exhibit "F"
[7] Exhibit "M"
[8] Exhibit "O"

Before Seizure dated January 8, 2001[9] giving petitioner its last opportunity to settle its tax liabilities. This notice was contested to by petitioner through a letter dated January 16, 2001.[10]

Finally, on July 11, 2001, petitioner received respondent's Final Decision on Disputed Assessment dated June 26, 2001.[11] A request for reconsideration was filed by petitioner on August 10, 2001,[12] which was denied by respondent through a letter dated November 12, 2001.[13]

On January 9, 2002, petitioner filed this instant Petition for Review questioning the validity of the assailed assessment notices both dated January 9, 1998 and requesting for the cancellation and/or withdrawal thereof.

On June 19, 2002, respondent filed through registered mail his Answer interposing the following Special and Affirmative Defenses:

6. He reiterates and repleads the preceding paragraphs of this answer as part of his Special and Affirmative Defenses;

7. The Assessment Notice No. 000273-94-388 dated January 9, 1998 issued to herein petitioner were valid and effective. Section 203 of the Tax Code provides as follows:

> "xxx Internal revenue taxes shall be assessed within three (3) years after the last day prescribed by law for the filing of the return xxx; provided, that in 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. xxx"

In relation thereto, Section 3.1.4 of Revenue Regulations No. 12-99 provides that an assessment is deemed made upon the service of the Formal Assessment Notice ("FAN") by registered mail or by personal service. In the instant case, the record shows that on January 9, 1998 respondent issued Assessment Notice No. 000273-94-388 to herein petitioner. On the same date, January 9, 1998, respondent served by registered mail with registry service return card upon petitioner at their business address the said formal Assessment Notice. In pursuance to the

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[9] Exhibit "P"
[10] Exhibit "Q"
[11] Exhibit "S"
[12] Exhibit "T"
[13] Exhibit "U"

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above quoted provision of law, counting from April 17, 1995, the date when petitioner filed its Corporate Annual Income Tax Return for taxable year 1994, respondent has until April 17, 1998 within which to assess/collect any deficiency tax liability of petitioner for taxable year 1994. Hence, the fact that the aforementioned Assessment Notice was served upon petitioner by registered mail on January 9, 1998, undoubtedly the assessment issued to petitioner for deficiency income and expanded withholding taxes for 1994 falls within the reglementary three (3) year prescriptive period.

8. Section 228 of the Tax Code, partly provides:

"Sec. 228. Protesting of Assessment. – Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations. Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.

Considering the failure of petitioner to submit all relevant supporting documents within sixty (60) days from filing its protest, the assessments have become final by operation of law.

9. Since the assessments have become final, this Honorable Court has no jurisdiction to act on the instant petition.

10. Assuming that this Honorable Court has jurisdiction over the case, the subject assessments were valid and effective, since after the reinvestigation of the BIR examiners it was disclosed that the presentation of petitioner of its Secretary's Certificate to support its claimed deductible bad debts are self-serving. It does not actually established (sic) the fact that the debts are in fact ascertained with certainty to be worthless and uncollectible. Further, there was no documentary evidence that will show that petitioner exerted diligent efforts to collect the said debts, hence, it should be disallowed as deductions from its gross income pursuant to Section 29 of the Tax Code, as amended.

11. After re-investigation it was further disclosed that the overriding commissions in the amount of P1,693,844.62 should be disallowed as deduction from petitioner's gross income for its failure to withheld taxes, pursuant to Section 1 (g) of Revenue Regulations No. 6-85 which provides that income payments to agents are liable to expanded withholding tax (EWT) as brokers.

12. Further, the supplemental compensation in the amount of P280,691.98 should be disallowed as deduction from petitioner's gross income since this item is subject to withholding tax and is taxable under Section 21 of the Tax Code, as amended.

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13. Furthermore, pursuant to Section I (g) of Revenue Regulations No. 6-85, the agent's commissions in the amount of P3,157,870.38 and its collection bonus in the amount of P3,004,667.86 of petitioner are subject to the 5% expanded withholding tax since income payments to agents are liable to expanded withholding tax (EWT) as brokers and is subjected to the 5% withholding tax rate.

14. Moreover, petitioner is liable to pay the 25% surcharge imposed under Section 248 of the Tax Code and the 20% annual interest imposed under Section 249 of the Tax Code and Revenue Memorandum Order No. 1-90, as well as the compromise penalty for its failure to pay the deficiency taxes for 1994 covered under Assessment Notice No. 000273-94-388 dated January 9, 1998.

15. The assessment issued against petitioner for deficiency income and expanded withholding taxes for taxable year 1994 in the amount of P2,666,172.93 and P896,861.17 respectively, covered under Formal Assessment Notice No. 000273-94-388 dated January 9, 1998 were made in accordance with law and regulations.

16. All presumptions are in favor of the correctness of tax assessments.

On May 4, 2006, this case was deemed submitted for decision, sans the memorandum of respondent.

The parties have jointly stipulated that the following are the issues for this Court to resolve:

1. Whether or not "the 1994 internal revenue tax liabilities in the amounts of P2,666,172,93 and P896,861.17 representing deficiency income and expanded withholding taxes respectively under final decision on disputed assessment dated June 26, 2001" had already prescribed;

2. Whether or not "bad debt (sic) written off P728,585.00" actually written off for being worthless and uncollectible are deductible expenses;

3. Whether or not there were "overstated salaries P2,111,507.63" which amount was totally disallowed as deduction from gross income;

4. Whether or not "agents commission (sic) P3,157,870.38 x 5% P157,893.52" and "collection bonus (sic) P3,004,667.86 x 5% P150,233.39" are subject to expanded withholding tax and are paid by petitioner;

5. Whether or not the Assessment Notice No. 000273-94-388 dated January 9, 1998 was properly mailed/served to petitioner's registered address at No. 149 CAP Building, Legaspi Street, Legaspi Village, Makati City; and

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6. Whether or not the right of the BIR to assess petitioner for any internal revenue tax for 1994 was suspended.

The first, fifth and sixth issues delve on prescription which this Court deems it proper to resolve first.

Petitioner argues that the subject assessment notice was issued beyond the three (3)-year prescriptive period allowed by law. Likewise, petitioner asserts that the subject assessment notice failed to comply with Revenue Regulations No. 12-99 which requires that assessment notices be issued "showing in detail, the facts and the law, rules and regulations, or jurisprudence on which the proposed assessment is based." Worse still, there was no proof that Assessment Notice No. 000273-94-388 dated January 9, 1998 was actually sent through registered mailed on January 9, 1998 as alleged by respondent and served upon petitioner. Accordingly, the alleged transmittal stamp by the Makati Central Post Office presented by respondent in evidence does not necessarily prove that what was mailed was the subject assessment notice.

Further, petitioner submits that respondent was duly informed of its change of address from 149 CAP Building, Legaspi Street, Legaspi Village, Makati City to YL Holdings Building, 115 Herrera corner Salcedo Streets, Legaspi Village, Makati City, address through a formal communication. To bolster such claim, petitioner presented the oral testimony[14] of its then Head of the Accounting Department, Mrs. Eugenia Cumal Romero, and documentary evidence[15] to prove that there was such communication.

After a careful scrutiny of the evidence on record, arguments of the parties, laws applicable and existing jurisprudence, this Court finds for the petitioner.

Section 203 of the National Internal Revenue Code of 1993, as amended, provides that:

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[14] Pages 8- 16, TSN, June 22, 2004
[15] Exhibits "Y", "P-1", "O-1", "E-1"

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> 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 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 is filed before the last day prescribed by law for the filing thereof shall be considered as filed on such last day." *(Emphasis supplied)*

Prescinding from the above provision of law, the general rule as to the prescriptive period for assessment is that where a return was filed, the period is within three (3) years after the date the return was due or was filed, whichever is later. And an assessment is deemed made for the purpose of giving effect thereto if it is (a) made within the period of three (3) years or ten (10) years, as the case may be,[16] and (b) notice of the assessment is **released, mailed, or sent to the taxpayer also within the same period.** It is not actually required that the notice be received by the taxpayer within the three (3)-year prescribed period.[17]

It is a settled rule that "where an assessment notice is sent by mail (for example by ordinary mail), it is presumed that the taxpayer received the mailed notice within the period of time when mail of such kind are ordinarily received so that if such presumed receipt is still within the prescriptive period, the taxpayer's contention that the Government's right to assess the tax has already prescribed cannot be given credit".[18]

Under Section 3 (v) of Rule 131 of the Revised Rules on Evidence there is a disputable presumption that a letter duly directed and mailed was received in the regular course of mail. Corollary thereto, Section 10 of Rule 13 of the Revised Rules of Civil Procedure provides that "service by registered mail is complete upon actual receipt by the addressee, or after five (5) days from the date he received the first notice of the postmaster, whichever date is earlier."

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[16] In case of false or fraudulent return or failure to file a return

[17] Basilan Estat, Inc. vs. Commissioner of Internal Revenue, L-22429, September 5, 1967

[18] Republic vs. Tan Kim En, CA-GR-28743-R, February 29, 1964

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However, as in any other disputable presumption, the same is subject to controversion and a direct denial by the taxpayer of the receipt of the assessment notice shifts the burden upon the respondent to prove that the mailed letter was received by the taxpayer. Jurisprudence is replete with cases holding that if the taxpayer denied ever having received an assessment from the BIR, it is incumbent upon the latter to prove by competent evidence that such notice was indeed received by the addressee. The *onus probandi* is therefore shifted to the respondent to prove by contrary evidence that the petitioner received the assessment notice in the due course of mail.[19] An assessment notice is not considered validly issued if the taxpayer denied receipt thereof.[20]

In this instant case, respondent submits that he issued and sent through registered mail the subject assessment notice on January 9, 1998. Respondent maintains that petitioner was served the assessment notice through registered mail with registry service card at its business address and, pursuant to Section 203 of the Tax Code, he had until April 17, 1998 within which to issue the assailed assessment notice. To prove that he had actually sent through registered mail Assessment Notice No. 000273-94-388 to petitioner on January 9, 1998, respondent offered in evidence the Transmittal Record No. F-1-86-388[21] of registered mails bearing the name of petitioner as well as the subject assessment notice duly stamped received by the Makati City Post Office on January 9, 1998.

We are not persuaded. A careful review of the said document presented in evidence by respondent reveals that the same was prepared by the Assessment Division of the BIR on January 9, 1998 and received by the Records Section of BIR Reg. No. 8, Makati City also on the same date (as evidenced by the rubber stamp of receipt). Indeed, said transmittal record may have indicated that Assessment Notice No. 000273 as "item no. 5" was received

[19] Republic vs. Court of Appeals, 149 SCRA 351; Arnoldus Woodworks International Inc., vs. The Commissioner of Internal Revenue, CTA Case No. 4269, March 18, 1994

[20] Commissioner of Internal Revenue vs. Obayashi Philippines Corporation, CTA EB No. 42 (CTA Case No. 6222) June 10, 2005; Commissioner of Internal Revenue vs. Akitsu Shipping Co. Ltd., CTA EB No. 33 (CTA Case No. 6360) March 31, 2005

[21] Exhibit "4"

by the Makati Post Office on January 9, 1998. However, this does not prove that the said "item" was actually the subject assessment notice and that the subject assessment notice was actually received by petitioner. It is noteworthy to emphasize that the transmittal record was prepared by the office of the respondent. No other evidence was offered by the respondent to prove that indeed petitioner received the assessment notice in question. Likewise, common practice dictates that assessment notices and demand letters issued are necessarily anterior to the date of actual release or mailing thereof.

What is essential to prove the fact of mailing is the registry receipt issued by the Bureau of Posts or the registry return card which would have been signed by the petitioner or its authorized representative. And if such documents could not be produced, respondent, at the very least, should have submitted to this Court a certification issued by the Bureau of Posts and any other pertinent document which is executed with the intervention of the Bureau of Posts. This Court cannot give too much credence to the self-serving documentations made by the respondent especially if they are unsupported by substantial evidence establishing the fact of mailing. Thus:

> "While we have held that an assessment is made when sent within the prescribed period, even if received by the taxpayer after its expiration (Coll. Of Int. Rev. vs. Bautista, L-12250 and L-12259, May 27, 1959), this ruling makes it more imperative that the release, mailing or sending of the notice be clearly and satisfactorily proved. Mere notations made without the taxpayer's intervention, notice or control, without adequate supporting evidence cannot suffice; otherwise, the taxpayer would be at the mercy of the revenue officers, without adequate protection or defense."[22]

In the case of **Commissioner of Internal Revenue vs. Arnoldus Woodworks International Inc. and The Court of Tax Appeals,**[23] it was held that under Section 8, Rule 13 of the Rules of Court, service by registered mail is deemed completed upon **actual receipt** by the addressee. If he fails to claim his mail from the post office within five (5)

[22] Nava vs. Commissioner of Internal Revenue, 13 SCRA 104
[23] CA-G.R. SP. No. 340019, August 31, 1995

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days from the date of first notice of the postmaster, service shall take effect at the expiration of such time. And under Section 10 of the same Rule, proof of such service shall consist of an affidavit of the person mailing of facts showing compliance with Section 5 of Rule 10. The receipt issued by the mailing office, and the registry return card evidencing receipt of the mail by the addressee, or in lieu thereof, the letter unclaimed together with the certified or sworn copy of the notice given by the postmaster to the addressee.

As regards the issue of whether or not the right to assess was suspended, this Court rules in the negative.

The law provides for the ground for the suspension of the running of the period to assess under Section 224 of the NIRC of 1993, as amended, to wit:

> SEC. 224. *Suspension of running of statute.* - The running of the statute of limitations provided in Section 203 and 223 on the making of assessments and the beginning of distraint or levy or a proceeding in court for collection, in respect of any deficiency, shall be suspended for the period during which the Commissioner of Internal Revenue is prohibited from making the assessment or beginning distraint or levy or a proceeding in court, and for sixty days thereafter; when the taxpayer requests for a reinvestigation which is granted by the Commissioner; when the taxpayer cannot be located in the address given by him in the return filed upon which tax is being assessed or collected; *Provided,* **That, if the taxpayer informs the Commissioner of Internal Revenue of any change in address, the statute of limitations will not be suspended**; when the warrant of distraint and levy is duly served upon the taxpayer, his authorized representative, or a member of his household with sufficient discretion, and no property could be located; and when the taxpayer is out of the Philippines.

As discussed earlier, petitioner offered in evidence the letter dated October 17, 1995[24] informing respondent of petitioner's change of address from 149 CAP Building, Legaspi Street, Legaspi Village, Makati City to YL Holdings Building, 115 Herrera corner Salcedo Streets, Legaspi Village, Makati City. This letter was duly stamped received by the Bureau of Internal Revenue Revenue District No. 47, East Makati on October 26, 1995. In other words, respondent was informed of petitioner's change of address. Thus, it cannot be

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[24] Exhibit "Y"

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said that the running of the prescriptive period was suspended. In fact, respondent sent several communications to petitioner already using the latter's new address.[25]

In fine, since respondent failed to prove receipt of the assessment by the petitioner, there was no valid assessment issued. Consequently, the government's right to issue an assessment for the said period has already prescribed.[26] This being the case, it is now futile to resolve the validity of the assessment *per se* on the merits.

IN VIEW OF THE FOREGOING, this instant Petition for Review is hereby **GRANTED.** The 1994 deficiency income and expanded withholding tax assessments issued against petitioner are hereby **CANCELLED** and **SET ASIDE** for being issued beyond the prescriptive period allowed by law.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

[25] Exhibits "E", "E-1", "P", "P-1", "O" and "O-1"
[26] Industrial Textile Manufacturing Co. of the Phils., Inc. vs. CIR, CTA Case No. 4885, August 22, 1996

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CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, 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's Division.

ERNESTO D. ACOSTA
Presiding Justice
Chairperson, First Division

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