REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

PHILIPPINE HEALTH CARE PROVIDERS, INC.,
Petitioner,

- versus -

CTA CASE NO. 6166

THE COMMISSIONER OF INTERNAL REVENUE,
Respondent,

Promulgated:

APR 0 5 2002

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DECISION

Elevated before this Court is a Petition for Review seeking for the cancellation of the alleged deficiency value added tax (VAT) and documentary stamp tax (DST) assessments, issued by respondent Commissioner of Internal Revenue against herein petitioner, in the aggregate amount of P 224,702,641.18 involving taxable years 1996 and 1997.

The facts as culled from the records of the case are as follows:

Petitioner is a corporation organized and existing under the laws of the Republic of the Philippines with principal office address at 19/F Medical Plaza Makati, Amorsolo cor. De la Rosa Street, Legaspi Village, Makati City. It was incorporated on June 30,1987 with the primary purpose of establishing, maintaining, conducting and operating a prepaid group practice health care delivery system or a health maintenance organization to take care of the sick, diseased and disabled persons who are enrolled in the health care plan and to provide for the administrative, legal and financial responsibilities of the organization *(Exhibits J, J-1, for the Petitioner; Exhibit 1-a, for the Respondent).*

On January 27, 2000, petitioner received a Formal Letter of Demand and four separate assessment notices numbered ST-VAT-96-0083-2000; ST-97-0084-2000; ST-DST-96-0081-2000; and ST-DST-97-0082-2000, all undated, from respondent (acting through Atty. Percival T. Salazar, Assistant Commissioner for Enforcement Service), who assessed and demanded from petitioner the total sum of P224,702,641.18 as alleged deficiency value added tax and documentary stamp tax for the taxable years 1996 and 1997 *(Admitted Fact, Amended Joint Stipulation of Facts, CTA docket, pp.117-118).* Details of the alleged deficiency taxes *(Exhibits A, A-1)* are computed as follows:

Value Added Tax

	1996	1997	TOTAL
Gross Receipts	P 238,870,544.00	P 328,562,029.00	
VAT rate	10%	10%	
Basic	23,887,054.40	32,856,202.90	
Surcharge	5,971,763.60	8,214,050.73	
Interest	15,908,778.23	13,668,180.41	
TOTAL	45,767,596.23	54,738,434.03	P 100,506,030.26

Documentary Stamp Tax

	1996	1997	TOTAL
Premium Received	P 232,761,387.00	P 328,692,719.00	
Rate (Section 185)			
Basic	29,095,173.38	41,086,589.88	
Less: Payment	-	-	
Surcharge	7,273,793.34	10,271,647.47	
Interest	19,377,385.47	17,092,021.39	
TOTAL	55,746,352.19	68,450,258.73	P 124,196,610.92
Alleged Deficiency Tax Payable			**P 224,702,641.18**

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The foregoing deficiency VAT assessment was based on the findings of the respondent's examiners that petitioner is a "service contractor" and therefore its gross receipts should have been subjected to the 10% VAT under Section 102 (now Section 108) of the Tax Code. Respondent's examiners cite VAT ruling No.18-98 dated June 23, 1998 in which the VAT Review Committee concluded that Aetna Health Care is subject to VAT for the reason that as a health maintenance organization (HMO), it does not directly perform or render medical, dental, hospital and/or veterinary services, therefore not exempt from VAT. On the other hand, the deficiency DST assessment was based on the findings of the respondent's examiners that petitioner's contracts create "obligations in the nature of indemnity" upon which a DST of P 0.50 for every P 4.00 of the premium payments should be imposed *(Exhibit A-2; Stipulated Fact, ibid., item no. 13 & 16, CTA docket, p. 119)*.

Petitioner protested the assessment in a letter dated February 23, 2000, which petitioner, through counsel, filed with respondent on February 24, 2000 *(Exhibit G)*. As of the date of the Petition for Review, 180 days have already lapsed since the filing of petitioner's written protest on February 24, 2000 and respondent has failed to act on the same *(Admitted Fact, ibid., item no. 5, CTA docket p.118)*.

Previous to the issuance of these assessments specifically on December 10, 1987, petitioner filed a letter with the respondent requesting for confirmation that the medical and/or hospital services it provided to the participants in its health care program are exempt from the value-added tax by virtue of Section 103 (1) of Executive Order No. 273. On June 8, 1988, the VAT Review Committee of the Bureau of Internal Revenue issued VAT Ruling No. 231-88, which confirmed that petitioner is a provider of medical services and is exempt from VAT under Section 103 (now Section 109) of the Tax Code *(Admitted Facts, ibid, item nos. 6 & 7, CTA docket 118).* This exemption by petitioner from VAT was further confirmed by Osmundo G. Umali, then Regional Director of Revenue Region No. 8, Makati, in a letter to petitioner dated April 22, 1994 *(Exhibit M)*.

Likewise, on August 23, 2000, petitioner, through counsel, filed a letter *(Exhibit O)* with the Insurance Commission requesting for confirmation that it is not engaged in the insurance business and therefore its activities are not regulated by nor subject to the jurisdiction of the Insurance Commission. On September 13, 2000, the Insurance Commissioner issued a letter *(Exhibit N)* confirming the representations of the petitioner in its letter dated August 23, 2000, that it is not engaged in the insurance business and therefore does not fall under the jurisdiction of the Insurance Commission *(Admitted Fact, ibid., item nos. 20 & 21, CTA docket p. 120)*

Prefatory to the final assessment notices issued by respondent, a preliminary assessment notice *(Exhibits H, H-1)* was sent to petitioner on October 1, 1999 on the alleged deficiency VAT and DST for taxable years 1996 and 1997. Upon receipt of petitioner of the said Pre-assessment notice on October 5, 1999, petitioner, through counsel, filed with the respondent, an 11-page protest letter on October 20, 1999 *(Exhibit I)*. Respondent failed to resolve the issues raised by petitioner in its protest but instead issued the four undated assessment notices *(Exhibits B, C, D, and E)* against the petitioner and which were duly assailed by the latter in a protest letter dated February 23, 2000.

The inaction of the respondent to the said protest letter prompted petitioner to elevate the matter before this Court by way of Petition for Review on September 21, 2000.

On November 13, 2000, Respondent filed an Answer to the instant Petition for Review, and raised therein the following Special and Affirmative Defenses *(CTA docket, pp 81-83)*, to wit:

> 11. "Petitioner was informed of the law and the facts on which the assessments are made in compliance with Section 228 of the Tax Code;
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> 12. Petitioner is subject to value-added tax as a service contractor;
>
> 13. Unearned medical fees are included in the computation of the value-added tax since the representatives of the Petitioner admitted that part of the said "unearned medical fees" were already received;
>
> 14. VAT ruling issued in 1998 declaring that medical services and/or Hospital services are exempt from VAT and the opinion rendered by Director Osmundo Umali in 1994 which classified them as not dealers in securities, are issuances n.ade long prior to the effectivity of the Expanded VAT law which took effect in 1996. Furthermore, the taxability of the Petitioner as service contractor was not used as basis for its exemption.
>
> 15. Petitioner is subject to documentary stamp tax under Section 185 of the Tax code, as amended by Republic Act 7760, which provides for the payment of DST for transactions involving obligations in the nature of indemnity;
>
> 16. The "Plans/Policies" or "Membership Agreements" issued by Petitioner have the same forms and features of an Insurance Contract aside from Petitioner being engaged in the business of contracting an obligation in the nature of indemnity;
>
> 17. The form and language used in the contract prepared by the Petitioner is that of Insurance Contract and Contract of Indemnity;

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18. The 1996 deficiency VAT assessment was issued within the prescriptive period;

19. The assessments were issued in accordance with law and regulations;

20. All presumptions are in favor of the correctness of tax assessments (CIR vs. Construction Resources of Asia, Inc., 145 SCRA 67), and the burden to prove otherwise is upon Petitioner."

Considering the foregoing arguments and disquisitions of both parties, this Court is now tasked to resolve the following issues, as stipulated upon by the parties, thus:

1. Whether or not the assessments are void and without force and effect for respondent's failure to comply with the requirements of Section 228 of the Tax Code as implemented by Revenue Regulations No. 12-99.

2. Whether or not petitioner was denied its right to due process when respondent acted as if petitioner did not protest the preliminary assessment notices dated October 1, 1999 and simply issued the assessments without explanation as to the grounds to justify the reiteration of the preliminary assessments;

3. Whether or not respondent can validly issue an assessment for deficiency value-added tax against petitioner who relied upon VAT Ruling No. 231-88 dated June 8, 1988 and the letter of Mr. Osmundo G. Umali dated April 22, 1994 both of which confirmed petitioner's exemption from VAT;

4. Whether or not the membership fees charged by the petitioner in connection with its prepaid group practice health care program is subject to VAT;

5. Whether or not the assessment for deficiency VAT for the taxable year 1996 is barred by prescription;

6. Assuming for the sake of argument that petitioner is subject to VAT, whether or not the respondent correctly computed the VAT due from the petitioner;

7. Whether or not petitioner is liable for the documentary stamp tax imposed under Section 185 of the Tax Code.

   7.1 Whether or not petitioner is engaged in the insurance business;

   7.2 Whether or not petitioner's Service Agreements create obligations in the nature of indemnity for loss, damage or liability.

With respect to the first issue, we rule in the negative. We are not convinced with the contention of the petitioner that the assessment should be declared void and without force and effect for failure of the respondent to comply with the procedural requirements as provided for in Section 228 of the Tax Code as implemented by Revenue Regulations No. 12-99. Petitioner insists that by issuing the Formal Letter of Demand as well as the Final Assessment, which is merely a reiteration of the preliminary assessment, respondent acted as if no protest was filed since no effort was made to resolve, first and foremost, the issues raised by petitioner in its protest to the preliminary assessment. This, according to petitioner is procedurally defective.

For reference, Section 228 of the Tax Code is partly reproduced as follows:

> ***"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:
>
> x x x x x x x x x
>
> 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.
>
> Within a period to be prescribed by implementing rules and regulations, the taxpayer shall be required to respond to such notice. If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings x x x".

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Corollary to the foregoing provision, we likewise deem it best to quote hereunder the rules implementing the above-cited provision, thus:

Revenue Regulations No. 12-99

> ***Section 3.1.2. Preliminary Assessment Notice (PAN).*** - If after review and evaluation by the Assessment division or by the Commissioner or his duly authorized representative, as the case may be, it is determined that there exists sufficient basis to assess the taxpayer for any deficiency tax or taxes, the said office shall issue to the taxpayer, at least by registered mail, a Preliminary Assessment Notice (PAN) for the proposed assessment, showing in detail, the facts and the law, rules and regulations, or jurisprudence on which the assessment is based. If the taxpayer fails to respond within fifteen (15) days from date of receipt of the PAN, he shall be considered in default, in which case, a formal letter of demand and assessment notice shall be caused to be issued by the office, calling for payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties.
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> ***Section 3.1.4. Formal Letter of Demand and Assessment Notice.*** - The formal letter of demand and assessment notice shall be issued by the Commissioner or his duly authorized representative. The letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall state the facts, the law, rules and regulations, or jurisprudence on which the assessment is based, otherwise, the formal letter of demand and assessment notice shall be void. The same shall be sent to the taxpayer only by registered mail or by personal delivery. If sent by personal delivery, the taxpayer or his duly authorized representative shall acknowledge receipt thereof in the duplicate copy of the letter of demand, showing the following: x x x

Prescinding from the foregoing, it is evident that what is declared void by law, is the failure of the Commissioner to state the facts, the law, rules and regulations or jurisprudence on which the assessment is made. The law apparently is strict in requiring the Commissioner or his duly authorized representative to give the taxpayer sufficient notice as to the factual and legal basis of the assessment. If petitioner decides not to file a protest on the assessment within the period prescribed by law, it is now the duty of the respondent to issue a formal demand and assessment notice. If, on the other hand, petitioner decided to protest the assessment, respondent has two options: he can either cancel the assessment if he finds the protest meritorious or, if he is not satisfied with the protest, he may proceed to issue the necessary demand letter as well as the assessment notice based on his findings. The latter option presupposes a ruling of denial on the part of the respondent. Such that, in this case, the issuance of the Formal Letter of Demand as well as the assessment notice by the respondent is tantamount to the denial of petitioner's protest on the Pre-assessment notice. It is no longer necessary for the respondent to discuss in detail why the protest of the petitioner was not given due course. By means of the pre-assessment notice, the taxpayer is already made aware of how the assessment was arrived at. To require the BIR to explain in detail why a protest was denied would result in unnecessary delay, as this would impede the BIR's tax collecting system to the prejudice of the government. It is sufficient that there is notice to the taxpayer of the legal and factual bases of the assessment and to our minds, this is substantial compliance of what was mandated by Section 228 of the Tax Code, as amended.

The next question is: was petitioner denied due process when the respondent acted as if petitioner did not protest the pre-assessment since it simply issued an assessment without stating the grounds relied upon in reiterating the preliminary assessment? We do not think so. Mere reiteration of the preliminary assessment without resolving petitioner's protest does not in itself constitute denial of due process. The details embodied in the Formal Demand letter only reflect the findings of the BIR as per their investigation. It is merely a reiteration of what is contained in the preliminary assessment notice. Petitioner cannot feign denial of due process. The essential elements of due process are notice and an opportunity to present one's side. As the facts would demonstrate, petitioner was never deprived of due process. First, the petitioner was fully apprised of the legal and factual bases of the assessment issued against him. Second, the law gives petitioner the chance to protest the assessment. And lastly, the pre-assessment notice gives the taxpayer the chance to clarify issues arising from the investigation if say, they are disagreeable with the BIR's findings. Thus, so long as the parties are given the opportunity to explain their side, the requirements of due process are satisfactorily complied with *(Calma vs. Court of Appeals, 302 SCRA 682).*

The third issue basically delves on the validity of VAT Ruling No. 231-88 dated June 8, 1988, which in effect exempts petitioner from VAT. VAT Ruling No. 231-88 confirmed the assertion that petitioner is a provider of medical services and thus exempt from VAT under Section 103 (Now Section 109) of the Tax Code, to wit:

> "**Section 103.** ***Exempt Transactions.*** - The following shall be exempt from the value-added tax:
>
> x x x x x x x x x
>
> (l) Medical, dental, hospital and veterinary services except those rendered by professionals.

Pertinent portions of VAT Ruling No. 231-88 is likewise reproduced as follows:

> "This has reference to your letter dated December 9, 1987 requesting a confirmatory ruling that the medical and /or hospital services

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provided by your client, the Philippine Health care providers, Inc., be exempted from the payment of the value-added tax (VAT).

In this connection, please be informed that the rendering of medical services even on a pre-paid basis is exempt from VAT pursuant to Section 103(1) of the Tax Code, as amended by EO 273."

Under Section 103(l) of the Tax Code, those contemplated to be exempt from VAT are taxpayers engaged in the performance of medical, dental, hospital and veterinary services, thus what should be resolved now is the question of whether or not petitioner is engaged in the performance of medical, dental, hospital and veterinary services.

In requesting for a confirmatory ruling, petitioner projected a company profile which emphasized on the fact that they are health providers, rendering medical, dental and hospital services, which at first impression would lead one to believe that they are included among those contemplated by law to be exempt from VAT. The BIR, in issuing the said VAT ruling merely relied on the representations of the petitioner without even clarifying the status of the petitioner. Conveniently, petitioner failed to disclose its status as a health maintenance organization in requesting for a ruling as evidenced by the cross-examination of petitioner's witness by respondent's counsel, during the hearing held on May 2, 2001, thus:

CROSS EXAMINATION BY ATTY. MENZON

Q. May I refer your attention to Exhibit P, Madam witness. In your facts, you stated that Philippine Health Care Providers is a domestic corporation recently organized and was incorporated on June 30, 1987 for the following purpose: to establish, maintain, conduct and operate a prepaid group practice, health care delivery

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system to take care of the sick. Is this embodied in your Articles of Incorporation, that purpose?

A. I believe so.

Q. I would like to refer your attention to your Articles of Incorporation, Madam Witness, which has been annexed to your Petition for Review and which is Annex C, will you please read the primary purpose which is found on page 2 of your Articles of Incorporation.

A. To establish, maintain, conduct and operate prepaid group practice health care delivery system or health maintenance organization to take care of the sick, diseased and disabled persons who are enrolled in the health care program.

Q. So, I believe that what you have stated in your request is stated in your Articles of Incorporation but you omitted this phrase, "or a health maintenance organization", did you deliberately omit this phrase? Because I would like to inform you that [the] AETNA was assessed for VAT because they are (sic) considered as a health maintenance organization which petitioner is, a health maintenance organization. It is not stated in your facts?

A. This was done by our company lawyers, so I would not be able to answer what is the intention of the omission.

As can be gleaned from the records of the case, petitioner was actually organized to establish, maintain, conduct and operate a prepaid group practice health care delivery system or a health maintenance organization to take care of diseased and disabled persons who are enrolled in the health care plan x x x *(Exhibit 1-a)*. Under the prepaid group practice health care delivery system adopted by petitioner, individuals enrolled in its health care program are entitled to medical services to be conducted by duly licensed physicians, specialists and other professional technical staff in a hospital or clinic owned, operated and accredited by petitioner. To be entitled to receive such medical services, an

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individual must enroll in petitioner's health care program and pay an annual fee. Enrolment thereon is on a year-to-year basis and enrollees are issued identification cards *(Exhibit P)*. Thus, it can be inferred from the foregoing that petitioner actually provides and arranges for the provision of pre-need health care services to its members for a fixed prepaid fee for a specified period of time. Petitioner contracts the services of physicians, medical and dental practitioners, clinics and hospitals to perform such services to its enrolled members. Petitioner also enters into contract with clinics, hospitals, medical professionals and then negotiates with them regarding payment schemes, financing and other procedures in the delivery of health services. In choosing which to accredit, they actually set the parameters, rules and guidelines for the accreditation of the participating clinics and hospitals.

Thus, it is evident that petitioner is not actually rendering medical service but merely acting as a conduit between the members and their accredited and recognized hospitals and clinics. Apparently, they are subject to VAT under Section 102 of the Tax Code as service contractors, thus:

> ***"Section 102. Value-added tax on sale of services and use or lease of properties. -*** (a) *Rate and base of tax.*- There shall be levied, assessed and collected, a value-added tax equivalent to 10% of gross receipts derived from the sale or exchange of services, including the use or lease of properties.
>
> The phrase 'sale or exchange of service' means the performance of all kinds of services in the Philippines for others for a fee, remuneration or consideration, including those performed or rendered by construction and service contractors; x x x".*(underlining supplied)*

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Suffice it to say, that what is really taxed in this case is the service rendered by petitioner in providing and arranging for the provisions of health care services to its members in exchange for a pre-negotiated, pre-paid membership fees. The records do not show any proof that petitioner actually owned a hospital or clinic nor is it directly engaged in the rendering of medical services.

VAT Ruling No. 231-88 dated June 9, 1988 is not in accord with the facts and the applicable law thus we cannot adopt the same in arriving at a just conclusion of this case. Thus, petitioner can be validly assessed of VAT deficiency, considering the erroneous interpretation by the BIR of the facts surrounding the case at bar. It bears stressing that the Government can never be in estoppel, particularly in matters involving taxes. It is a well-known rule that erroneous application and enforcement of the law by public officers do not preclude subsequent correct application of the statute, and that the Government is never estopped by mistake or error on the part of its agents ***(Philippine Basketball Association, GR 119122, 337 SCRA 358, August 8, 2000).*** Thus, in the case of ***Philippine Bank of Communications vs. Commissioner of Internal Revenue, GR No. 112024, 302 SCRA 241, January 28, 1999:***

> "It bears repeating that Revenue Memorandum Circulars are considered administrative rulings (in the sense of more specific and less general interpretations of tax laws) which are issued from time to time by the Commissioner of Internal Revenue. It is widely accepted that the interpretation placed upon a statute by the executive officers, whose duty is to enforce it, is entitled to great respect by the courts. Nevertheless, said interpretation is not conclusive and will be ignored if judicially found to be erroneous. Thus, the court will not countenance administrative issuances that override, instead of remaining consistent and in harmony with, the law they seek to apply and implement."

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The next issue is concerned with the question of whether or not membership fees in connection with prepaid group practice health care program are subject to VAT. We answer in the affirmative. The revenues of health care providers are actually derived from the application and membership fees being paid by their members. Thus, the basis for computing the VAT in case of sellers of services shall be the gross receipts, which in this case shall be the payments for medical plans and application fees actually received from the members, undiminished by any amount paid or payable to owners/operators of hospitals, clinics and medical and dental practitioners.

Thus from the foregoing, the proper computation of petitioner's VAT is as follows:

<u>1996 Deficiency Valued-Added Tax:</u>
(Formula Based on RAMO No. 2-93)

Income during the period		
Medical plans		P178,349,598.00
Application fees		635,299.00
Other income (Sch. 3 of 1996 ITR)		274,329.00
Add: Beginning balances of		
a. Accts recb'le-medical plans	P39,706,532.00	
b. Accts recb'le-others	5,915,124.00	
Ending balance of unearned medical plans	79,808,718.00	125,430,374.00
Total		P304,689,600.00
Less: Ending balances of		
a. Accts recb'le-medical plans	P65,103,461.00	
b. Accts recb'le-others	715,595.00	
Beginning balance of unearned medical plans	62,431,890.00	128,250,946.00
Taxable Gross Receipts		P 176,438,654.00
Multiply by VAT Rate		10%
Basic Deficiency Value-Added Tax Due		P 17,643,865.40
Add: 25% Surcharge		4,410,966.35
Deficiency Value-Added Tax Due		P 22,054,831.75

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1997 Deficiency Valued-Added Tax:

Income during the period		
Medical plans		P 218,435,581.00
Application fees		879,084.00
Other income (Sch. 3 of 1997 ITR)		501,189.00
Add: Beginning balances of		
a. Accts recb'le-medical plans	P65,103,461.00	
b. Accts recb'le-others	715,595.00	
Ending balance of unearned medical plans	115,078,621.00	180,897,677.00
Total		P 400,713,531.00
Less: Ending balances of		
a. Accts recb'le-medical plans	P69,924,944.00	
b. Accts recb'le-others	2,226,558.00	
Beginning balance of unearned medical plans	79,808,718.00	151,960,220.00
Taxable Gross Receipts		P 248,753,311.00
Multiply by VAT Rate		10%
Basic Deficiency Value-Added Tax Due		P 24,875,331.10
Add: 25% Surcharge		6,218,832.75
Deficiency Value-Added Tax Due		P 31,094,163.87

It must be emphasized, however, that in this case, petitioner cannot avail of the input tax credit. A perusal of petitioner's financial statement shows no record of input tax that can be applied to its output tax liability. Petitioner, in believing that they are actually exempt from VAT, included and charged said input tax as part of their expenses. For this reason, petitioner is liable to pay the aggregate amount of P42,519,196.50 representing the deficiency VAT due for taxable years 1996 and 1997.

We now proceed to the issue of prescription.

Petitioner contends that the 1996 VAT assessment is already barred by prescription considering that the assessment in question was issued beyond the three year period mandated by law to assess and collect the tax due. Petitioner explained that under

Section 4.110-1 of Revenue Regulations No. 7-95, every person liable to VAT shall file a quarterly return x x x within 20 days following the close of the calendar quarter. Thus, in assessing petitioner's 1996 VAT due, respondent has only up to January 20, 2000 to issue the deficiency VAT assessment. However, in the case at bar, the assessment in question was mailed only after January 20, 2000, hence, petitioner opines that respondent's action is already barred by prescription.

We do not agree.

The facts narrated above show that petitioner's reliance on VAT Ruling no. 231-88 led him to believe that they are actually not subject to VAT. For this reason, petitioner did not even bother to file any return, which could reflect its VATable sales of services. Thus, considering that no quarterly VAT returns was actually filed by the taxpayer then, the ten year prescriptive period as provided for in Section 223(a) of the Tax Code, as amended, applies, thus:

> ***"Section 223. Exceptions as to period of limitation of assessment and collection of taxes.*** - (a) In the case x x x of failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment at any time within ten years after the discovery of the x x x omission x x x.

It is clear from the foregoing provision that respondent's right to collect/assess petitioner's tax deficiencies has not yet prescribed since respondent still has ten years counted from the time the omission was discovered from which to assess/collect the said tax.

With respect to the issue of whether or not petitioner is subject to the documentary stamp tax imposed under Section 185 of the Tax Code, it is appropriate to quote said Section, thus:

> ***"Section 185. Stamp tax on fidelity bonds and other insurance policies.*** - On all policies of insurance or bonds or obligations of the nature of indemnity for loss, damage, or liability made or renewed by any person, association or company or corporation transacting the business of accident, fidelity, employer's liability x x x, which may be made or renewed by any such person, company or corporation, there shall be collected a documentary stamp tax of fifty centavos (P0.50) on each four pesos, or fractional part thereof of the premium charged"

From the foregoing, it becomes imperative for this Court to determine whether the membership agreement between the petitioner and its members can be considered an insurance contract which is in the nature of indemnity for loss, damage or liability. As foreign jurisprudence would say, "it is immaterial, or at least not controlling, that the term "insurance" nowhere appears in the contract the nature of which is to be determined x x x. The nature of a contract as one of insurance depends upon its contents and the true character of the contract actually entered into or issued. Simply put, whether a contract is one of insurance is to be determined by the consideration of the real character of the promise or of the act to be performed, and by a consideration of the exact nature of the agreement in the light of the occurrence, contingency, or circumstances under which the performance becomes requisite, and not by what it is called" ***(43 AmJur 2d 4-5)***.

Thus, this Court finds it necessary to make reference to the contents of the membership contract entered into by petitioner and its members ***(BIR records pp.861-***

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866) in order to shed light on the issue of whether said contract could be classified as one of indemnity.

A cursory look at the membership agreement would show that petitioner undertakes to provide its members with all the medical, hospital and dental benefits listed on the said contract. Likewise contained therein are the kinds of illness and disease excluded from the coverage of their plan. Thus, in the event that a member contracts sickness or suffers injury, which requires confinement in a participating hospital, the service or benefits (as enumerated, i.e. Room and Board, Services of physician, use of OR and recovery room, lab test), shall be provided to the member, free of charge but shall not exceed P75,000. It is also stipulated therein that all account in excess of the P75,000 ceiling shall be borne by the enrolled member. Other services, such as out-patient services, including physical examinations, preventive health care, consultations, treatment of injury, x-ray, immunization and other emergency care shall be reimbursed by the members subject to the rules and guidelines as prescribed by herein petitioner. Given the contents of the membership agreement, the question now, is whether this partakes of the nature of a contract of insurance.

We do not think so.

A contract of insurance, in legal parlance, is defined as an agreement whereby one undertakes for a consideration to indemnify another against loss, damage or liability arising from an unknown or contingent event (Section 2 (1), Insurance Code).

It must be underscored that what differentiates an insurance contract from the other contract is the undertaking on the part of the insurer to indemnify the insured against loss, damage and liability. As can be inferred from the membership agreement, an enrolled member may avail of the medical/hospital/dental benefits anytime, even on the absence of peril on their part. This is true since a member may take advantage of the laboratory services, x-ray, routine examination and consultation anytime he wants. The inclusion of emergency care available to the members, on the onset of sudden, unexpected illness or injury is merely incidental to the list of services available. Thus, the shouldering of the expense by the petitioner is not confined merely on the happening of a contingency but likewise includes other incidents even in the absence of illness or injury. As the Court of Appeals held,

> "An examination of the subject Health Care agreement leads us to conclude that it is not an insurance contract within the context of our existing Insurance Code.
>
> It is of foremost importance that a member may take advantage of the benefits under the Health care agreement even in the absence of any loss, damage on his part. At any given time, he may avail of physical examinations, laboratory tests, medical consultations, vaccine administration as well as family planning counseling, among others" ***(Philippine National Bank vs. Commissioner of Internal Revenue, C.A. GR No. Sp-53301, June 18, 2001)***

The membership contract of the petitioner is in reality designed to safeguard the economic interest of their members as far as their health needs are concerned. Practically speaking, contracts of this nature merely aim to spare their enrolled members from exposure to the high cost of hospitalization and other medical expense brought about by the fluctuating economy.

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To our mind, this is not one of indemnity since the reimbursement made to Petitioner is not by reason of loss, damage or liability in the strictest sense of the word, but by virtue of the actual expenses incurred, which is more or less dependent on the will of the member if he chose to avail of the listed services. It does not intend to compensate against the peril or hazard of loss or damage. The petitioner only relieved the member of the obligation of shelling out money from their pockets by shouldering the actual expenses incurred or in some cases, advanced by their members.

American jurisprudence is also replete with cases holding that health care agreement is not an insurance contract.

> "Generally speaking, a corporation, whether or not organized for profit, the object of which is to provide the members of a group with medical services and hospitalization, is considered not engaged in the insurance business and hence not subject to insurance laws. Thus, it has been stated that is there is no hazard or peril as contemplated by a statute defining insurance, but a mere contract entitling certificate holders to medical services or supplies free or at a reduced rates, the contract is not one of insurance ***(43 Am Jur 2d 11, citing California Physicians' Service vs Garrison, 28 Cal 2d 790 and Michigan Hospital Service vs. Sharpe, 339 Mich 357).***

As it is generally recognized that the business of insurance is one that is impressed with public interest, it is just proper that they are subject of control and regulation by the state acting through the Insurance Commission. And considering the fact that the government agency tasked to supervise and regulate the operation of Health maintenance Organizations is the Department of Health (pursuant to Executive Order No. 119) and not the Insurance Commission, we are of the view, that herein Petitioner, in its strict sense is not engaged in the business of insurance.

WHEREFORE, in view of the foregoing, the instant Petition for Review is **PARTIALLY GRANTED**. Petitioner is hereby **ORDERED** to **PAY** the deficiency VAT amounting to P22,054,831.75 inclusive of 25% surcharge plus 20% interest from January 20, 1997 until fully paid for the 1996 VAT deficiency and P31,094,163.87 inclusive of 25% surcharge plus 20% interest from January 20, 1998 until fully paid for the 1997 VAT deficiency. Accordingly, VAT Ruling No. 361-88 is declared void and without force and effect. The 1996 and 1997 deficiency DST assessment against petitioner is hereby **CANCELLED AND SET ASIDE.** Respondent is **ORDERED** to **DESIST** from collecting the said DST deficiency tax.

SO ORDERED.

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

WE CONCUR:

(Concurring and Dissenting)
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

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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

PHILIPPINE HEALTH CARE PROVIDERS, INC.,
Petitioner,

- versus -

C.T.A. CASE NO. 6166

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

APR 05 2002

x - x

CONCURRING AND DISSENTING OPINION

I agree with the opinion that there was no violation of Section 228 of the NIRC, nor was there a denial of due process when respondent failed to formally answered the protest. However, I beg to disagree with the findings that petitioner is not exempt from VAT. I believe the provision of law is broad enough to cover the business of petitioner. Section 103(l) of the NIRC exempts from VAT "medical, dental, hospital and veterinary services except those rendered by professionals". Its Article of Incorporation and the Joint Stipulation of Facts state that petitioner is organized for the purpose of "establishing, maintaining, conducting and operating a prepaid group practice health care delivery system to take care of the sick, diseased and disabled persons who are enrolled in its health care program" and that petitioner is engaged in the "disposition of preventive, diagnostic and curative medical services to individuals enrolled in its health care program." Health care maintenance program is one way or procedure of delivering medical services. I believe the law does not distinguish how the particular medical services are delivered. Whether it is prepaid or not does not matter. I believe the reason behind the exemption of medical services from VAT is to keep the cost of medical services low. There is now a proliferation of health care organization the primary beneficiary are those in the lower and middle strata of our society who in most cases group themselves to be covered by this program to keep the premium low. To impose VAT will definitely increase the cost of availing this program.

Secondly, granting for purposes of argument that petitioner is liable to VAT as ruled in the case of ***Aetna Health Care, Inc***. *(VAT Ruling No. 018-98 dated June 23 1999),* I believe said ruling cannot be given retroactive effect, pursuant to Section 246 of the NIRC. The earlier VAT Ruling No. 231-88 dated June 8, 1988 issued in favor of petitioner confirmed its entitlement to VAT exemption under Section 103 governed. Exhibit "P" which served as basis for the issuance of the VAT ruling in favor of petitioner sufficiently described the business of the petitioner. The fact that the phrase "or a health maintenance organization" was not mentioned does not affect the fact that it is rendering medical services. This VAT ruling was even confirmed subsequently by Regional Director Osmundo G. Umali in his letter dated April 22, 1994 (Exh "M"), So, in the absence of proof that petitioner deliberately committed mistakes or omitted material facts, or the facts gathered by the Bureau are materially different/or the petitioner acted in bad faith, we must uphold the application of Section 246 of the Tax code.

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Nevertheless, I agree with the majority opinion that petitioner is not subject to documentary stamp tax. Likewise, I agree that the assessment has not prescribed also.

In view of the foregoing, I believe not only the DST assessment should be cancelled but also the VAT assessment as well.

ERNESTO D. ACOSTA
Presiding Judge

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