REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

HAMBRECHT & QUIST PHILIPPINES, INC.,
Petitioner,

- versus -

C.T.A. CASE NO. 6362

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:
SEP 24 2004
APApolinario

x - x

DECISION

This is a judicial appeal from the final decision of the respondent Commissioner of Internal Revenue denying the protest filed by the petitioner against Assessment Notice No. 001543-89-5668 for Deficiency Income Tax in the amount of P1,583,076.00 and Deficiency Expanded Withholding Tax in the amount of P1,353,484.87 covering the taxable year 1989.

Petitioner is a domestic corporation duly registered with the Securities and Exchange Commission, organized and existing under and by virtue of Philippine laws, with principal office located at the 22nd Floor, PCIB Tower 2, Makati Avenue corner H.V. De La Costa Streets, Makati City.

In the Joint Stipulation of Facts and Issues filed by the parties on February 14, 2002, the following facts are admitted by both parties:

> In a letter dated February 15, 1993, petitioner informed the Bureau of Internal Revenue (BIR), through its West-Makati District Office of its change of business address from the 2nd Floor Corinthian Plaza, Paseo de Roxas, Makati City to the 22nd Floor PCIB Tower II,

Makati Avenue corner H.V. De la Costa Streets, Makati City. Said letter was duly received by BIR-West Makati on February 18, 1993.

On November 4, 1993, petitioner received a tracer letter or follow-up letter dated October 11, 1993 issued by the Accounts Receivable/Billing Division of the BIR's National Office and signed by then Assistant Chief Mr. Manuel B. Mina, demanding for payment of alleged deficiency income and expanded withholding taxes for taxable year 1989 amounting to P2,936,560.87.

On December 3, 1993, petitioner, through its external auditors, filed with the same Accounts Receivable/Billing Division of the BIR's National Office, its protest letter against the alleged deficiency tax assessments for 1989 as indicated in the said tracer letter dated October 11, 1993.

That the alleged deficiency income tax assessment apparently resulted from an adjustment made to Petitioner's taxable income for the year 1989, on account of the disallowance of certain items of expense, namely, professional fees paid, donations, repairs and maintenance, salaries and wages, and management fees. The latter item of expense, the management fees, made up the bulk of the disallowance, the examiner alleging, among others, that Petitioner failed to withhold the appropriate tax thereon. This is also the same basis for the imposition of the deficiency withholding tax assessment on the management fees. Revenue Regulations No. 6-85 (EWT Regulations) does not impose or prescribe EWT on management fees paid to a non-resident.

On November 7, 2001, nearly eight (8) years later, petitioner's external auditors received a letter from the respondent Commissioner of Internal Revenue dated October 27, 2001. The letter advised the petitioner that respondent had rendered a final decision denying its protest on the ground that the protest against the disputed tax assessment was allegedly filed beyond the 30-day reglementary period prescribed in then Section 229 of the NIRC.

On December 6, 2001, Petitioner filed the instant Petition for Review to appeal the final decision of the Commissioner of Internal Revenue denying its protest against the deficiency income and withholding tax assessments issued for taxable year 1989 pursuant to Section 7 of Republic Act No. 1125, otherwise known as an "Act Creating the Court of Tax Appeals" and Section 228 of the NIRC, as amended, which provides:

112

> If the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within thirty (30) days from receipt of the said decision, or from the lapse of the one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable.

The parties likewise stipulated on the following issues to be determined by this court:

1. Whether or not the assessment notice sent through registered mail is considered or may be deemed to have been received by the petitioner;

2. Whether or not the filing of petitioner's request for reinvestigation interrupted the prescriptive period to collect assessment;

3. Whether or not the BIR's right to collect, or enforce collection of the disputed tax assessment is already barred by prescription;

4. Whether or not a "tracer" or follow-up letter that was sent to petitioner by the Accounts Receivable/Billing Division of the BIR's National Office may be considered as the notice of assessment in itself, and therefore petitioner's protest letter of December 3, 1993 was timely filed;

5. Whether or not professional fees paid, donations, repair and maintenance, salaries and wages and management fees are items deductible from petitioner's gross income earned;

6. Whether or not professional fees paid, donations, repairs and maintenance, salaries and wages and management fees are subject to withholding tax.
7. Whether or not the management fees are reimbursements made by petitioner of the expenses incurred by H&Q-US in providing advice and support in connection with petitioner's duties under the Management Agreement hence, deductible from petitioner's gross income;

8. Whether or not the management fees were paid by petitioner to H&Q-US hence, subject to any Philippine withholding tax;

9. Whether or not H&Q-US has a permanent establishment (PE) in the Philippines to which business profits may be attributed for Philippine income tax purposes pursuant to the RP-US Tax Treaty.

We shall first discuss the issue of whether or not the Assessment Notice sent through registered mail is considered or may be deemed to have been received by the petitioner.

Petitioner maintains that it never received Assessment Notice No. 001543-89-5668 for deficiency income tax and deficiency expanded withholding tax for the taxable year 1989 allegedly sent by registered mail to its old address at the 2nd Floor, Corithian Plaza, Paseo de Roxas, Makati City. And that it has no knowledge of the assessments until a tracer letter dated October 11, 1993 was received by it on November 4, 1993.

Petitioner also alleges that as early as November 24, 1992, through a letter dated November 23, 1992 *(Exhibit N)* signed by its Senior Vice-President, the respondent had been sufficiently informed of its new address. Petitioner posits that since the aforementioned letter was written on its letterhead bearing its new address, the respondent had been adequately informed of its new address. The said letter was addressed to Mr. Rogelio B. Zambarrano, the Revenue District Officer (RDO), Bureau of Internal Revenue, 5/F Atrium Bldg., Makati Ave., Makati, Metro Manila, advising him that Ms. Melinda P. Evangelista had been authorized to represent the petitioner at the informal conference scheduled on November 24, 1992 pursuant to a letter from Mr. Zambarrano requesting for such conference *(Exhibit 2, BIR Records, p 248)*. In fact, petitioner's witness, Ms. Evangelista, during the hearing held on March 7, 2002 testified that the letter was received by the Assistant RDO of East-Makati on November 24, 1992 *(TSN, March 7, 2002, p.18)*.

Moreover, as admitted by the respondent in the joint stipulation of facts, particularly in paragraph (3) thereof, in a letter dated February 15, 1993, petitioner informed the BIR, through its West-Makati District Office of its change of business address from the 2nd Floor Corinthian Plaza, Paseo de Roxas, Makati City to the 22nd Floor PCIB Tower II, Makati Avenue corner H.V. De la Costa Street, Makati City. Said letter was duly received by BIR-West Makati on February 18, 1993.

In its Memorandum, petitioner quoted the testimony of its witness to support its claim that it did not receive the Assessment Notice issued by respondent, thus:

> "Petitioner respectfully maintains that it never received the said Assessment Notice Nos. 001543-89-5668 and 001543-89-5668 that Respondent alleges was sent to its old address in Corinthian Plaza, Paseo de Roxas, Makati City, and had no knowledge of the assessments until a letter dated October 11, 1993 or "tracer letter" was served to Petitioner only on November 4, 1993. Petitioner indubitably proved this fact through the testimony of its Senior Accountant, Ms. Melinda P. Evangelista, during the hearing conducted on March 7, 2002, to wit:
>
> Atty. Vargas : Let us pursue this allegation of the BIR that your protest was filed out of time and therefore should be denied. Ms. Witness, are you familiar with this Formal Assessment Notice that is cited by the BIR Commissioner in his denial letter dated October 27, 2001?

/R

Ms. Evangelista: The first time that I was made aware of the assessment was when the BIR issued to us a so-called "Tracer Letter" sometime in October 1993.

Atty. Vargas : Previous to that, did you know that a Formal Assessment Notice was sent to your company by the BIR particularly that which according to the BIR Commissioner was issued sometime in January 1993?

Ms. Evangelista: No, mam.
(TSN dated March 7, 2002, p. 12)

In the same hearing, Ms. Melinda P. Evangelista also testified that when Petitioner moved from Corinthian Plaza to PCIBank Tower 2, it informed Respondent of its change of business address in a letter dated February 15, 1993. *(Exhibit "A"; Admitted paragraph 3, Joint Stipulations of Facts and Issues)* In fact, as early as November 24, 1992, Respondent, through its examiners, had been sufficiently informed of the address of Petitioner when the latter sent a letter dated November 23, 1992 addressed to Mr. Rogelio Zambarrano, Revenue District Officer of RDO No. 32-A (West Makati), using its new letterhead which clearly shows the new address of Petitioner at PCIBank Tower 2 Makati Avenue corner H.V. De La Costa Streets, Makati City. *(Exhibits "N", "N-1" and "N-2")* Thus:

Atty. Vargas : Ms. Evangelista, on page 4 of the same denial letter, the BIR stated that the Formal Assessment Notice was mailed under Registry No. 21811 on January 3, 2001 to H&QPI former place of business, which is, at Corinthian Plaza along Paseo de Roxas, Makati?

Ms. Evangelista: Yes, because that's where we used to hold office before we moved to a new building office in PCIBank along Makati Avenue, Makati.

Atty. Vargas : Until when did your company hold office at Corinthian Plaza along Paseo de Roxas, Makati.

Ms. Evangelista: Late of October 1992.

Atty. Vargas : When you moved from Corinthian Plaza to PCIBank Tower II, Makati, what action, if any, did you do?

Ms. Evangelista: We filed a letter addressed to the BIR informing them of our change of address.

114

Atty. Vargas : I am showing you a one-page letter dated February 15, 1993 pre-marked as Exhibit "A". Is this the same letter that you were referring to?

Ms. Evangelista: Yes, ma'am.

xxx xxx xxx

Atty. Vargas : Ms. Evangelista, aside from that February-letter that you submitted to the BIR, would you recall, if any, that you indicated to the BIR the fact that you moved to a new business address?

Ms. Evangelista: Yes, I believe that the BIR, Revenue District Officer, Mr. Rogelio B. Zambarrano, was sufficiently informed as early as November 1992.

Atty. Vargas : Why do you say that?

Ms. Evangelista: Because we even wrote the Revenue District Officer in November 1992, using our new letterhead which clearly shows our new office address at PCIBank Tower II, Makati Avenue cor. H.V. De la Costa St. Makati.

Atty. Vargas : What was this letter all about?

Ms. Evangelista: This is our letter informing the BIR referring to a conference that I have been authorized at the BIR's office.

Atty. Vargas : If you are shown a copy of said letter, will you be able to recognize and identify the same?

Ms. Evangelista: Yes, ma'am.

Atty. Vargas : I am showing you a one page letter dated November 23, 1992 addressed to Mr. Rogelio B. Zambarrano, the Revenue District Officer. Is this the same document that you were referring to?

Ms. Evangelista: Yes, that is the same.

Atty. Vargas : I would like to direct your attention to the upper left portion of the letter which has a handwritten note "ARDO" and beneath the same appears to be a signature with a date. Will you please tell us what the handwritten note is all about?

117

Ms. Evangelista: Yes, that is actually the acknowledgment receipt by the Assistant RDO of East Makati for our letter which was received on November 24, 1992.

Atty. Vargas : **Ms Witness, please tell us where in this document the BIR could have known of the new address of Petitioner?**

Ms. Evangelista: **It is on the lower portion, it states the address, 22nd Floor, PCIB Tower 2, Makati Avenue corner H.V. De La Costa Streets, Makati City**. (Emphasis supplied)

(TSN dated March 7, 2002, pp. 13-18)

Assuming, but without admitting, that Petitioner's notice to the BIR of its change of business address was belatedly made, Respondent nonetheless failed to prove that said assessment notice was sent to Petitioner's old address in Corinthian Plaza, Paseo de Roxas, Makati City." *(Petitioner's Memorandum, CTA Records, pp. 180 – 182)*

Respondent, on the other hand, argues that the assessment notice for deficiency expanded withholding and income taxes for taxable year 1989 was mailed under Registry Receipt No. 21811 on 8 January 1993. In support thereof, respondent asserts that:

"On page 274 of the BIR records is the photocopy of the duplicate of the List of Assessment Notices mailed by the Acting Chief of the Records Section, BIR Region No. 8, Makati City and marked as Exhibit "6" for the respondent. The fact of said mailing was further strengthened by the testimony of Mr. Rogelio C. De Lizo, Chief, Records Section, Revenue Region 8, Makati City in the hearing conducted on 25 June 2003. Under Section 10, Rule 13 of the Revised Rules on Civil Procedure, 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.

Petitioner belatedly informed the Revenue District Office on 18 February 1993 of its change of address. The written notice relative to the change of address was made only after the assessment notice was sent by registered mail on 8 January 1993. Consequently, service to petitioner's former place of business, which is the address indicated in its corporate tax return, shall be considered valid and binding for purposes

118

of computing the period within which to reply. Section 11 of Revenue Regulations No. 12-85 provides, thus:

> In case of change of address, the taxpayer must give written notice thereof to the Revenue District Officer or district having jurisdiction over his former legal residence and/or place of business, copy furnished the Revenue District Officer having jurisdiction over his new legal residence or place of business, the Revenue Computer Center and the Receivable Accounts Division, BIR, National Office, Quezon City, and in case of failure to do so, any communication referred to in these regulations previously sent to his former legal residence or business address shall be considered valid and binding for purposes of the period within which to reply.

Moreover, it is beyond comprehension how petitioner in its December 3, 1993 protest-letter would know the items of disallowed expenses and breakdown of the total tax liabilities involved if it did not receive the assessment. The reminder-letter of October 11, 1993 of the Accounts Receivable/Billing Division, which petitioner claims to be the only notice it received and no other, merely states the total amount of tax liability. It is hard to understand how petitioner received the reminder-letter of October 11, 1993 and not the formal assessment notice of January 6, 1993, considering the fact that both letters bear the same, old address of the petitioner." *(Respondent's Memorandum, CTA Records, pp. 153-155).*

It is well settled that an assessment is deemed made when notice to this effect is released, mailed, or sent by the Collector to the taxpayer and it is not required that the notice be received by the taxpayer within the aforementioned five-year period (now three years). (*Basilan Estates, Inc. vs. The Commissioner of Internal Revenue and the Court of Tax Appeals, 21 SCRA 17*).

Moreover, Sec. 3 (v), Rule 131 of the Rules of Court, provides that a letter duly directed and mailed was received in the regular course of the mail. "The facts to be proved to raise this presumption are (a) that the letter was properly addressed with postage prepaid, and (b) that it was mailed. Once these facts are proved, the presumption is that the letter was received by the

119

addressee as soon as it could have been transmitted to him in the ordinary course of the mail." *(Nava vs. Commissioner of Internal Revenue, 13 SCRA 104).*

However, petitioner denies having received the assessment notice and alleges that the presumption in Sec. 3 (v), Rule 131 of the Rules of Court does not apply in the case before us. That, according to the petitioner, direct denial of receipt of the Assessment Notice shifts the burden upon the party favored by the presumption to prove that the mailed letter was indeed received by the addressee as held by the Supreme Court in the case of *Republic of the Philippines vs. The Court of Appeals & Nielson and Company, Inc., 149 SCRA 351.*

Petitioner's witness testified that they moved to their new office located at PCIBank Tower II along Makati Avenue sometime in October 1992. She likewise stated that petitioner informed the BIR of their change of address only on February 18, 1993 through a letter dated February 15, 1993. However, she claimed that the BIR, through Revenue District Officer Mr. Zambarrano was "sufficiently informed" of said change of address as early as November 1992 through a letter dated November 23, 1992, which authorized her to represent the petitioner at a conference to be held on the following day to discuss and go over the findings of the BIR examiner and to present documentary evidence for any objections against the proposed assessment (*Exhibit N*). And according to the witness for the respondent, "the formal conference was made" [held] (*TSN, May 20, 2003, p. 10).*

We are not persuaded.

To begin with, petitioner had knowledge of the on-going BIR examination of its tax liabilities for the year 1989. In fact, petitioner's Sr. Vice-President, Francis G. Horn, wrote a letter dated November 23, 1992 *(Exhibit N)* in response to the Letter/Notice to Taxpayer dated November 11, 1992, (*Exhibit 2)* signed by Rogelio B. Zambarrano, the Revenue District Officer of Revenue District No. 32-A West-Makati, Metro Manila. Noteworthy also is the fact that petitioner's witness was the one who received the Letter of Authority *(Exhibit 1)* authorizing the revenue examiner named therein to conduct the examination of the books of accounts and other accounting records of the petitioner for the year 1989.

With full knowledge of the on-going tax investigation, petitioner transferred to its new office address sometime in October 1992 but, by its own admission and understanding, formally notified the Revenue District Officer of the BIR West-Makati on February 18, 1993 *(Exhibit A)* only. The assessment notice had already been sent by the respondent through registered mail on January 8, 1993 to petitioner's old business address, long before petitioner's so-called "formal notice" of a change of address to respondent.

Section 11 of Revenue Regulations No. 12-85 requires that when a taxpayer transfers to another location, a written notice of said change of address shall be filed in the manner prescribed therein. It provides that:

> "In case of change of address, the taxpayer must give written notice thereof to the Revenue District Officer or district having jurisdiction over his former legal residence and/or place of business, copy furnished the Revenue District Officer having jurisdiction over his new legal residence or place of business, the Revenue Computer Center and

(121)

> the Receivable Accounts Division, BIR, National Office, Quezon City, and **in case of failure to do so, any communication referred to in these regulations previously sent to his former legal residence or business address shall be considered valid and binding for purposes of the period within which to reply."** (Emphasis supplied.)

Revenue Regulations No. 12-85 therefore required that the written notice must be sent to the Revenue District Officer who has jurisdiction over his former place of business, furnishing a copy to each of the following BIR offices:

a. The Revenue District Officer having jurisdiction over his new legal residence or place of business;
b. The Revenue Computer Center; and
c. The Receivable Accounts Division, BIR, National Office, Quezon City.

Should a taxpayer fail to comply with the foregoing requirement, any communication that might have been sent to his former legal residence or business address shall be considered valid and binding for purposes of the period within which to reply.

Petitioner failed to comply with Section 11 of Revenue Regulations No. 12-85. First, *Exhibit A* which petitioner refers as its written notice of change of address was really a covering letter for the cancellation of petitioner's VAT registration with the BIR West-Makati. Also, not a single one of the offices mentioned in Section 11 of Revenue Regulations No. 12-85 was furnished a copy thereof. Second, *Exhibit N* is only an authorization letter, informing the BIR that petitioner's witness had been authorized to represent the petitioner in the conference scheduled on November 24, 1992. Hence, neither *Exhibit A* nor

Exhibit N could qualify as the notice of change of address required under the law.

In view of petitioner's failure to comply with the requirement of a written notice of its change of address, any communication sent by the respondent addressed to petitioner's former place of business is valid and binding for purposes of the period within which to reply. In this particular case, the period within which to reply refers to the filing of the protest against the assessment required by Section 229 of the NIRC of 1977. The taxpayer is given a thirty (30)-day period within which to protest an assessment, thus:

> "SEC. 229. *Protesting of Assessment.* - When the Commissioner of Internal Revenue or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings. Within a period to be prescribed by implementing regulations, the taxpayer shall be required to respond to said notice. If the taxpayer fails to respond, the Commissioner shall issue an assessment based on his findings.
>
> Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation in such form and manner as may be prescribed by implementing regulations within thirty (30) days from receipt of the assessment; otherwise, the assessment shall become final and unappealable.
>
> If the protest is denied in whole or in part, the individual, association or corporation adversely affected by the decision on the protest may appeal to the Court of Tax Appeals within thirty (30) days from receipt of said decision; otherwise, the decision shall become final, executory and demandable."

Petitioner had thirty (30) days within which to file its protest against the assessment. The assessment notice was sent by registered mail on January 8, 1993. Petitioner's protest letter was filed only on December 3, 1993. As stated above, "the presumption is that the letter was received by the addressee as

123

soon as it could have been transmitted to him in the ordinary course of the mail" *(Nava vs. Commissioner of Internal Revenue, supra).* Although the date of filing of petitioner's protest letter was within the thirty (30)-day period from petitioner's receipt of the "tracer letter", it is beyond the 30-day period allowed by Sec. 229 reckoned from receipt of the assessment notice, be it actual or constructive (presumed) receipt.

It must be noted that the records of the case likewise reveal that the "tracer letter" *(Exhibit B)* dated October 11, 1993 was, **like the assessment notice**, sent by mail and addressed to petitioner's old business address. In the same manner, the Letter/Notice to Taxpayer *(Exhibit 2)* dated November 11, 1992 was directed to the same old address of petitioner. These letters were written and dated almost a year apart but petitioner was able to receive both letters in spite of the fact that petitioner transferred to its new address in October 1992. This undisputed fact weighs heavily against petitioner's theory.

On the other hand, the respondent was able to prove that the assessment notice for deficiency expanded withholding and income taxes for taxable year 1989 addressed to the petitioner was mailed under Registry Receipt No. 21811 on January 8, 1993. The respondent introduced documentary evidence such as the Assessment Notice *(Exhibit 4)* addressed to petitioner's office at 2/F Corinthian Plaza, Paseo de Roxas, Makati, MM, as well as a List of Assessment Notices mailed on January 8, 1993 *(Exhibit 6)* as proofs that the Assessment Notice was properly addressed to petitioner and that it was mailed. The fact of mailing was further strengthened by the testimony of Rogelio C. De Lizo, the Chief of the Records Section, Revenue Region No. 8, Makati City, that "upon receipt of the document to be mailed from the Assessment Division, we readily acknowledged the receipt and then, mailed the same on the same date" *(TSN, June 25, 2003, p. 10).* On cross-examination, petitioner's counsel was able to elicit from the same witness that he has "no proof that indeed petitioner received the final assessment notice" *(TSN, June 25, 2003, p.13).* But this was sufficiently explained by the same witness on re-direct examination that it is not unusual that the registry return card may not have been returned by the addressee of the assessment notice *(TSN, June 25, 2003, pp. 14 and 15).*

Furthermore, petitioner's reliance on the case of *Republic vs. Court of Appeals and Nielson & Company, Inc., supra.,* is misplaced since the ruling therein is not applicable to the case before us. Said case did not involve a change of address on the part of the taxpayer who did not comply with the written notice required by Revenue Regulations No. 12-85.

In a much later decision, the Supreme Court in the case of ***Proctector's Services, Inc. vs. Court of Appeals and Commissioner of Internal Revenue, 330 SCRA 404,*** held that:

> "Turning now to petitioner's denial that he received the 1985 assessment, we agree with the factual findings of the CTA that the assessment letter may be presumed to have been received by petitioner. The CTA found as follows:
>
> > 'The 1985 assessment which petitioner denied as having been received was negated when the respondent introduced documentary evidence showing that it was

125

> mailed by registered mail. It was further buttressed by the testimony of witness Mr. Arnold C. Larroza, Chief Administrative Branch Mailing Section, Rev. Region 4B-1, Quezon City that the 1983, 1984 and 1985 assessments were placed in one envelope when it was mailed by registered mail. Presumably, it was received in the regular course of the mail . . . . The facts to be proved to raise this presumption are (a) that the letter was properly addressed with postage prepaid; and (b) that it was mailed. Once these facts are proved, the presumption is that the letter was received by the addressee as soon as it could have been transmitted to him in the ordinary course of the mails. Such being the case, this Court cannot be made to believe that the 1985 assessment which incidentally has a substantially greater amount involved, was not received by the petitioner. Hence, the same assessment is also considered final and unappealable for failure to protest the same within the reglementary period provided by law'."

Applying the foregoing ruling to the case before us, the Assessment Notice sent by registered mail to petitioner's former place of business has become final and unappealable for failure to protest the same within the period provided by law. The merits of the subject Assessment Notice can no longer be the subject of inquiry.

We shall now discuss the second and third issues simultaneously as they both relate to the issue of prescription of the right of the respondent to collect the deficiency withholding and income taxes from the petitioner.

The applicable provisions of the National Internal Revenue Code of 1977, in addition to Section 229 above, are Sections 223 (c) and 224, quoted hereunder:

> SEC. 223. *Exceptions as to period of limitation of assessment and collection of taxes.* - (a) xxx xxx xxx
>
> (b) xxx xxx xxx

126

> (c) Any internal revenue tax which has been assessed within the period of limitation above-prescribed may be collected by distraint or levy or by a proceeding in court within three years following the assessment of the tax.
>
> (d) xxx xxx xxx
>
> (e) xxx xxx xxx
>
> SEC. 224. *Suspension of running of statute.* – The running of the statute of limitation provided in Section 203 and 223 on the making of assessment 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 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 the tax is being assessed or collected; *Provided*, That, if the taxpayer informs the Commissioner of any change in address, the running of 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.

Having ruled that the assessments had become final and unappealable for failure of the petitioner to protest within the reglementary period, this court considers petitioner's protest letter dated December 2, 1993 (*Exhibit C)* as an invalid and ineffectual protest because it was filed beyond the thirty (30)-day period granted to the taxpayer within which to protest an assessment. As such, it did not suspend the running of the prescriptive period to collect the tax. The assessment was made on January 8, 1993, respondent had only three (3) years therefrom to initiate collection of said tax by a distraint or levy or by a proceeding in court. However, no such action was initiated by the respondent. By the time that respondent issued the assailed decision up to the time the

127

petitioner filed its Petition for Review on December 6, 2001, more than eight (8) years had already elapsed. Hence, respondent can no longer enforce the collection of the subject deficiency taxes.

In the case of ***Republic of the Philippines vs. Salud V. Hizon, 320 SCRA 575,*** the Supreme Court had occasion to explain the effect of a request for reconsideration or reinvestigation that was filed beyond the thirty (30)-day period on the right of the government to collect the tax. The Supreme Court said:

> Second. With regard to the issue that the case filed by petitioner for the collection of respondent's tax deficiency is barred by prescription, §223(c) of the NIRC provides:
>
> Any internal revenue tax which has been assessed within the period of limitation above-prescribed may be collected by distraint or levy or by a proceeding in court within three years following the assessment of the tax.
>
> The running of the three-year prescriptive period is suspended —
>
> for the period during which the Commissioner 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 the tax is being assessed or collected; *provided,* that, if the taxpayer informs the Commissioner of any change in address, the running of the statute of limitations will not be suspended; when the warrant of distraint or 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.
>
> Petitioner argues that, in accordance with this provision, respondent's request for reinvestigation of her tax deficiency assessment on November 3, 1992 effectively suspended the running of the period of prescription such that the government could still file a case for tax collection.

124

The contention has no merit. Sec. 229 of the Code mandates that a request for reconsideration must be made within 30 days from the taxpayer's receipt of the tax deficiency assessment, otherwise the assessment becomes final, unappealable and, therefore, demandable. The notice of assessment for respondent's tax deficiency was issued by petitioner on July 18, 1986. On the other hand, respondent made her request for reconsideration thereof only on November 3, 1992, without stating when she received the notice of tax assessment. She explained that she was constrained to ask for a reconsideration in order to avoid the harassment of BIR collectors. In all likelihood, she must have been referring to the distraint and levy of her properties by petitioner's agents which took place on January 12, 1989. Even assuming that she first learned of the deficiency assessment on this date, her request for reconsideration was nonetheless filed late since she made it more than 30 days thereafter. Hence, her request for reconsideration did not suspend the running of the prescriptive period provided under §223(c). Although the Commissioner acted on her request by eventually denying it on August 11, 1994, this is of no moment and does not detract from the fact that the assessment had long become demandable.

Nonetheless, it is contended that the running of the prescriptive period under §223(c) was suspended when the BIR timely served the warrants of distraint and levy on respondent on January 12, 1989. Petitioner cites for this purpose our ruling in *Advertising Associates, Inc. v. Court of Appeals*. Because of the suspension, it is argued that the BIR could still avail of the other remedy under §223(c) of filing a case in court for collection of the tax deficiency, as the BIR in fact did on January 1, 1997.

Petitioner's reliance on the Court's ruling in *Advertising Associates Inc. v. Court of Appeals* is misplaced. What the Court stated in that case and, indeed, in the earlier case of *Palanca v. Commissioner of Internal Revenue*, is that the timely service of a warrant of distraint or levy suspends the running of the period to collect the tax deficiency in the sense that the disposition of the attached properties might well take time to accomplish, extending even after the lapse of the statutory period for collection. In those cases, the BIR did not file any collection case but merely relied on the summary remedy of distraint and levy to collect the tax deficiency. The importance of this fact was not lost on the Court. Thus, in *Advertising Associates*, it was held: "It should be noted

> that the Commissioner did not institute any judicial proceeding to collect the tax. He relied on the warrants of distraint and levy to interrupt the running of the statute of limitations."
>
> Moreover, if, as petitioner in effect says, the prescriptive period was suspended twice, *i.e.*, when the warrants of distraint and levy were served on respondent on January 12, 1989 and then when respondent made her request for reinvestigation of the tax deficiency assessment on November 3, 1992, the three-year prescriptive period must have commenced running again sometime after the service of the warrants of distraint and levy. Petitioner, however, does not state when or why this took place and, indeed, there appears to be no reason for such. It is noteworthy that petitioner raised this point before the lower court apparently as an alternative theory, which, however, is untenable
>
> **For the foregoing reasons, we hold that petitioner's contention that the action in this case had not prescribed when filed <u>has no merit</u>.** xxx *(Emphasis and underscoring supplied; footnotes omitted)*

From the foregoing ruling of the Supreme Court, it is clear that a request for reconsideration or reinvestigation which has not been seasonably filed does not interrupt the prescriptive period to collect the tax.

Assuming, for purposes of academic discussion, that petitioner's request for reconsideration was filed on time, still respondent's right to collect the tax cannot be considered as having been suspended. Petitioner, through its external auditors, requested for a reinvestigation of the assessment notice in its protest letter belatedly filed on December 3, 1993. The respondent rendered a final decision thereon only on October 27, 2001 *(Exhibit D)* which was received by the petitioner on November 7, 2001 or nearly eight years from date of protest. In said decision, petitioner's protest was denied by the respondent by

130

simply invoking the final and executory character of the assessment for failure of petitioner to seasonably file its protest, thus:

> From the facts above-stated there can be no doubt that H&QPI received the said assessment notice, and that its failure to protest the same seasonably makes the assessment final and executory. Accordingly, there is no need to go into the merits of the second major issue as the same has been rendered moot and academic.

It is evident that the respondent did not conduct a reinvestigation, the protest having been dismissed on ground that the assessment has become final and executory. There is nothing in the record that would show what action was taken in connection with the protest of the petitioner. In fact, petitioner did not hear anything from the respondent nor received any communication from the respondent relative to its protest, not until eight years later when the final decision of the Commissioner was issued *(TSN, March 7, 2002, p. 24)*. In other words, the request for reinvestigation was not granted. Under Section 224 of the NIRC of 1977, the request for reinvestigation must be "granted" by the Commissioner in order that the prescriptive period to collect would be suspended. Since petitioner's request was not granted, the respondent should have instituted collection proceedings within the three-year period from assessment as prescribed by Section 223 (c). This could have been done either by distraint and levy or by a civil or criminal action. Section 205 further provides that either of these remedies or both may be pursued simultaneously in the discretion of the authorities charged with the collection of such taxes. However, respondent did not initiate collection proceedings within the period allowed by law thereby losing his right to collect on otherwise final and unappealable assessments.

In sum, a request for reconsideration of the assessment by the taxpayer which was not considered or acted upon by the Commissioner does not suspend the running of the period for filing of an action for collection. Thus, the Supreme Court ruled:

> In the case at bar the defendant, after receiving the assessment notice of September 24, 1949, asked for a reinvestigation thereof on October 11, 1949 (Exh. A). There is no evidence that this request was considered or acted upon. In fact, on October 23, 1950 the then Collector of Internal Revenue issued a warrant of distraint and levy for the full amount of the assessment (Exh. D), but there was no follow-up of this warrant. Consequently, the request for reinvestigation did not suspend the running of the period for filing an action for collection. *(Republic vs. Acebedo, 22 SCRA 1356)*

To reiterate, since the period to collect the tax was not suspended, the respondent's right to enforce collection of the deficiency income and expanded withholding tax assessment issued against petitioner has already prescribed.

WHEREFORE, Assessment Notice No. 001543-89-5668 for deficiency income and expanded withholding taxes dated January 6, 1993 is hereby **CANCELLED** and **WITHDRAWN** for failure of respondent to enforce collection thereof within the period allowed by law.

SO ORDERED.

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

132

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

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 Justice