REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
Quezon City

EN BANC

PEOPLE OF THE PHILIPPINES, Petitioner,	**CTA EB CRIM. NO. 067** (CTA Crim. Case No. O-630)
	Present:
- **versus** -	**DEL ROSARIO, *P.J.*, CASTAÑEDA, JR., UY, RINGPIS-LIBAN, MANAHAN, BACORRO-VILLENA,** and **MODESTO-SAN PEDRO, *JJ.***
CROSS COUNTRY OIL AND PETROLEUM CORP., ARTURO M. ZAPATA, AND JACOB VALERIANO, JR., Respondents.	Promulgated: SEP 16 2020 3:01 p.m.

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DECISION

BACORRO-VILLENA, J.:

Previously before the First Division[1] of this Court, respondents Cross Country Oil and Petroleum Corp. (**CCOPC**), Arturo M. Zapata (**Zapata**) and Jacob Valeriano, Jr. (**Valeriano**) filed a Demurrer to Evidence (**Demurrer**) seeking the dismissal of CTA Crim. Case No. O-630[2], charging them with violation of Section 255[3], in relation to

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1 With Presiding Justice Roman G. Del Rosario as Chairman, Associate Justices Erlinda P. Uy and Cielito N. Mindaro-Grulla as Members.

2 Entitled *People of the Philippines v. Cross Country Oil and Petroleum Corp., Arturo M. Zapata and Jacob Valeriano, Jr.*

Sections 253(d)[4] and 256[5] of the National Internal Revenue Code (**NIRC**) of 1997, as amended. The First Division denied respondents' Demurrer.[6]

Later, the case was transferred to the Third Division[7] which resolved respondents' Motion for Reconsideration (**MR**). In a Resolution dated 04 December 2018[8], the Third Division granted respondents' MR and dismissed the case. Likewise, it cancelled Assessment Notice No. 30-10-VT-5556 dated 09 January 2014[9], Formal Letter of Demand (**FLD**) dated 09 January 2014[10], Final Notice Before Seizure[11] (**FNBS**) issued against respondents. In effect, it cancelled the assessment of the Bureau of Internal Revenue (**BIR**) against them. The dispositive portion of the 04 December 2018 Resolution reads:

> ...
> **WHEREFORE**, premises considered, accused's **Motion for Reconsideration (of the Resolution dated 05 July 2018[])** is

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3 **SEC. 255.** *Failure to File Return, Supply Correct and Accurate Information, Pay Tax, Withhold and Remit Tax and Refund Excess Taxes Withheld on Compensation.* - Any person required under this Code or by rules and regulations promulgated thereunder to pay any tax, make a return, keep any record, or supply correct the accurate information, who willfully fails to pay such tax, make such return, keep such record, or supply such correct and accurate information, or withhold or remit taxes withheld, or refund excess taxes withheld on compensation, at the time or times required by law or rules and regulations shall, in addition to other penalties provided by law, upon conviction thereof, be punished by a fine of not less than Ten thousand pesos (P10,000) and suffer imprisonment of not less than one (1) year but not more than ten (10) years.

Any person who attempts to make it appear for any reason that he or another has in fact filed a return or statement, or actually files a return or statement and subsequently withdraws the same return or statement after securing the official receiving seal or stamp of receipt of internal revenue office wherein the same was actually filed shall, upon conviction therefore, be punished by a fine of not less than Ten thousand pesos (P10,000) but not more than Twenty thousand pesos (P20,000) and suffer imprisonment of not less than one (1) year but not more than three (3) years.

4 **SEC. 253.** *General Provisions.* -

...

(d) In the case of associations, partnerships or corporations, the penalty shall be imposed on the partner, president, general manager, branch manager, treasurer, officer-in-charge, and the employees responsible for the violation.

...

5 **SEC. 256.** *Penal Liabilities of Corporations.* - Any corporation, association or general co-partnership liable for any of the acts or omissions penalized under this Code, in addition to the penalties imposed herein upon the responsible corporate officers, partners, or employees, shall, upon conviction for each act or omission, be punished by a fine of not less than Fifty thousand pesos (P50,000) but not more than One hundred thousand pesos (P100,000).

6 Resolution dated 05 July 2018, Division Docket, Volume II, pp. 572-583.

7 With Justice Erlinda P. Uy as Chairman and Associate Justice Ma. Belen M. Ringpis-Liban as Member.

8 Division Docket, Volume III, pp. 649-663.

9 Exhibit "P-19", id., Volume I, p. 224.

10 Exhibit "P-20", id., pp. 225-228.

11 Exhibit "P-24", id., p. 234.

> **GRANTED.** Accordingly, the instant case is **DISMISSED** for failure of the prosecution to present sufficient evidence to warrant conviction beyond reasonable doubt. Further, the Assessment Notice No. 30-10-VT-5556 dated January 9, 2014, Formal Letter of Demand dated January 9, 2014, and Final Notice Before Seizure dated July 15, 2014, and Warrants of Garnishment are **CANCELLED** and **SET ASIDE**.
>
> **SO ORDERED.**[12]
>
> ...

Perturbed of the First Division's action, more particularly of the cancellation of the assessment, petitioner People of the Philippines (**petitioner**) filed an MR on the civil aspect of the afore-cited Resolution; which MR the Third Division denied in its Resolution of 04 April 2019.[13]

Pursuant to Rule 8, Section 3(b)[14] of the Revised Rules of the Court of Tax Appeals (**RRCTA**), petitioner filed this Petition for Review[15] assailing the Third Division's 04 December 2018 and 04 April 2019 Resolutions, respectively.

FACTS OF THE CASE

On 13 February 2017, an Information[16] was filed against respondent CCOPC, represented by its officers, Zapata and Valeriano, President and Treasurer, respectively, for "willful failure to pay taxes on value-added tax (VAT) on sales for the taxable year (TY) 2010 under Section 255, in relation to 253(d) and 256 of the NIRC of 1997, as amended".

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12 Underscoring supplied.

13 Id., pp. 684-688.

14 **SEC. 3.** *Who may appeal; period to file petition.* –

...

(b) A party adversely affected by a decision or resolution of a Division of the Court on a motion for reconsideration or new trial may appeal to the Court by filing before it a petition for review within fifteen days from receipt of a copy of the questioned decision or resolution. Upon proper motion and the payment of the full amount of the docket and other lawful fees and deposit for costs before the expiration of the reglementary period herein fixed, the Court may grant an additional period not exceeding fifteen days from the expiration of the original period within which to file the petition for review.

15 Filed 10 May 2019, *Rollo*, pp. 5-15.

16 Division Docket, Volume I, pp. 6-8.

The Information also alleges that respondents are liable for basic deficiency VAT liabilities in the amount of ONE BILLION THREE MILLION EIGHTY-SEVEN THOUSAND NINE HUNDRED EIGHTY-SEVEN PESOS AND EIGHTY-TWO CENTAVOS (₱1,003,087,987.82) exclusive of penalties, interest and surcharges.

On 25 April 2017, petitioner filed an Amended Information[17] equally charging Zapata and Valeriano for the aforementioned offense. Subsequently, a Second Amended Information[18] was filed on 20 June 2017 correcting the heading by adding the word "Second" before the words "Amended Information".

Trial ensued thereafter wherein petitioner presented Revenue Officers (**ROs**): (1) Ma. Paz Arcilla[19] (**RO Arcilla**); (2) Fernando R. Gonzales[20] (**RO Gonzales**); (3) Jefferson T. Ocampo[21] (**RO Ocampo**); (4) Dennis V. Ruelo[22] (**RO Ruelo**); and, (5) Jeffrey P. Camba[23] (**Camba**) as witnesses, who all testified by way of their judicial affidavits. Aside from identifying petitioner's exhibits, they all testified to either conducting the audit investigation against respondent CCOPC or serving upon the latter documents relevant to its assessment.

After petitioner rested its case, respondents filed a Motion for Leave to File the Attached Demurrer to Evidence on 04 April 2018.[24] In its Demurrer, respondents argued that the BIR's assessment was void as it violates its right to due process on the following grounds:

1) Letter of Authority (**LOA**) No. eLA201000045507/LOA-030-2011-00000616[25] dated 22 July 2011 was served on respondent Zapata only on 02 September 2011 or more than 30 days from the date of issue in violation of Revenue Audit Memorandum Order (**RAMO**) No. 1-00[26];

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17 Id., pp. 103-105.
18 Id., pp. 141-143.
19 See Judicial Affidavit, Exhibit "P-36", id., pp. 306-309.
20 See Judicial Affidavit, Exhibit "P-35", id., pp. 319-322.
21 See Judicial Affidavit, Exhibit "P-38", id., pp. 332-335.
22 See Judicial Affidavit, Exhibit "P-37", id., pp. 363-365.
23 See Judicial Affidavit, Exhibit "P-34", id., pp. 371-377.
24 Id., Volume II, pp. 519-537.
25 Exhibit "P-9", id., Volume I, p. 197.
26 Updated Handbook on Audit Procedures and Techniques Volume I (Revision – Year 2000).

2) Petitioner failed to prove the service of the Notice of Informal Conference[27] (**NIC**), Amended NIC[28], Preliminary Assessment Notice[29] (**PAN**) dated 03 December 2013, Final Assessment Notice[30] (**FAN**) and FLD[31] dated 09 January 2014 as the BIR never presented registry receipts or witnesses to testify to the actual receipt of these notices; and,

3) Petitioner failed to prove that the non-payment of the deficiency VAT liabilities was "willful".

The First Division granted the motion for leave and admitted the attached Demurrer in a Resolution dated 11 April 2018.[32]

After petitioner filed his Comment/Opposition to the Demurrer[33], the First Division denied the same.[34]

In denying respondents' Demurrer, the First Division found sufficient evidence to sustain petitioner's case. Responding to respondents' grounds in calling for the criminal case's dismissal, it upheld the LOA's validity and found that petitioner's pieces of evidence showed that the BIR duly notified respondents either *via* private courier, registered mail, or constructive service and that there was *prima facie* showing of willful non-payment of deficiency taxes against respondents.

Aggrieved, respondents timely filed an MR, reiterating and reinforcing their contentions in their Demurrer.

In the *interim*, Court of Tax Appeals (CTA) Administrative Circular No. 02-2018[35] was issued transferring[36] the case to the Third Division that acted favorably on respondents' MR. It set aside the First Division's denial of the Demurrer and granted the same.

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27 Exhibit "P-10", Division Docket, Volume I, pp. 198-202.
28 Exhibit "P-12", id., pp. 204-209.
29 Exhibit "P-17", id., pp. 217-220.
30 Supra at note 9.
31 Supra at note 10.
32 Id., Volume II, pp. 542.
33 Filed on 30 April 2018, id., pp. 563-567.
34 Supra at note 6.
35 Reorganizing the Three (3) Divisions of the Court dated 18 September 2018.
36 Order dated 21 September 2018, Division Docket, Volume III, p. 647.

In deciding in respondents' favor, the Third Division held that petitioner failed to prove the service of the PAN since Exhibits "P-18-1" (LBC courier receipt) and "P-18-2" (Philpost registry receipt) were denied admission when petitioner failed to present the original copies. Furthermore, the Third Division held that there was no constructive service of the PAN pursuant to Section 3.1.7 of Revenue Regulation (**RR**) No. 12-99 which provides:

> ...
> If the notice to the taxpayer herein required is served by registered mail, and no response is received from the taxpayer within the prescribed period from date of the posting thereof in the mail, the same shall be considered actually or constructively received by the taxpayer. If the same is personally served on the taxpayer or his duly authorized representative who, however, refused to acknowledge receipt thereof, the same shall be constructively served on the taxpayer. **Constructive service thereof shall be considered effected by leaving the same in the premises of the taxpayer and this fact of constructive service is attested to, witnessed and signed by at least two (2) revenue officers other than the revenue officer who constructively served the same.** The revenue officer who constructively served the same shall make a written report of this matter which shall form part of the docket of this case.[37]
> ...

The Third Division also pointed out the following supposed irregularities in the constructive service of the PAN:

> ...
> 1) The PAN was not constructively served on the taxpayer, [respondent CCOPC] or in its premises but rather on [respondent] Zapata at his residence on 07 December 2013; and[,]
>
> 2) The PAN's service was only witnessed by a certain MC Libay in contravention of that the constructive service must be witnessed by two (2) revenue officers.[38]
> ...

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[37] Emphasis supplied.
[38] Division Docket, Volume III, p. 660.

The Third Division henceforth concluded that the invalidity of the PAN's service likewise invalidated the FAN/FLD and FNBS dated 15 July 2014. With the grant of respondents' Demurrer, the Third Division not only dismissed the criminal case for failure to pay tax but likewise cancelled the prior assessment against them.

Unfazed, petitioner filed an MR on the civil aspect of the case.[39] The Third Division denied the MR and maintained the assessment's invalidity.[40]

Hence, this petition.[41]

Before the Court *En Banc* could resolve the present petition, it received from respondents' counsel a Notice of Death[42] informing it of respondent Zapata's passing.

ISSUE

Petitioner ascribes this error to the Third Division:

> THE THIRD DIVISION ERRED IN GRANTING RESPONDENTS' DEMURRER TO EVIDENCE AND IN DISMISSING THE CASE.[43]

ARGUMENTS

In support of the petition, that mainly questions the civil aspect of the case (CTA Crim. Case No. O-630), petitioner argues that the BIR's assessment of petitioner was valid and is already final, executory and demandable. Petitioner insists that respondents had allowed the assessment to lapse into finality when it failed to file a timely protest against it. Likewise, aside from the fact that respondents are already barred in questioning the assessment, the criminal action is *not* the proper venue to raise issues against it.

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39 Id., pp. 664-669.
40 See Resolution dated 04 April 2019, id., pp. 684-688.
41 Supra at note 15.
42 Notice of Death dated 10 January 2020. Respondents' counsel undertook to submit the certified true copy of the Death Certificate on or before 16 March 2020, yet did not submit the same.
43 Supra at note 15, p. 10.

Expectedly, respondents maintain the assessment's invalidity particularly due to the BIR's failure to strictly observe procedural requirements in relation to service of the NIC, PAN and FLD. They ultimately argue that these procedural lapses should result in the assessment's nullity thereby freeing them from any civil liability that could possibly arise from it.

RULING OF THE COURT *EN BANC*

After a careful review of the parties' contrasting arguments and the records of the case, the Court *En Banc* finds merit in petitioner's arguments.

The case subject of CTA Crim. Case No. O-630 is a criminal case, one that involves failure to pay tax under Section 255[44] of the NIRC of 1997, as amended, and the civil liability arising therefrom (civil liability *ex delicto*); wholly independent from the civil liability for deficiency taxes arising from law, particularly, the NIRC of 1997, as amended. Apparently, this civil liability arising from law has already been determined with BIR's assessment attaining finality without respondents protesting the same.

As the records show, respondents raised defenses which would have only been proper in cases of disputed assessments elevated to this Court *via* a Petition for Review under Section 3(a), Rule 8 of the RRCTA.[45] **A criminal case for failure to pay tax is *not* the proper forum for the determination of an assessment's validity.**

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44 Supra at note 3.

45 **SEC. 3.** *Who may appeal; period to file petition.* – (a) A party adversely affected by a decision, ruling or the inaction of the Commissioner of Internal Revenue on disputed assessments or claims for refund of internal revenue taxes, or by a decision or ruling of the Commissioner of Customs, the Secretary of Finance, the Secretary of Trade and Industry, the Secretary of Agriculture, or a Regional Trial Court in the exercise of its original jurisdiction may appeal to the Court by petition for review filed within thirty days after receipt of a copy of such decision or ruling, or expiration of the period fixed by law for the Commissioner of Internal Revenue to act on the disputed assessments. In case of inaction of the Commissioner of Internal Revenue on claims for refund of internal revenue taxes erroneously or illegally collected, the taxpayer must file a petition for review within the two-year period prescribed by law from payment or collection of the taxes.

In the 2018 case of *Macario Lim Gaw v. Commissioner of Internal Revenue*[46] (**Gaw**), the Supreme Court had, in fact, already stated that "**civil liability arising from a different source of obligation, such as when the obligation is created by law, such civil liability is not deemed instituted with the criminal action**" like one herein for failure to pay tax under Section 255 of the NIRC of 1997, as amended.

In *Gaw*, the BIR filed a case for tax evasion against petitioner before the CTA. Subsequently, petitioner filed a petition for review to challenge the validity of the BIR's assessment which was eventually denied due course for his failure to pay the docket fees. The petitioner however argued that, despite the denial, his petition for review was deemed instituted with the criminal case for tax evasion. The CTA, in concurrence with this view, resolved that the issue of civil liability arising from the disputed assessment was deemed instituted with the consolidated criminal cases. Needless to say, the Supreme Court disagreed with this contention and reversed the CTA:

> ...
> Rule 111, Section 1 (a) of the Rules of Court provides that **what is deemed instituted with the criminal action is only the action to recover civil liability arising from the crime. Civil liability arising from a different source of obligation, such as when the obligation is created by law, such civil liability is not deemed instituted with the criminal action.**
>
> It is well-settled that the taxpayer's obligation to pay the tax is an obligation that is created by law and does not arise from the offense of tax evasion, as such, the same is not deemed instituted in the criminal case.
>
> ...
> **...[w]hat is deemed instituted with the criminal action is only the government's recovery of the taxes and penalties relative to the criminal case. The remedy of the taxpayer to appeal the disputed assessment is not deemed instituted with the criminal case. To rule otherwise would be to render nugatory the procedure in assailing the tax deficiency assessment.**[47]
> ...

[46] G.R. No. 222837, 23 July 2018.
[47] Citations omitted; emphasis and underscoring supplied.

In *Gaw*, the Supreme Court cited its decision in *Republic of the Philippines v. Patanao*[48] (**Patanao**) stating:

> ...
>
> ...**Civil liability to pay taxes arises from the fact, for instance, that one has engaged himself in business, and not because of any criminal act committed by him.** The criminal liability arises upon failure of the debtor to satisfy his civil obligation. The incongruity of the factual premises and foundation principles of the two cases is one of the reasons for not imposing civil indemnity on the criminal infractor of the income tax law... Considering that **the Government cannot seek satisfaction of the taxpayer's civil liability in a criminal proceeding under the tax law or, otherwise stated, since the said civil liability is not deemed included in the criminal action, acquittal of the taxpayer in the criminal proceeding does not necessarily entail exoneration from his liability to pay the taxes.** It is error to hold, as the lower court has held, that the judgment in the criminal cases Nos. 2089 and 2090 bars the action in the present case. **The acquittal in the said criminal cases cannot operate to discharge defendant appellee from the duty of paying the taxes which the law requires to be paid, since that duty is imposed by statute prior to and independently of any attempts by the taxpayer to evade payment. Said obligation is not a consequence of the felonious acts charged in the criminal proceeding, nor is it a mere civil liability arising from crime that could be wiped out by the judicial declaration of nonexistence of the criminal acts charged.**[49]
>
> ...

The Supreme Court quotes further its decision in *Proton Pilipinas Corp. v. Republic of the Phils.* (**Proton**),[50] to wit:

> ...
>
> While it is true that according to the aforesaid Section 4, of Republic Act No. 8249, the institution of the criminal action automatically carries with it the institution of the civil action for the recovery of civil liability, however, in the case at bar, **the civil case for the collection of unpaid customs duties and taxes cannot be simultaneously instituted and determined in the same proceedings as the criminal cases before the Sandiganbayan, as it cannot be made the civil aspect of the criminal cases filed**

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48 G.R. No. L-22356, 21 July 1967.

49 Citation omitted; underscoring and emphasis supplied.

50 G.R. No. 165027, 12 October 2006.

> **before it.** It should be borne in mind that **the tax and the obligation to pay the same are all created by statute; so are its collection and payment governed by statute. The payment of taxes is a duty which the law requires to be paid. Said obligation is not a consequence of the felonious acts charged in the criminal proceeding nor is it a mere civil liability arising from crime that could be wiped out by the judicial declaration of non-existence of the criminal acts charged. Hence, the payment and collection of customs duties and taxes in itself creates civil liability on the part of the taxpayer. Such civil liability to pay taxes arises from the fact, for instance, that one has engaged himself in business, and not because of any criminal act committed by him.**[51]
>
> ...

Considering the foregoing doctrines, it would be incorrect to adjudge the lack of civil liability based on the irregularity in the PAN's service since, as the Supreme Court decided repeatedly and consistently in the cited cases, the civil liability arising from crime and the civil liability arising from law are distinct from one another; the existence of either is *not* a prerequisite in order that the other action survives. In the same vein, there is no legal reason to dwell heavily on the regularity of the PAN's service (in connection with the final assessment) when, in the first place, the assessment is already considered final, executory, and demandable by respondents' failure to question the same in a separate proceeding where such civil liability arising from law could have been determined.

Following the disquisition above, the cancellation of the FLD, FNBS and Warrants of Garnishment in the assailed 04 December 2018 Resolution in CTA Crim. Case No. O-630 could only be deemed to have been improperly made. Such cancellation effectively discharged respondents from payment of their tax liabilities (that arose from a final and executory assessment).

As earlier quoted from *Patanao* case, "the acquittal [in the criminal case] cannot operate to discharge [an accused] from the duty of paying the taxes which the law requires to be paid, since that duty is imposed by statute prior to and independently of any attempts by the taxpayer to evade payment. Said obligation is not a consequence of the

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51 Citations omitted and emphasis supplied.

felonious acts charged in the criminal proceeding, nor is it a mere civil liability arising from crime that could be wiped out by the judicial declaration of nonexistence of the criminal acts charged".

Moreover, to allow respondents to question the validity of the BIR's assessment in a criminal case for failure to pay tax is tantamount to permitting them to file an appeal from the assessment of the BIR which respondents had allowed to lapse into finality, not to mention with the complete absence of any payment of filing fees in this Court.

In addition, the Third Division's declaration cancelling and setting aside the FAN, FLD, and FNBS effectively grants affirmative relief in favor of the respondents, to the prejudice of the BIR, without the latter being impleaded in the case before the Third Division.

The Supreme Court ruled in *Maccay v. Spouses Nobela*[52] that the trial court should confine itself to the criminal aspect and the possible civil liability of the accused arising out of the crime and that judgment cannot bind persons who are not parties to the action, *viz:*

> ...
>
> A court trying a criminal case cannot award damages in favor of the accused. **The task of the trial court is limited to determining the guilt of the accused and if proper, to determine his civil liability.** A criminal case is not the proper proceedings to determine the private complainant's civil liability, if any.
>
> The trial court erred in ordering complainant petitioner Maccay and prosecution witness Potenciano, as part of the judgment in the criminal case, to reimburse the P300,000 and pay damages to the accused respondent spouses. This Court ruled in ***Cabaero v. Hon. Cantos*** that **a court trying a criminal case should limit itself to the criminal and civil liability of the accused**, thus:
>
>> **[Thus,] the trial court should confine itself to the criminal aspect and the possible civil liability of the accused arising out of the crime. The counterclaim (and cross-claim or third-party**

52 G.R. No. 145823, 31 March 2005.

> **complaint, if any) should be set aside or refused cognizance without prejudice to their filing in separate proceedings at the proper time.**

The Court recently reiterated this ruling in ***Casupanan v. Laroya and Republic v. Court of Appeals***.

The appellate court erred in affirming the trial court's award of damages by justifying it as a counterclaim. Nothing in the records shows that respondent spouses filed or attempted to file a counterclaim. **The 2000 Rules on Criminal Procedure prohibit counterclaims in criminal cases.** Section 1 of Rule 111 provides:

> SECTION 1. Institution of criminal and civil actions.
>
> (a) x x x
>
> No counterclaim, cross-claim or third-party complaint may be filed by the accused in the criminal case, but any cause of action which could have been the subject thereof may be litigated in a separate civil action.

This paragraph addresses the lacuna mentioned in ***Cabaero*** on the "absence of clear-cut rules governing the prosecution of impliedly instituted civil action and the necessary consequences and implications thereof." In the present case, the civil liability of petitioners for swindling respondent spouses and for maliciously filing a baseless suit must be litigated in a separate proceeding.

The trial court also erred in holding prosecution witness petitioner Potenciano, together with complainant petitioner Maccay, liable for damages to respondent spouses. **A judgment cannot bind persons who are not parties to the action. A decision of a court cannot operate to divest the rights of a person who is not a party to the case.** The records clearly show that petitioner Potenciano is not a party to this case. The Information filed by the prosecutor had only petitioner Maccay as its complainant. The Verification attached to the Information had only petitioner Maccay signing as complainant. Nothing in the records shows that petitioner Potenciano played a role other than being a witness for the prosecution. To rule otherwise would violate petitioner Potenciano's constitutional right to due process.[53]

...

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[53] Emphasis supplied and citations omitted.

In the same vein, the BIR is only the private complainant in the criminal action filed against respondents before the Third Division. Thus, to divest BIR of its right to collect taxes by cancelling and setting aside the FAN, FLD, and FNBS (which, in the first place, has already attained finality) without being a party to the case effectively deprives it of its constitutional right to due process.

At this point, it is most propitious to reiterate that respondents never filed a protest to the FLD. Even granting that the PAN was improperly served, as the assailed 04 December 2018 Resolution found, respondents were nevertheless notified of their tax deficiencies through the FLD, which they should have protested if they were in disagreement with the BIR's findings.

Section 228 of the NIRC of 1997, as amended, in relation to Revenue Regulations (**RR**) No. 12-99[54], as amended by RR 18-13[55] outlines the proper procedure in challenging the BIR's assessments, hence:

> ...
>
> **SEC. 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...*
>
> ...
>
> 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 said notice. If the taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings.
>
> **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**

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54 Implements the provisions of the National Internal Revenue Code of 1997 governing the rules on assessment of national internal revenue taxes, fees and charges (14 September 1999).

55 Amends certain sections of RR No. 12-99 relative to the due process requirement in the issuance of a deficiency tax assessment (28 November 2013).

> **regulations.** Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.
>
> **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.**[56]
>
> ...

While RR 12-99, as amended by RR 18-13, states:

> ...
> SECTION 3. ***Due Process Requirement in the Issuance of a Deficiency Tax Assessment.*** —
>
> 3.1 Mode of procedure in the issuance of a deficiency tax assessment:
>
> 3.1.1 ***Preliminary Assessment Notice (PAN).*** — <u>If after review and evaluation 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 a Preliminary Assessment Notice (PAN) for the proposed assessment. It shall show in detail the facts and the law, rules and regulations, or jurisprudence on which the proposed assessment is based...</u>
>
> <u>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 Final Assessment Notice (FLD/FAN) shall be issued calling for payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties.</u>
>
> <u>If the taxpayer, within fifteen (15) days from date of receipt of the PAN, responds that he/it disagrees with the findings of deficiency tax or taxes, an FLD/FAN shall be issued within fifteen (15) days from filing/submission of the taxpayer's response, calling for payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties.</u>

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56 Emphasis supplied.

...

3.1.3 ***Formal Letter of Demand and Final Assessment Notice (FLD/FAN).*** — The Formal Letter of Demand and Final Assessment Notice (FLD/FAN) shall be issued by the Commissioner or his duly authorized representative. The FLD/FAN 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 assessment shall be void...

3.1.4 ***Disputed Assessment.*** — The taxpayer or its authorized representative or tax agent may protest administratively against the aforesaid FLD/FAN within thirty (30) days from date of receipt thereof. The taxpayer protesting an assessment may file a written request for reconsideration or reinvestigation...

...

If the taxpayer fails to file a valid protest against the FLD/FAN within thirty (30) days from date of receipt thereof, the assessment shall become final, executory and demandable. No request for reconsideration or reinvestigation shall be granted on tax assessments that have already become final, executory and demandable.

If the protest is denied, in whole or in part, by the Commissioner's duly authorized representative, the taxpayer may either: (i) appeal to the Court of Tax Appeals (CTA) within thirty (30) days from date of receipt of the said decision; or (ii) elevate his protest through request for reconsideration to the Commissioner within thirty (30) days from date of receipt of the said decision. No request for reinvestigation shall be allowed in administrative appeal and only issues raised in the decision of the Commissioner's duly authorized representative shall be entertained by the Commissioner.

...

As already stated, petitioner did not file any protest. Even if the PAN was void for lack of valid constructive service, notices in the forms of the FAN/FLD and FNBS should have alerted respondents to question the assessment given that a valid LOA had already been served on them. Thus, in *Commissioner of Internal Revenue v. Hambrecht & Quist Philippines, Inc.*[57], the Supreme Court stated that "**... to be sure, the fact that an assessment has become final for**

[57] G.R. No. 169225, 17 November 2010.

failure of the taxpayer to file a protest within the time allowed only means that the validity or correctness of the assessment may no longer be questioned on appeal".

Moreover, in *Marcos II v. Court of Appeals, et al.*[58], a case stemming from a tax evasion case against the estate of the late President Ferdinand Marcos, the Supreme Court barred a taxpayer from questioning the validity of an assessment that had become final, executory and demandable. There, the petitioner assailed the validity of the BIR's assessment for deficiency estate tax liabilities on numerous grounds. The Supreme Court, in affirming the Court of Appeals' decision, held that:

> ...
>
> ... [P]etitioner, and the other heirs never questioned the assessments served upon them, allowing the same to lapse into finality, and prompting the BIR to collect the said taxes by levying upon the properties left by President Marcos.
>
> ...
>
> **If there is any issue as to the validity of the BIR's decision to assess the estate taxes, this should have been pursued through the proper administrative and judicial avenues provided for by law.**
>
> ...
>
> **Moreover, these objections to the assessments should have been raised, considering the ample remedies afforded the taxpayer by the Tax Code, with the Bureau of Internal Revenue and the Court of Tax Appeals...**[59]
>
> ...

Given the afore-cited provisions of law, procedural rules and jurisprudence, if the assailed 04 December 2018 Resolution is left to stand, the criminal case for failure to pay tax affords respondents a new avenue (similar to a petition for review) wherein they could attack an otherwise final assessment and thus circumnavigate their way against settled rules that actually prohibit them from doing so. Basic is

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58 G.R. No. 120880, 05 June 1997.
59 Emphasis supplied.

the principle that what cannot be done directly, cannot be done indirectly.[60]

To illustrate further, respondents had thirty (30) days within which to file their protest to the FLD. Absent any protest within the given period, the assessment would become final and executory. Thus, if respondents were to subsequently file a Petition for Review before this Court, We would surely deny the petition for lack of jurisdiction since the same was filed out of time. However, if we allow respondents to now question the assessment's validity in a criminal case for failure to pay tax filed against them (and filed years after the finality of the FLD), they would still be granted the benefits of a timely filed appeal by raising the assessment's invalidity as a defense without prior protest to the BIR or payment of docket fees[61] for that matter. If such is allowed, then delinquent taxpayers would be encouraged to ignore the BIR's demands and merely wait for the latter to commence litigation in order that they may question the validity of the BIR's assessments in complete disregard of rules set forth in Section 228[62] of the NIRC of 1997, RR 12-99[63] as amended, and this Court's very own procedural rules.

Given that respondents' criminal liability may no longer be subject to this Court's review, this Court is now only tasked with determining whether the civil liability arising *ex delicto* exists. In doing so, the Court should need to only look at whether the pieces of evidence that the CIR presented met the quantum of proof required, in civil cases, that is, preponderance of evidence.[64]

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60 *Tawang Multi-Purpose Cooperative v. La Trinidad Water District,* G.R. No. 166471, 22 March 2011.

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RULE 6
PLEADINGS FILED WITH THE COURT

...

SEC. 3. Payment of docket fees. – The Clerk of Court shall not receive a petition for review for filing unless the petitioner submits proof of payment of the docket fees. Upon receipt of the petition or the complaint, it will be docketed and assigned a number, which shall be placed by the parties on all papers thereafter filed in the proceeding. The Clerk of Court will then issue the necessary summons to the respondent or defendant.

...

62 Supra at p. 14.

63 Supra at note 54.

64 Rule 133, Section 1, Rules of Court.

On the civil liability ex delicto. The institution of the criminal action necessarily carries with it the civil action arising from the crime or *ex delicto*. Section 11, Rule 9 of RRCTA, as amended, provides:

> ...
> **Sec. 11.** *Inclusion of civil action in criminal action.* - In cases within the jurisdiction of the Court, the criminal action and the corresponding civil action for the recovery of civil liability for taxes and penalties shall be deemed jointly instituted in the same proceeding. The filing of the criminal action shall necessarily carry with it the filing of the civil action. No right to reserve the filing of such civil action separately from the criminal action shall be allowed or recognized.
> ...

The Supreme Court has consistently held that what is deemed instituted with the criminal action is only the civil liability *ex delicto*. Civil liability arising from other sources of obligation, such as from law like payment of taxes, which can stand independently of the criminal prosecution, is not included.[65]

Generally, an acquittal in a criminal case does not *ipso facto* result in the extinguishment of civil liability *ex delicto*. An exception would be when there is a finding in a final judgment in the criminal action that the act or omission from which civil liability may arise did not exist.[66]

In this case, the Third Division found that respondents cannot be held liable for failure of petitioner to "prove by sufficient evidence that elements of the crime charged were attendant in this case".[67] As the law requires that failure to pay tax under Section 255 of the NIRC of 1997, as amended, must be willful and the main ground for respondents' acquittal stemmed from the fact that the element of "willfulness" was wanting, this Court cannot hold respondents liable for civil liability *ex delicto*. To hold otherwise and declare willful failure to pay tax at this stage of the proceedings would run afoul against the exact nature of their acquittal (in a manner as if to claim that they

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65 *Gloria S. Dy v. People of the Philippines, et al.*, G.R. No. 189081, 10 August 2016.
66 Rule 111, Section 2, Revised Rules on Criminal Procedure.
67 Division Docket, Volume III, p. 663.

should have been convicted if only our hands were not tied by the rule on double jeopardy).

On the civil liability arising from FAN and FLD. Again, what is deemed instituted with the criminal action is only the civil liability *ex delicto*. It does not include that which arose from law (NIRC of 1997, as amended) such as the deficiency assessment against the taxpayer. The rulings of the Supreme Court in the cases of *Gaw* and *Patanao*, as previously discussed, are instructive on this matter.

From the foregoing cases, any civil liability of accused arising from the finality of the FAN is *not* deemed included in this case. Corollary, the Court would have no legal anchor to declare or to order the cancellation of BIR's prior assessment notices, FLD and FNBS pursuant to the NIRC of 1997, as amended.

WHEREFORE, premises considered, the assailed Resolutions dated 04 December 2018 and 04 April 2019 in CTA Crim. Case No. O-630 are **AFFIRMED** with **MODIFICATION**. Accordingly, the order cancelling Assessment Notice No. 30-10-VT-5556 dated 09 January 2014, Formal Letter of Demand dated 09 January 2014, Final Notice Before Seizure dated 15 July 2014 and Warrants of Garnishment is hereby **VACATED**.

SO ORDERED.

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

WE CONCUR:

(I concur in the result)
ROMAN G. DEL ROSARIO
Presiding Justice

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

(I concur in the result)
ERLINDA P. UY
Associate Justice

Ma. Belen
(Please see Concurring and Dissenting Opinion)
MA. BELEN M. RINGPIS-LIBAN
Associate Justice

Catherine T. Manahan
(I concur in the result)
CATHERINE T. MANAHAN
Associate Justice

(I concur in the result)
MARIA ROWENA MODESTO-SAN PEDRO
Associate Justice

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.

ROMAN G. DEL ROSARIO
Presiding Justice

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

PEOPLE OF THE PHILIPPINES,	**CTA EB CRIM NO. 067** (CTA Crim Case No. O-630)
Petitioner,	
	Present: **DEL ROSARIO,** *P.J.,* **CASTAÑEDA, JR., UY, RINGPIS-LIBAN, MANAHAN, BACORRO-VILLENA,** *and* **MODESTO-SAN PEDRO,** *JJ.*
- versus -	
CROSS COUNTRY OIL AND PETROLEUM CORP., ARTURO M. ZAPATA, AND JACOB VALERIANO, JR.,	
Respondents.	Promulgated: SEP 16 2020 3:01 p.m.

x- x

CONCURRING & DISSENTING OPINION

RINGPIS-LIBAN, *J.*:

I concur in the *ponencia* in dismissing the case for failure of the prosecution to present sufficient evidence to warrant conviction beyond reasonable doubt.

Yet I dissent on the finding that it would be incorrect to adjudge the civil liability of Respondents based on the irregularity in the service of the Preliminary Assessment Notice ("PAN") since the civil liability on a tax assessment and the civil liability for tax evasion are distinct from one another.

It is my humble view that this Court has authority to nullify an assessment when records undoubtedly show that the same is bereft of validity.

As found by the Court in Division, the Bureau of Internal Revenue failed to comply with the requirements of a valid constructive service of the PAN.

Following the pronouncement of the Supreme Court in the case of *Commissioner of Internal Revenue v. Metro Star Superama, Inc.*[1], the absence of the service of the PAN to Respondents to inform of the assessment for deficiency Value-Added Tax (VAT) renders the subsequently issued Final Assessment Notice (FAN Final Letter of Demand (FLD) void on the ground that the right of the Respondents to due process was violated. Considering that the FAN/FLD is void, the Final Notice Before Seizure dated July 15, 2014 is likewise void.

All told, I vote for the **DENIAL** of the Petition for Review filed with the Court *En Banc* for lack of merit, and to **AFFIRM** the Assailed Resolutions of the Court in Division in CTA Crim Case No. O-630.

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

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[1] G.R. No. 185371, December 08, 2010.