

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

GMA NETWORK, INC.,

Petitioner,

E.B. No. 482

(C.T.A. Case No. 7055)

Present:

ACOSTA, *P.J.*
CASTAÑEDA, Jr.,
BAUTISTA,
UY,
CASANOVA,
PALANCA-ENRIQUEZ,
FABON-VICTORINO,
MINDARO-GRULLA, and
COTANGCO- MANALASTAS III:

-versus-

COMMISSIONER OF INTERNAL
REVENUE,

Respondent.

Promulgated:

APR 07 2010

*En Apolicario
1:20 p.m.*

X ----- X

DECISION

ACOSTA, P.J.:

Before this Court is a Petition for Review *En Banc* filed on April 23, 2009 assailing the Decision of this Court's Second Division dated July 26, 2007 and the subsequent Resolution dated March 9, 2009, affirming the assailed Decision. The dispositive portion of the assailed Decision reads:

“WHEREFORE, premises considered, the present Petition for Review is hereby **DISMISSED**. Accordingly, petitioner is **ORDERED TO PAY** respondent the amount of **EIGHTEEN MILLION SEVEN HUNDRED FIFTY SEVEN THOUSAND FOUR HUNDRED NINETY SIX AND 60/100 PESOS (P18,757,496.60)**, representing petitioner's deficiency withholding tax for the taxable year 2000, inclusive of 25% surcharge and 20% deficiency interest.

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In addition, petitioner is **ORDERED TO PAY** 20% delinquency interest per annum on the P18,757,496.60 computed from April 1, 2004 until the amount is fully paid, as amended pursuant to Section 249(c)(3) of the NIRC of 1997, as amended.

SO ORDERED.”

The antecedent facts culled from the records are as follows:

Petitioner is a duly incorporated domestic corporation engaged in the broadcast industry and operates station Channel 7. As part of its operations as a television network, petitioner avails of goods and services subject to Value Added Tax (VAT) such as program rights to motion pictures and the likes from local and foreign suppliers. Petitioner is a VAT-registered taxpayer.¹

Respondent is the Commissioner of the Bureau of Internal Revenue (BIR), the government agency tasked, among others, to collect national internal revenue taxes.²

In a Preliminary Assessment Notice (PAN) received by petitioner on December 22, 2003, petitioner was assessed with deficiency Withholding Tax on Compensation, Expanded Withholding Tax, and Final Withholding Taxes for the calendar year 2000 in the total amount of P14,109,384.99, inclusive of interest, surcharge and compromise.³

After several informal conferences between petitioner and respondent, the amount of taxes assessed was adjusted. On January 16, 2004, petitioner paid the adjusted amount of taxes assessed, to which it has no contest, including interest

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¹ Records, pp. 203 & 216.

² Records, p. 44.

³ Records, pp. 119-120.

computed up to December 30, 2002.⁴ Then, petitioner filed a letter on January 21, 2004 with respondent as regards the PAN, formally informing the latter that it agreed with the assessment for Withholding Tax on Compensation, Expanded Withholding Tax, and Final Withholding Tax on payments to foreign companies on program rights and interest on foreign loans.⁵

Petitioner was not amenable to the assessment for Final Withholding Tax on cash dividends paid to individuals and VAT withholding on payments to foreign program rights.

Thereafter, petitioner received an undated Formal Letter of Demand for final withholding tax deficiencies in the total amount of P18,757,496.60, inclusive of interests and surcharges, details are as follows:

FINAL WITHHOLDING TAX ON VAT⁶

Basic still due	P 9,155,720.26
Surcharge	2,288,930.07
Interest up to March 30, 2004	<u>6,797,943.12</u>
Total	<u>P18,242,593.45</u>

FINAL WITHHOLDING TAX ON CASH DIVIDENDS⁷

Basic still due	P 206,245.60
Interest	<u>132,882.44</u>
Total	<u>P339,128.04</u>

DEFICIENCY INTEREST ON THE WITHHOLDING TAX - P175,775.11

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⁴ Records, p. 218.

⁵ Records, pp. 121-122.

⁶ Records, p. 133.

⁷ Records, pp. 133 & 220.

*(The amount of interest paid by petitioner on January 16, 2004 was computed only up to December 31, 2002 but it turned out that the interest should have been computed by the BIR until January 15, 2004.)*⁸

Petitioner filed a Protest Letter dated January 23, 2004⁹ on the Formal Letter of Demand. But, due to respondent's inaction, petitioner filed an appeal before this Court on September 22, 2004.

On July 26, 2007, the Court's Second Division promulgated its Decision dismissing petitioner's Petition for Review. Also, on March 9, 2009 the Second Division denied petitioner's Motion for Reconsideration. Hence, this petition.

Respondent failed to file his Comment and Memorandum despite the Court's order so the case was submitted for decision on October 2, 2009, after considering petitioner's Memorandum.

Petitioner submitted the following grounds to support the instant Petition:

- I. WITH ALL DUE RESPECT, IT WAS GRAVE REVERSIBLE ERROR FOR THE HONORABLE COURT'S SECOND DIVISION TO RULE THAT PETITIONER IS LIABLE FOR ALLEGED DEFICIENCY FINAL WITHHOLDING TAX ON VAT CONSIDERING THAT IT HAS FULLY PAID ALL ITS VAT LIABILITY FOR THE YEAR 2000;
- II. WITH ALL DUE RESPECT, IT WAS GRAVE REVERSIBLE ERROR FOR THE HONORABLE COURT'S SECOND DIVISION TO RULE THAT PETITIONER IS LIABLE FOR PENALTIES AND INTERESTS ON DEFICIENCY FINAL WITHHOLDING TAX ON VAT;
- III. WITH ALL DUE RESPECT, IT WAS GRAVE REVERSIBLE ERROR FOR THE HONORABLE COURT'S SECOND DIVISION TO

⁸ Records, pp. 134 & 139.

⁹ Records, pp. 138-140.

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RULE THAT PETITIONER IS LIABLE FOR ALLEGED DEFICIENCY WITHHOLDING TAX AND INTEREST PENALTIES FOR CASH DIVIDENDS DISTRIBUTED FROM THE RETAINED EARNINGS CONSIDERING THAT THE DIVIDENDS WERE DECLARED OUT OF RETAINED EARNINGS FOR THE YEAR 1997 AND PRIOR THERETO;

IV. WITH ALL DUE RESPECT, IT WAS GRAVE REVERSIBLE ERROR FOR THE HONORABLE COURT'S SECOND DIVISION TO RULE THAT THE PERIOD TO ASSESS DEFICIENCY WITHHOLDING TAX HAS NOT PRESCRIBED.

On the first issue, petitioner posits that the assessment for VAT is not valid considering that its VAT liabilities have already been extinguished both by payment and through its availment of the BIR's Voluntary Assessment and Abatement Program (VAAP).

We cannot agree. Petitioner is being assessed of deficiency final withholding tax on VAT, allegedly for its failure to withhold and remit the corresponding final taxes due on the income payments made to foreign suppliers.

The final withholding tax on VAT is different and separate from the VAT itself. Correspondingly, the duty to withhold tax is entirely distinct from the duty to pay VAT; the duties being imposed by separate provisions of the law. In the operation of the withholding tax system, the payee (herein petitioner's foreign suppliers) is the taxpayer, the person on whom the tax is imposed, while the payor (herein petitioner), a separate entity, acts no more than an agent of the government for the collection of the tax in order to ensure its payment.¹⁰

Simply put, as far as petitioner's VAT liabilities are concerned, the taxpayer is petitioner itself but when it comes to the final withholding tax on VAT, the taxpayer is

¹⁰ Bank of America NT & SA vs. Court of Appeals, G.R. No. 103092, July 21, 1994.

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petitioner's foreign suppliers. Obviously, the amount used to settle the tax liability is deemed sourced from the proceeds constitutive of the tax base¹¹ which in this case refers to the income payments made by petitioner to its foreign suppliers. Since petitioner's foreign suppliers are the real taxpayers, whatever VAT payments made by petitioner does not mean an extinguishment of its liabilities arising from its failure to withhold the final tax on VAT. The Court agrees with the Court *a quo* when it explains that:

“Verily, petitioner's deficiency tax assessments arose from its failure to withhold and remit the 10% VAT on income payments to its foreign suppliers. Petitioner, in this case, is not the party liable for the tax, but rather, it acts as a withholding agent for the government, to withhold and remit the VAT imposed on the income of its non-resident suppliers. This is entirely different and distinct from petitioner's income and VAT liabilities as a taxpayer.

xxx. [P]etitioner is merely an agent acting for the government to ensure the collection of taxes. Its liability to withhold and remit taxes is personal and direct. Petitioner shall be answerable for its failure to comply with the withholding tax provisions of the Tax Code, which is to deduct and withhold from the payees and to remit to the government the withholding tax due. The provisions on the withholding taxes are mandatory and must be complied with by the withholding agent. Thus, for petitioner's failure to withhold the taxes due, respondent therefore has factual and legal bases to issue the deficiency tax assessments against petitioner.”

On the same vein, the availment by petitioner of the VAAP does not extinguish its liabilities from its failure to fulfill its duties under the withholding tax system. It is well noted that the BIR's VAAP covers only the VAT, income tax, and excise tax due, if any, from the underdeclared sales/receipts/income of taxpayers. Well said that under the withholding tax system, petitioner is not the taxpayer but its foreign suppliers. Being so, its availment of the VAAP has no effect on its liabilities as a withholding agent.

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¹¹ Bank of America NT & SA vs. Court of Appeals, *supra*.

Also, availment of the VAAP does not excuse a taxpayer from being assessed of deficiency taxes. In this course, relevant herein is Section 2.7 of Revenue Memorandum Order (RMO) No. 23-02, prescribing the guidelines and procedures in the implementation of the VAAP pursuant to the provisions of Revenue Regulations (RR) No. 12-2002 dated September 11, 2002, to wit:

“2.7 Effect of VAAP Availment. — The following shall be the effects of VAAP availment subject to Section 8 of Revenue Regulations No. 12-2002 and Section 2.9 of this Order.

2.7.1 **Abatement or cancellation of penalties** that would otherwise be imposed to the taxpayer with respect to the applicable taxes due from the underdeclared sales disclosed, which penalties include the imposition of the 50% surcharge, 20% interest per annum and compromise penalties;

2.7.2 Taxpayer shall **not be subjected to criminal penalties**;

2.7.3 Taxpayer shall **not be subjected to the administrative penalty of closure** of business establishment for underdeclaration of at least 30%; and

2.7.4 Taxpayer shall be entitled to the **privilege of last priority** in audit but the BIR shall continue in gathering third party information from external as well as its internal records.

Nothing precludes the BIR from checking with available sources of information the correctness of the tax base used by the taxpayer in his VAAP availment in respect to the taxable periods where no returns have been previously filed.”(*Emphasis supplied.*)



From the foregoing Section, the only beneficial consequences of availing the VAAP are: abatement of penalties, not being subjected to criminal penalties and administrative penalty of closure, and enjoys the last priority in audit. Exemption from tax assessment is not one of them.

On the contrary, the abatement or cancellation of penalties under the VAAP is predicated and conditioned on the taxpayer's full, complete, correct, accurate and honest disclosure of his sales/receipts/income/taxable base as well as the payment of correct amount of taxes due thereon. Thus, notwithstanding a taxpayer's availment of VAAP and payment of the amount required under the Program, in case there is incorrect disclosure of a taxpayer's sales or receipts, the availment and the payments made thereon shall be null and void and the entire underdeclaration shall be subjected to the full force of the law (i.e., criminal prosecution, closure of business establishment, tax audit, provided, approved by the Commissioner).¹²

Anent the assessed unpaid interest on withholding tax deficiency, records show that the assessment arose from an error in the computation of interest penalties on the uncontested and paid Final Withholding Tax on payments to foreign companies on program rights and interest on foreign loans. The interest was computed only up to December 30, 2002 instead of until January 15, 2004, which is the day after the BIR presented to petitioner the recomputed amount of the alleged deficiency taxes.

Petitioner asseverates that to allow respondent to revise its computations after the petitioner has paid its tax liabilities in accordance with the computation made by the BIR itself is an utter violation of petitioner's right to due process.



¹² Sections 2.9 & 2.9.1, RMO No. 23-02.

Again, we cannot agree. It is settled that in the performance of governmental functions, the State is not bound by the neglect or mistake of its agents and officers. And nowhere is this principle more true than in the field of taxation ¹³ for taxes are the lifeblood of the government and so should be collected without unnecessary hindrance.

Applying the above jurisprudence, the mistake committed by the BIR officials in computing the interest will not bar them from rectifying their errors and collecting from petitioner the right amount.

Going now to the second issue, petitioner claims that the imposition of interest penalties in the amount of P6,797,942.12 and 25% surcharge in the amount of P2,288,930.07, against petitioner's alleged VAT deficiency for the calendar year 2000 is illegal and invalid because its case does not fall under any of the circumstances enumerated under Sections 248 and 249 of the Tax Code.

Petitioner's argument deserves scant consideration because contrary to what it believes, the very factual circumstance of the case falls within the context of situations mentioned in Sections 248 and 249, justifying the imposition of interests and surcharges. To recall, Sections 248 and 249 provide that:

"SEC. 248. Civil Penalties. - (A) There shall be imposed, in addition to the tax required to be paid, a penalty equivalent to twenty-five percent (25%) of the amount due, in the following cases:

(1) **Failure to file any return and pay the tax due thereon as required under the provisions of this Code or rules and regulations on the date prescribed; or**

(2) **Unless otherwise authorized by the Commissioner, filing a return with an internal revenue officer other than those with whom the return is required to be filed; or**

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¹³ Philex Mining Corp. vs. CIR, G.R. No. 125704, August 28, 1998.

(3) Failure to pay the deficiency tax within the time prescribed for its payment in the notice of assessment; or

(4) Failure to pay the full or part of the amount of tax shown on any return required to be filed under the provisions of this Code or rules and regulations, or the full amount of tax due for which no return is required to be filed, on or before the date prescribed for its payment.

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SEC. 249. Interest. -

(A) *In General.* - There shall be assessed and collected on any unpaid amount of tax, interest at the rate of twenty percent (20%) per annum, or such higher rate as may be prescribed by rules and regulations, from the date prescribed for payment until the amount is fully paid.

(B) *Deficiency Interest.* - Any deficiency in the tax due, as the term is defined in this Code, shall be subject to the interest prescribed in Subsection (A) hereof, which interest shall be assessed and collected from the date prescribed for its payment until the full payment thereof.

(C) *Delinquency Interest.* - In case of failure to pay:

(1) The amount of the tax due on any return required to be filed, or

(2) The amount of the tax due for which no return is required, or

(3) A deficiency tax, or any surcharge or interest thereon on the due date appearing in the notice and demand of the Commissioner, there shall be assessed and collected on the unpaid amount, interest at the rate prescribed in Subsection (A) hereof until the amount is fully paid, which interest shall form part of the tax.

(D) *Interest on Extended Payment.* - If any person required to pay the tax is qualified and elects to pay the tax on installment under the provisions of this Code, but fails to pay the tax or any installment hereof, or any part of such amount or installment on or before the date prescribed for its payment, or where the Commissioner has authorized an extension of time within which to pay a tax or a deficiency tax or any part thereof, there shall be assessed and collected interest at the rate hereinabove prescribed

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on the tax or deficiency tax or any part thereof unpaid from the date of notice and demand until it is paid.”

The withholding agent is directly and independently liable for the correct amount of the tax that should be withheld. The withholding agent is, moreover, subject to and liable for deficiency assessments, surcharges and penalties should the amount of tax withheld be finally found to be less than the amount that should have been withheld under the law,¹⁴ *moreso*, if he failed to pay the taxes altogether.

In this case, petitioner failed to withhold and remit the taxes due, thus, it will definitely be liable to surcharges and interests in accordance with Sections 248(1) and 249 of the 1997 Tax Code.

With respect to the third issue, petitioner argues that the dividends declared, subject of the assessments, came from its retained earnings of 1997. It explains that the retained earnings as of December 31, 1997, as shown in its audited financial statement, is P555M while the dividends for 1998-2000, amounted only to P88M. Petitioner continues that the P88M dividends could have been declared out of the 1997 retained earnings even if there were also retained earnings for the years 1998-2000 because what was first earned must be the first to be distributed as dividends. Being declared from the 1997 retained earnings, the dividends declaration is not subject to tax pursuant to the last paragraph Section 24(B)(2) of the 1997 Tax Code which provides “*that the tax on dividends shall apply only on income earned on or after January 1, 1998. Income forming part of retained earnings as of December 31, 1997 shall not, even if declared or distributed on or after January 1, 1998, be subject to this tax.*”

¹⁴ Commissioner vs. Procter and Gamble Philippines Manufacturing Corporation, G.R. No. L-66838, December 2, 1991.

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We are unconvinced. We join the Court *a quo* in ruling that petitioner's financial statements are insufficient to show that the dividends were really declared from petitioner's 1997 retained earnings. A review of the audited financial statements of petitioner and the corresponding notes thereof, show that it is not clear whether the dividends declared in 1998-2000 came from the 1997 retained earnings. The notes only contain a mathematical computation of the yearly retained earnings of petitioner. However, there is no explanation or any indication therein as to the source of the dividends declaration.

Considering that what the last paragraph of Section 24(B)(2) of the 1997 Tax Code provides is tantamount to a tax exemption, petitioner is duty bound to show through competent and relevant evidence that it is entitled thereto. Here, petitioner failed. Mere logical implication from the balances obtained in its financial statements coupled with the assumption that "*what was earned first must be the first to be distributed*" do not show to a whole extent and to the satisfaction of the Court that the dividends came from the 1997 retained earnings and that petitioner is not liable to withholding tax on its dividend declarations.

It is worthwhile to reiterate the ruling of the Court *a quo* on this matter:

"Although petitioner's financial statements show that it has retained earnings in the amount of P555Million as of December 31, 1997, it does not follow that the cash dividends distributed to its individual stockholders in the year 2000 came from this amount. Petitioner failed to convince this Court that the questioned cash dividends declared in the calendar year 2000 were paid from its retained earnings for the year 1997 and prior thereto.

Furthermore, petitioner's contention is also self-serving. No other document to substantiate petitioner's allegation was presented to convince this Court otherwise. Absent any clear and convincing proof, this Court sustains the validity of the assessment against petitioner. It is well settled that assessments are presumed correct and made in good faith

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and the taxpayer has the burden of proving that there is any irregularity in the performance of the official duties in issuing the same.”

Finally on the last issue, petitioner claims that the subject assessment for VAT has already prescribed. According to petitioner, respondents has only three years from the filing of returns to assess. More than three years has already lapsed when respondent issued its Formal Letter of Demand.

However, petitioner’s argument is pretext on its understanding that the subject assessment for final withholding tax on VAT is really an assessment for VAT. It is already settled that final withholding tax on VAT is an entirely different tax from the VAT itself. The VAT Returns filed by petitioner were not the required returns under the withholding system.

Petitioner failed to withhold and remit the withholding tax on VAT. Obviously it failed to file the corresponding returns thereof. Consequently, what is applicable here is the ten-year period to assess provided in Section 222 of the 1997 Tax Code, which goes:

“SEC. 222. Exceptions as to Period of Limitation of Assessment and Collection of Taxes. —

(a) **In the case of a false or fraudulent return with intent to evade tax or of failure to file return, the tax may be assessed, or a proceeding in court for the collection of such tax may be filed without assessment, at any time within ten (10) years after the discovery of the falsity, fraud or omission:** Provided, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof.”(*Emphasis supplied.*)

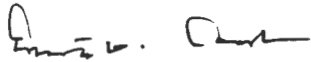
The afore-quoted section is clear. If no return is filed, the tax maybe assessed anytime within ten years after the discovery of the omission. This provision applies on

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all fours to the case at bar. Petitioner failed to file the corresponding withholding returns, thus, it can be assessed within the 10-year period. Hence, the period to assess petitioner for deficiency withholding tax on VAT has not yet prescribed.

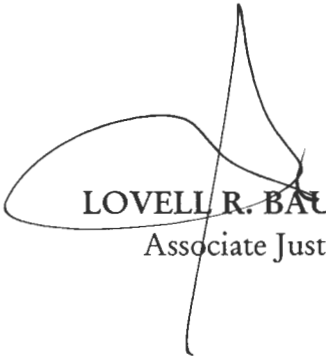
WHEREFORE, finding no reversible error in the assailed Decision promulgated on July 26, 2007 and the Resolution dated March 9, 2009, the instant Petition for Review is hereby **DISMISSED** for lack of merit.

SO ORDERED.


ERNESTO D. ACOSTA
Presiding Justice

We Concur:


JUANITO C. CASTANEDA, JR.
Associate Justice


LOVELL R. BAUTISTA
Associate Justice


ERLINDA P. UY
Associate Justice


CAESAR A. CASANOVA
Associate Justice

ON LEAVE

OLGA PALANCA-ENRIQUEZ
Associate Justice


ESPERANZA R. FABON-VICTORINO
Associate Justice

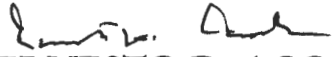

CIELITO N. MINDARO-GRULLA
Associate Justice


AMELIA R. COTANGCO-MANALASTAS
Associate Justice



CERTIFICATION

Pursuant to Section 13, Article VIII 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 *En Banc*.


ERNESTO D. ACOSTA
Presiding Justice

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