LIB.

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

THE ESTATE OF BENIGNO P. TODA, JR., represented by SPECIAL CO-ADMINISTRATORS LORNA KAPUNAN and MARIO LUZA BAUTISTA,
Petitioners,

- versus -

C.T.A. CASE NO. 5328

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Promulgated:

JAN 03 2000

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DECISION

This is a judicial appeal of the decision of the Commissioner of Internal Revenue denying petitioner's protest of the assessment for deficiency income tax, inclusive of surcharges and interest, in the amount of P79,099.999.22 covering the year 1989.

Petitioner is the Estate of the late Benigno P. Toda, Jr. (Decedent) who passed away on January 16, 1994.

The Decedent was the registered and beneficial owner of 99,991 shares of stocks of Cibeles Insurance Corporation (Cibeles), a domestic corporation, constituting 99.991% of the issued and outstanding capital stock of said corporation.

Cibeles owned two parcels of land together with a 16 storey-building constructed thereon and other improvements located in Ayala Avenue, Makati City, covered by Transfer Certificate of Title No. 338017 (Exh. I) and Transfer Certificate of Title No. 338018 (Exh. J).

On March 2, 1989, the stockholders of Cibeles issued a resolution authorizing the Decedent, who was then the President thereof, to sell the said building and two parcels of land for an amount not less than P90,000,000.00 (Exh. C).

On August 30, 1989, Cibeles sold the said property to Rafael Altonaga for the amount of P100,000,000.00 (Exh. K;8). Altonaga, on the same day, sold the same property to Royal Match, Inc. (Royal Match) for P200,000,000.00 (Exh. O;9).

On April 15, 1990, Cibeles filed its 1989 Income Tax Return (Exh. L) declaring , among others, gain from sale of property in the sum of P75,728,021.00. Tax due for the period was P26,595,704.00. Cibeles paid the amount of P26,341,207.00 after crediting the withholding taxes of P254,497.00, as evidenced by the confirmation receipts (Exhs. N & N-1) and payment orders (Exhs. M & M-1), all dated April 16, 1990.

In a Certificate Authorizing Registration (Exh. E), it appears that Rafael Altonaga paid the capital gains tax due on the sale of said property in the amount of P10,000,000.00.

On July 12, 1990, the Decedent sold his entire shareholdings in Cibeles to Le Hun T. Choa for P12,500,000.00 (Exh. P). On January 16, 1994, Benigno P. Toda, Jr. died.

Subsequently, on March 29, 1994, an assessment notice (Exh. 12) and demand letter (pp. 448-449, BIR rec.) were issued against Cibeles for deficiency income tax covering the year 1989. Cibeles, thru its new President, Mr. Rufino H. Ko Pio, sent a letter to the BIR asking for a reconsideration of the assessment by way of a protest on April 28, 1994 (pp. 446-447, BIR rec.). It countered that Cibeles was not the proper party to be assessed on the grounds that the tax liability, if ever due, is imputable to the old Cibeles having entirely different stockholders from the present Cibeles; fraud is a state of mind and could not be disassociated from the natural person/s representing it during the sale (Toda) and Mr. Toda undertook and agreed to hold the buyer and Cibeles free and harmless from any and all tax liabilities for the fiscal years 1987, 1988 and 1989.

In a demand letter dated January 9, 1995 (pp. 474-475, BIR rec.) Cibeles and/or the Estate of the Decedent was assessed deficiency income tax for 1989 in the amount of P79,099,999.22, computed as follows:

INCOME TAX - 1989

Net Income Per Return		P 75,987,725.00
Add: Additional gain on sale of real property taxable under ordinary corporate income but were substituted with individual capital gains (P200M-P100M)		100,000,000.00
Total Net Taxable Income per Investigation		P 75,987,725.00
Tax due thereof at 35%		P 61,595,703.75
Less: Payments already made		
1. Per return	P26,595,704.00	
2. Thru Capital Gains Tax made by R.A. Altanoga	10,000,000.00	36,595,704.00
Balance of Tax Due		P24,999,999.75
Add: 50% Surcharge		12,499,999.88
25% Surcharge		6,249,999.94
Total		P43,749,999.57
Add: Interest 20% from 4/16/90 to 4/30/94 (.808)		35,349,999.65
TOTAL AMOUNT DUE & COLLECTIBLE		P79,099,999.22

Petitioner protested the said assessment in a letter dated February 24, 1995 (Exh. H). However, respondent denied petitioner's protest in a letter dated October 19, 1995 (Exh. G;11) which was received by petitioner only on January 13, 1996. Hence, this appeal on February 12, 1996.

The main issue to be determined in this case is whether or not petitioner is liable for deficiency income tax for the year 1989 in the amount of P79,099,999.22.

The corollary issues to be first resolved are:

(1) Whether or not the sales of the property constitute fraudulent transactions;

(2) Whether or not the right to assess petitioner has prescribed;

(3) Whether or not the principle of piercing the veil of corporate entity is applicable, thereby making petitioner personally responsible for any liability incurred by Cibeles.

Respondent advances the proposition that a fraudulent scheme was adopted by Cibeles by making it appear that there were two sale transactions. In reality though, the supposed sales constituted a single sale of the property involved from Cibeles to Royal Match. Respondent theorized further that Altonaga was neither the buyer nor seller of the property.

Petitioner, on the other hand, argues that the scheme perpetrated by Cibeles was a legitimate tax planning and avoidance, hence, not fraudulent.

We agree with the Petitioner.

As disclosed by the records in this case, the property in question was sold by Cibeles to Altonaga on August 30, 1989 for P100,000,000.00. Altonaga, in turn, sold the same property on the same day, to Royal Match for P200,000,000.00. Cibeles paid the corresponding income tax due on the first sale while Altonaga paid the 5% capital gains tax due on the second sale.

Respondent, however, posits that these transactions were simulated which resulted in a change of the income structure of the proceeds of the sale. The additional gain of P100,000,000.00 (P200,000,000.00 in the second sale less P100,000,000.00 in the first sale) realized by Cibeles was taxed at the rate of only 5% capital gains tax instead of 35% ordinary corporate income tax. Accordingly, the income tax return filed by Cibeles for 1989 was fraudulent.

The term "fraud", in its general sense, is deemed to comprise anything calculated to deceive, including all acts, omissions, and concealment involving a breach of legal or equitable duty, trust or confidence justly reposed, resulting in damage to another, or by which an undue or unconscientious advantage is taken of another. (Philippine Law Dictionary, Moreno, 3rd Ed., p. 392).

As Petitioner asserts, the key word is deception. The other party is misled willfully and deliberately. In the case at bar, Cibeles wrote the BIR asking for a ruling on the tax consequence of the intended sales (Exh. A). There was also a follow-up information sent by Cibeles to the BIR (Exh. B). In this respect, it is crystal clear that full disclosure was made to the BIR. Furthermore, BIR clearance was secured (Exh. E) and new Transfer Certificates of Title were obtained (Exhs. D & D-1, Q, R). Cibeles also filed its income tax return for the period and Altonaga paid the 5% capital gains tax.

Respondent based his allegations on the belief that Altonaga was a close business associate of the Decedent and that he derived his salary in the USA from Aeroben, Inc., a foreign corporation "believed" to be owned by the Decedent.

The allegation that Altonaga was a mere dummy of Cibeles was never proven by the respondent. There was no evidence found to show that he was a regular executive of Cibeles or he was a stockholder or a legal nominee therein.

Fraud is a question of fact which must be alleged and proved. It is a serious charge and to be sustained, it must be supported by clear and convincing evidence. **(Yutivo Sons Hardware Co. vs, Court of Tax Appeals**, 1 SCRA 160; **Republic vs. Ker & Co. Ltd.**, 18 SCRA 207; **Commissioner of Internal Revenue vs. Ayala Securities**, 70 SCRA 204).

In other words, fraud cannot be imputed by mere assumptions. The fact that Altonaga's residence at Ayala Alabang Village, Muntinlupa, is ordinary looking or that his salary is modest ($8,400.00 for 1989) does not mean that he could not qualify as a buyer of a hundred million worth of property. Nowhere in the law is it mandated that financial capacity is a requisite before a person can enter into a contract of sale. Article 1489 of the New Civil Code provides that "all persons who are authorized in this Code to obligate themselves, may enter into a contract of sale". By the contract of sale one of the contracting parties obligates himself to transfer the ownership of and to deliver a determinate thing, and the other to pay therefor a price certain in money or its equivalent (Art. 1458, New Civil Code; **Philippine National Bank vs. Court of Appeals**, 272 SCRA 291).

By the clear provision of the law, it is sufficient that one obligates himself to deliver a determinate thing and the other party, to pay a price certain in money. It is not necessary that the full price or a portion of the price be paid upon the execution of the contract or upon entering into a transaction. After all, a contract is a private agreement between the parties and is valid as long as it is not contrary to law, morals, good customs, public order, or public policy (Art. 1306, New Civil Code).

Respondent also contends that the notarization of the second sale ahead of the first sale only proved that there was no sale at all to Altonaga by Cibeles.

We do not subscribe to the respondent's view.

In sales, the contract is perfected when the seller obligates himself, for a price certain, to deliver and to transfer ownership of the thing or right to the buyer, over which the latter agrees. (**Ang Yu Asuncion vs. Court of Appeals**, 238 SCRA 602). The essence of the contract of sale is the transfer of title or agreement to transfer it for a price paid or promised. (**Schmid and Oberly, Inc. vs. RJL Martinez Fishing Corporation, 166 SCRA 493**). The Deed of Sale is a private document evidencing the contract of sale being entered into by the parties. It is valid between the parties. Notarization is what converts a private document into a public document which becomes binding to third persons. Therefore, if the second Deed was notarized ahead of the first Deed, it simply means that the former was first converted into a public document. But the fact remains, that before the notarization, there existed valid private contracts between the parties. It must be noted that the notarization was done on the same day and documents differed only on the page numbers as recorded in the books of the Notary Public.

Respondent avers further that an initial payment of P40,000,000.00 was made by Royal Match to Cibeles as early as May 4, 1989 (Exhs. 3, 6 & 6-a). Thus, bolstering its position that indeed the sale was a direct sale from Cibeles to Royal Match. However, there was no direct proof in the records of Royal Match or Cibeles that the checks issued by Royal Match in favor of Cibeles comprised the consideration of the sale of the property. Respondent arrived at this conclusion from mere presumptions. Fraud must be proved to exist by clear and convincing evidence amounting to more than mere preponderance, and cannot be justified by mere speculation because fraud is never lightly to be presumed (**Philippine Commercial International Bank vs. Commissioner of Internal Revenue**, CTA Case No. 5003, February 4, 1997).

In sum, respondent failed to prove by clear and convincing evidence that fraud was committed by Cibeles which ultimately deprived the government of the taxes due it.

But even assuming that a pre-conceived scheme was adopted by Cibeles, the same constitutes mere tax avoidance and not tax evasion.

Tax avoidance is the minimization of one's tax liability by taking advantage of legally available tax planning opportunities while tax evasion entails the reduction of tax liability by using illegal means. (Black's Law Dictionary, Sixth Ed., p. 1460). Tax avoidance is not forbidden in our jurisdiction. It is worth emphasizing also that even the Revenue Examiners in their Memorandum Report dated March 8, 1991 (Exh. 3) described the schemes of Cibeles as tax avoidance schemes.

Having established that Respondent failed to categorically prove that fraudulent transactions were entered into by Cibeles, the applicable period to assess Cibeles and/or petitioner was three (3) years. Section 203, of the Tax Code, as amended, provides, to wit:

> **SEC. 203.** ***Period of limitation upon assessment and collection.*** **-** Except as provided in the succeeding section, internal revenue taxes shall be assessed within three years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of the period: xxx

As already adverted to, this case involves the period 1989. Cibeles filed its income tax return on April 15, 1990 (Exh. L). The disputed assessment was issued on January 9, 1995. Therefore, four years eight months and seventeen days had .already lapsed which was beyond the three-year period allowed by law to assess. In other words, the government's right to assess Cibeles prescribed on April 15, 1993. Considering that the assessment was issued only on January 9, 1995, the same was no longer valid and binding upon Cibeles and/or petitioner.

But even assuming, for the sake of argument, that a valid assessment was issued, the Estate, petitioner herein, cannot be held accountable for the deficiency income taxes.

Respondent is of the firm belief that the sale was tainted with fraud to evade the payment of tax. Hence, the separate corporate entity of Cibeles should be pierced.

We disagree.

The fact that the Decedent owned 99.991% of the capital stock of Cibeles does not mean that the separate corporate personality of Cibeles may be disregarded. Mere ownership by a single stockholder or by another corporation of all or nearly all of the capital stock of a corporation is not of itself sufficient ground for disregarding the separate corporate personality. (**Palay, Inc. vs. Clave, 124 SCRA 638**). Along this line, the assessment against the Estate of Benigno Toda was defective from the very beginning. The fact that Benigno Toda undertook to free the buyer and Cibeles from any and all tax liabilities for the fiscal years 1987, 1988 and 1989 should not affect the right of the government to assess and collect taxes. The Deed of Absolute Sale executed by the parties was a private agreement and not binding against the government.

As borne by the records in this case, the sale executed by the Decedent was authorized by a resolution of the stockholders (Exh. C). The Decedent therefore, acted within his official capacity when he sold the property. Moreover, he did not act beyond what had been required of him.

Yet, respondent insists contrawise that the proceeds of the sale inured to the personal benefit of the Decedent. He, having personally drawn the initial payment of P40,000,000.00 allegedly made by Royal Match. We already ruled that no clear and convincing evidence was presented to prove that the P40,000,000.00 was paid in consideration of the sale on August 30, 1989. After all, it was issued and drawn as early as May 4, 1989 long before the sale on August 30, 1989.

It is worth mentioning further that the personality of Royal Match was never questioned in this case. Consequently, Royal Match was a buyer in good faith. The right of an innocent purchaser must be respected and protected, even if the seller obtained his title through fraud (**Veloso vs. Court of Appeals, 260 SCRA 593**). Thus, the transaction entered into by it is valid. And since the second sale is valid, even if We pierce the veil of corporate entity of Cibeles and making the petitioner responsible for any liabilities it may have incurred, still, there would only be one questionable transaction and that was the first transaction. In said sale, Cibeles paid the corporate income tax. So such transaction could not give rise to a deficiency tax.

Conversely, if We make the first sale null and void, then there can be no basis for the second sale. Altonaga would not become the buyer and seller of the property. Royal Match had only direct dealing with Altonaga. Respondent was never able to prove that Cibeles had directly dealt with Royal Match relative to the sale transactions.

WHEREFORE, in view of all the foregoing, Petitioner is not liable for deficiency income tax in the amount of P79,099,999.22 for the year 1989. Accordingly, the assessment issued by the respondent on January 9, 1995 is hereby CANCELLED and SET ASIDE.

SO ORDERED.

ERNESTO D. ACOSTA
Presiding Judge

WE CONCUR:

RAMON O. DE VEYRA
Associate Judge

AMANCIO Q. SAGA
Associate Judge

CERTIFICATION

I hereby certify that the above decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge