REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

PHIL. GOLD PROCESSING & REFINING CORP.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. EB NO. 866
(C.T.A. Case No. 8168)

Present:

DEL ROSARIO, *PJ*
CASTAÑEDA, JR.,
BAUTISTA,
UY,
CASANOVA,
FABON-VICTORINO,
MINDARO-GRULLA,
COTANGCO-MANALASTAS, *and*
RINGPIS-LIBAN, *JJ.*

Promulgated:

JUL 29 2013 8:20 a.m.

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DECISION

Fabon-Victorino, J.:

The petition[1] at bar challenges the (1) Resolution[2] dated November 24, 2011, which dismissed the Petition for Review dated September 29, 2010 filed by petitioner Phil. Gold Processing & Refining Corp., for failure to prosecute; and (2) Resolution[3] dated January 16, 2012, which effectively affirmed the order of dismissal, both rendered by the Court in Division in CTA Case No. 8168, entitled *Phil. Gold Processing & Refining Corp. vs. Commissioner of Internal Revenue*.

[1] *En Banc* docket, pp. 1-19.
[2] *Id.*, p. 27.
[3] *Id.*, pp. 30-34.

The facts as borne by the record of the case are as follows:

Petitioner is a domestic corporation with business address at 3rd Floor Corinthian Plaza Condominium Building, 121 Paseo de Roxas, Legaspi Village, Makati City. It is a producer of mineral resources for export, registered with the Board of Investments (BOI) under Certificate of Registration No. 2008-042 issued on February 7, 2008.[4] It is likewise registered with the Bureau of Internal Revenue (BIR) under Tax Identification No. 004-498-686-000 issued on March 15, 1996 and is classified as a Value Added Taxpayer.[5]

Respondent, on the other hand, is the Commissioner of the BIR, with the power, among others, to act on application for refund or tax credit of internal revenue taxes erroneously/excessively or illegally paid, assessed or collected.[6]

On September 30, 2010, petitioner filed with the Court in Division a *Petition for Review* dated September 29, 2010, seeking for the refund or issuance of a tax credit certificate in the amount of Php155,149,717.28, allegedly representing its excess and unutilized input taxes for the first quarter of the fiscal year ending June 30, 2009.[7]

On November 22, 2010, respondent filed her Answer.[8]

Thereafter, the parties were notified of the pre-trial conference set on January 20, 2011, for which they were directed to submit and serve on each other their respective pre-trial briefs at least three (3) days before the scheduled pre-trial conference.[9]

On January 20, 2011, the parties obliged and were granted fifteen (15) days or until February 4, 2011, to

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[4] Joint Stipulation of Facts and Issues (JSFI), *Rollo*, pp. 201-203.
[5] *Id.*
[6] *Id.*
[7] *Rollo*, pp. 4-13.
[8] *Rollo*, pp. 162-167.
[9] *Rollo*, p. 169.

submit their *Joint Stipulation of Facts and Issues* duly signed by their respective counsels.[10]

On February 11, 2011, the Court in Division approved the parties *Joint Stipulation of Facts and Issues* although belatedly filed on February 7, 2011 or three (3) days after the lapse of the period granted. The pre-trial conference was terminated and the **initial presentation of evidence for petitioner was set on February 21, 2011.**[11]

On February 17, 2011, petitioner filed a *Motion*[12] for the cancellation of the initial presentation of evidence set on February 21, 2011, on the ground that it needed four (4) Commissioner's Hearing to mark its exhibits.

In the *Order* dated February 18, 2011,[13] the Court in Division granted petitioner's *Motion* and reset the February 21, 2011 initial presentation of evidence for petitioner to March 21, 2011. As prayed for, Commissioner's Hearings were set on February 28, March 2, 7, & 9, 2011 for the pre-marking of petitioner's exhibits.

Out of the four (4) requested Commissioner's Hearings, petitioner attended only two settings - on March 7 and 9, 2011 – during which petitioner pre-marked its exhibits. Petitioner failed to appear on February 28, 2011,[14] and while it was present on March 2, 2011,[15] it was not ready with its documents for marking.

On March 21, 2011,[16] petitioner manifested in open court that it filed a motion[17] to reset its initial presentation of evidence on the ground that it still needed at least ten (10) more Commissioner's Hearings to mark its exhibits consisting of voluminous documents given that only 30 documents were allowed for marking by the Commissioner every setting. There being no objection, the Court again

[10] *Rollo*, p. 200.e
[11] *Rollo*, p. 210.
[12] *Rollo*, pp. 218-219.
[13] *Rollo*, p. 221.
[14] *Rollo*, p. 222.
[15] *Rollo*, p. 223.
[16] *Rollo*, p. 237.
[17] *Rollo*, pp. 233-234.

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accommodated petitioner's motion and reset the proceeding to June 27, 2011. As prayed for by petitioner, Commissioner's Hearings were set on April 11, 13, 25 & 27, 2011, May 9, 16, 23 & 30, 2011 and June 6 & 13, 2011.

On April 11[18] and 13[19], 2011, May 23[20] and 30[21], 2011 and June 6[22] and 13[23], 2011 scheduled Commissioner's Hearings, petitioner failed to appear, despite agreement and due notice.

On June 22, 2011, petitioner again filed a Motion[24] for the cancellation of its initial presentation of evidence set on June 27, 2011 on the very same ground that it needed at least ten (10) more Commissioner's Hearings to mark its exhibits. The motion was again granted in open court on June 27, 2011.[25] Petitioner's initial presentation of evidence was reset to September 28, 2011 and the requested additional Commissioner's Hearings were set on July 4, 11, 18 and 25, 2011, August 1, 8, 15, 22 and 29, 2011, and September 5, 2011.

Of the second ten (10) additional Commissioner's Hearings requested, petitioner attended only five (5), viz., July 4, 11 and 25, 2011 and August 1 and 22, 2011.

On September 23, 2011, petitioner, after admittedly marking about 600 documents, filed an *Omnibus Motion*[26] for the appointment of an Independent Certified Public Accountant (ICPA) and for the suspension of the presentation of its initial evidence set on September 28, 2011. During the scheduled hearing on September 28, 2011, the Court in Division granted petitioner's motion.

On October 27, 2011, the day set for the commissioning of the ICPA, petitioner moved to reset the

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[18] *Rollo*, p. 238.
[19] *Rollo*, p. 239.
[20] *Rollo*, p. 263.
[21] *Rollo*, p. 264.
[22] *Rollo*, p. 265.
[23] *Rollo*, p. 266.
[24] *Rollo*, pp. 267-268
[25] *Rollo*, p. 271.
[26] *Rollo*, pp. 301-303.

scheduled proceeding allegedly because the intended ICPA was not available. Respondent did not interpose any objection, thus, the commissioning of petitioner's intended ICPA was reset to November 24, 2011 with notice to the parties in open court.[27]

On November 24, 2011, petitioner, despite notice, failed to appear. For the first time, respondent's counsel objected and insisted that the case be dismissed.[28]

In the assailed Resolution dated November 24, 2011, [29] the case was dismissed for petitioner's failure to prosecute.

Petitioner moved for reconsideration but it was denied in the similarly assailed Resolution of January 16, 2011.

Hence, this *Petition for Review*[30] filed on February 7, 2012, assigning the following error allegedly committed by the Court in Division, thus:

> WITH ALL DUE RESPECT, THE SECOND DIVISION OF THIS HONORABLE COURT ERRED IN DISMISSING THE DIVISION CASE BASED ON SECTION 3 OF RULE 17 OF THE RULES OF COURT CONSIDERING THAT:
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> I. THE ABSENCES OF PETITIONER'S COUNSEL WAS CAUSED BY UNAVOIDABLE CIRCUMSTANCES AND THAT THE HONORABLE COURT AND COUNSEL FOR THE RESPONDENT WERE ALWAYS NOTIFIED OF COUNSEL'S INABILITY TO ATTEND THE SCHEDULED HEARING AND THE REASON THEREFOR AND NEITHER WITH ANY INTENT TO DELAY THE

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[27] *Rollo*, p. 311.
[28] *Rollo*, p. 312.
[29] See Note 2, *supra.*
[30] See note 1, *supra.*

DIVISION CASE NOR CAUSED BY LACK OF ZEAL OR DILIGENCE;

II. THERE WAS NO VIOLATION OF RESPONDENT'S RIGHT TO SPEEDY TRIAL INASMUCH AS THE PETITIONER WAS ABLE TO COMPLETE THE MARKING OF ITS VOLUMINOUS DOCUMENTS IN A SPAN OF SEVEN MONTHS;

III. THE HONORABLE COURT'S POLICY OF MARKING THIRTY (30) DOCUMENTS FOR EVERY HEARING PROMPTED PETITIONER'S COUNSEL TO REQUEST ADDITIONAL HEARING DATES FOR THE MARKING OF ITS EXHIBITS.

Petitioner claims that the absences of its counsel did not result in vexatious, capricious, and oppressive delays to merit a dismissal of its case on the ground of *non prosequitur*. It argues that the repeated postponements of its initial presentation of evidence and series of requests for additional Commissioner's Hearings were necessary given the voluminous documents that petitioner had to mark before trial on the merits. Besides, only thirty (30) documents could be marked every Commissioner's Hearing warranting additional dates for marking. Further, the absences of its counsel on the scheduled hearings were brought about by the fact that: 1) the documents were not available as they were subject of audit by the ICPA in CTA Case Nos. 8006 and 8122; 2) the original documents had to be shipped from petitioner's principal place of business in Aroroy, Masbate to Manila; 3) there were conflict of schedules in the cases handled by counsel; or 4) the scheduled hearing date was declared a holiday and that the Court in Division and respondent's counsel were informed of his unavailability and the ground therefor.

Petitioner likewise claims that the right of respondent to speedy trial was never violated by the series of postponements it requested and granted by the Court in Division. In determining whether a party has been denied this right, the court must apply the balancing test, in which the conduct of both parties is weighed, and such factors as length and reason for the delay, the party's assertion or non-assertion of his right, and prejudice to the other party resulting from such delay. Further, the invocation of speedy trial was premature considering that: (1) the marking of about 600 exhibits started on February 7, 2011 and ended on August 22, 2011; (2) only 30 pieces of documents were allowed for marking each Commissioner's Hearing thus the repeated request for additional settings for the purpose; (3) respondent did not interpose any objection to the requested postponements. Moreover, strong evidence must be presented to show that respondent was indeed deprived of her right to speedy trial; (4) assuming that there was delay, respondent was not prejudiced since the amount for refund was and still is in the government's coffers; and (5) if the Court *En Banc* had the impression that petitioner's counsel was remiss in its professional responsibility to prosecute the case, petitioner's counsel apologizes and undertakes to religiously and painstakingly ensure that no further delay will occur.

Lastly, the dismissal of the case will deprive petitioner of the right to prove the merits of its case. As petitioner seeking for refund, it has greater interest to have the Case speedily resolved.

Ruling of the Court En Banc

The Petition for Review should be denied.

Section 3, Rule 17 of the Rules of Court reads as follows:

> Sec. 3. *Dismissal due to fault of plaintiff.* — If, for no justifiable cause, the plaintiff fails to appear on the date of the presentation of his evidence in chief on the complaint, or to prosecute his action for an

> unreasonable length of time, or to comply with these Rules or any order of the court, the complaint may be dismissed upon motion of the defendant or upon the court's own motion, without prejudice to the right of the defendant to prosecute his counterclaim in the same or in a separate action. This dismissal shall have the effect of an adjudication upon the merits, unless otherwise declared by the court.

The foregoing provision contemplates of three circumstances wherein the trial court may dismiss an action on its own volition or upon motion of the defendant, for failure to prosecute, to wit: (1) where the plaintiff fails to appear during a scheduled trial for the presentation of his evidence in chief; (2) where he fails to prosecute his action for an unreasonable length of time; and, (3) when he fails to comply with the rules or any order of the court.[31]

Thus, the existence of any of the three (3) enumerated circumstances will merit a dismissal of a case, with or without prejudice. In the instant case, all the three circumstances are obtaining negating petitioner's contention that the Court in Division erred in dismissing the case for failure to prosecute. The record of the case speaks for itself. And there is no denying on the part of petitioner who admits that all the postponements were at its instance but decks such admission with justifications tailored fit to suit its interest.

Petitioner's proclivity to procrastinate and cause unreasonable delay not only in the marking of exhibits but also in the initial presentation of its evidence for a span of eight (8) months – from February 21, 2011 to November 24, 2011 - appeared unnoticed by respondent. The latter objected to further postponement and moved to dismiss the case for failure to prosecute only after the initial presentation of evidence for petitioner failed to proceed for the sixth time.

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[31] *Goldloop Properties, Inc. vs. Court of Appeals*, G.R. 99431, August 11, 1992, 212 SCRA 498; Regner v. Logarta, 537 SCRA 277.

Significantly, some of the justifications relied upon by petitioner gave it away. By petitioner's own admission, most of the documents were not in its possession at the time it sought judicial intervention for its claim for refund. It is therefore safe to conclude that it failed to substantiate its administrative action before respondent for lack of the required documents. Further, all along petitioner knew that it would present voluminous documents yet only after it requested for about twenty five (25) commissioner's hearings and marked about 600 documents that it moved for the appointment of an ICPA, only to reset it and worse be without any appearance on the next setting, despite its own request.

In every action, the plaintiff is duty-bound to prosecute it with utmost diligence and with reasonable dispatch to enable him to obtain the relief prayed for and, at the same time, minimize the clogging of the court dockets. A party's failure to prosecute his case and proceed with the trial for an unreasonable length of time leads to no other conclusion that he had no interest in seeing his case terminated at the earliest possible time.[32]

Indeed, there was want of due diligence on the part of petitioner in failing to proceed with the initial presentation of its evidence with reasonable promptitude.[33] As stated by the Court in Division, petitioner was remiss in its duty to prosecute its case as shown in the numerous postponements requested by its counsel.

We quote with approval the observation of the Court in Division on the matter as stated in the assailed Resolution dated January 16, 2012, thus:

> From the very start, petitioner was extended by the Court great liberality when it repeatedly filed its Motion for the resetting of petitioner's initial presentation

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[32] *Id.*
[33] Suarez v. Villarama, Jr., 493 SCRA 74.

> of evidence, primarily on the ground that it needs more commissioner's hearings for the marking of exhibits. However, as can be seen from the above-cited facts, and notwithstanding the fact that it was the petitioner's counsel himself who requested and selected the dates for the commissioner's hearings, still, there were a number of instances when he failed to appear at the same which resulted to the repeated postponements of petitioner's initial presentation of evidence. Moreover, he likewise failed to appear in the last scheduled hearing on November 24, 2011 despite due notice.
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> Based on the foregoing, counsel for the petitioner far demonstrated his lack of diligence and zeal in the performance of his duty as an officer of the Court as manifested in his frequent non-appearance during Court hearings, whether it be in the scheduled hearing or commissioner's hearing. This laxity and negligence of petitioner's counsel not only violated the right of respondent to speedy trial but also wasted the Court's precious time in repeatedly adjusting its schedule just to accord petitioner a wide latitude of opportunity to prosecute its claims.

The failure of petitioner to proceed with its initial presentation evidence with dispatch without any justifiable cause gave rise to presumptions that it was only buying time for reason only known to it and not actually serious in the prosecution of the case to obtain from the court the relief prayed for in its petition.[34]

The dismissal of a case for failure to prosecute has the effect of an adjudication on the merits and is understood to be with prejudice to the filing of another action unless otherwise provided in the order of dismissal.[35]

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[34] Malayan Insurance Co., Inc. v. Ipil International Inc., 500 SCRA 371.
[35] Crus v. Court of Appeals, 482 SCRA 379.

WHEREFORE, the *Petition for Review* filed by petitioner Phil. Gold Processing & Refining Corporation is hereby **DENIED,** for lack of merit.

SO ORDERED.

ESPERANZA R. FABON-VICTORINO
Associate Justice

We Concur:

ROMAN G. DEL ROSARIO
Presiding Justice

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

(On Leave)
LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

(On Leave)
CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

Pursuant to Section 13, Article VIII of the Constitution, it is hereby certified that the above Decision has been reached in consultation with the members of the Court *En Banc* before the case was assigned to the writer of the opinion of the Court.

ROMAN G. DEL ROSARIO
Presiding Justice