REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

FSM CINEMAS, INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

C.T.A. CASE NO. 7525

Members:

CASTAÑEDA, JR., *Chairperson,*
CASANOVA, and
MINDARO-GRULLA, *JJ.*

Promulgated:

MAY 25 2012
3:15 p.m.

x - x

DECISION

CASANOVA, *J.*:

Before Us is a Petition for Review filed on October 2, 2006 seeking the cancellation and termination of the assessment against petitioner for deficiency Income Tax, Value-Added Tax (VAT), Expanded Withholding Tax and Final Withholding Tax Assessments, in the total amount of P66,952,432.93 for the taxable year ending December 2000.

The facts, as stated in parties' Joint Stipulation of Facts and Issues[1], are as follows:

Petitioner is a domestic corporation duly organized and existing under the laws of the Republic of the Philippines, with its principal place of business

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[1] Docket, pp. 68-71

located at the 4th Floor, Festival Supermall, Filinvest Corporate City, Alabang, City of Muntinlupa, Metro Manila.

Respondent is the duly appointed Commissioner of Internal Revenue, vested under the appropriate laws with the authority to carry out all the functions, duties and responsibilities of said Office, including, *inter alia*, the power to decide, cancel and abate tax liabilities pursuant to Section 204(B) of the National Internal Revenue Code (NIRC), as amended, and holds Office at the 5th Floor, BIR National Office Building, BIR Road, Diliman, Quezon City.

On August 22, 2002, petitioner received BIR Form No. 1920 (Audit Notice) dated August 2, 2002, with OCN 9AN0000004800, issued by Mr. Antonio I. Ortega, Revenue Regional Director (Makati), authorizing Revenue Officers Theodora D. Reyes and Beatriz Meneses to examine petitioner's books of account and accounting records for all internal revenue taxes for the period January 1, 2000 to December 31, 2000.

On January 3, 2006, petitioner received the Formal Assessment Notices (FANs) dated December 23, 2005. Said FANs (FAN Nos. IT-4800-00-05-0452[2], VT-4800-00-05-0452[3], WE-4800-00-05-0452[4], WF-4800-00-05-0452[5]), which were received at petitioner's business address (4th level, Festival Supermall, Inc. Filinvest Corporate City, Alabang, City of Muntinlupa), alleged that FCI has incurred deficiency income tax, VAT and

[2] Exhibit "3"
[3] Exhibit "4"
[4] Exhibit "5"
[5] Exhibit "6"

withholding taxes (expanded and final) in the total amount of P66,882,432.93.[6]

On January 23, 2006, petitioner timely filed with respondent Commissioner of Internal Revenue, through the Assessment Division, Revenue Region No. 8 (Makati), its written protest against the abovementioned assessments.[7]

Due to respondent's inaction on petitioner's protest, petitioner appealed to this Court the Final Assessment Notice through a Petition for Review[8] filed on October 2, 2006.

Respondent filed her Answer[9] through registered mail on December 12, 2006, and interposed therein the following special and affirmative defenses:

> "6. He reiterates and re-pleads the preceding paragraphs of this answer as part of his Special and Affirmative Defenses;
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> 7. Petitioner is subject to the deficiency income tax due to disallowed expenses resulting from petitioner's failure to substantiate its claim that the excess amounts of income as shown in the comparison of the amounts per audit and per withholding tax returns indicated in Schedule 1 of the Details of Discrepancies were already subjected to tax; further verification disclosed that petitioner have incurred loans payable amounting to P29,939,721.00 and salaries expense amounting to P820,595.69, but were not reported in its financial statements, hence, considered undeclared source of income subject to income tax at the rate of 32% pursuant to Section 27 in relation to Section 32, both of the NIRC; further petitioner declared miscellaneous expenses in the amount of P214,166.00 that were

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[6] Par 4, Facts Admitted, Joint Stipulation of Facts and Issues (JSFI), Docket, p.69; Exhibit "7"
[7] Par 5, Facts Admitted, JSFI , docket, p. 69
[8] Docket, pp. 1-10
[9] Docket, pp. 36-38

unsupported thus, disallowed pursuant to Section 34 (A) (1) (b) of the NIRC.

8. Petitioner was assessed of the deficiency Value-Added tax on its additional taxable sales of P94,737,039.43 that were not subjected to VAT, including the ticket sales in the amount of P94,694,966.00.

9. Revenue Memorandum Circular No. 28-2001 dated July 2, 2001, neither enact or implement the provision of the EVAT Law but was issued by the respondent only to publicize VAT Ruling No. 031-00 dated September 8, 2000, which in effect interprets the provisions of the EVAT Law, particularly on the imposition of the 10% VAT on gross receipts from the admission of persons to places of amusement, which was implemented beginning from January 1, 1996 pursuant Revenue Regulations No. 6-95 dated December 11, 1995, therefore, the cinema ticket sales of the petitioner for table year 1999 is subject to 10% VAT based on its gross receipts from the admission of persons to places of amusement.

10. Petitioner is assessed of the deficiency expanded withholding tax because of its failure to withhold and remit the expanded withholding tax due on the income payments already discussed above in accordance with Section 2.57.1 (A)(5) of Revenue Regulations No. 2-98, as amended.

11. Petitioner is assessed of the final withholding tax on the ground that it was not able to substantiate its claim that the cash dividends it declared were paid to a domestic corporation.

7.*(sic)* Tax assessments are presumed correct and made in good faith and the burden is on the taxpayer to prove otherwise. (Bonifacia Sy Po vs. CTA, G.R. No. 81446, August 18, 1988)."

The case was initially set for Pre-Trial Conference on January 12, 2007.[10] However, after the filing of the parties' motions to reset the Pre-Trial

[10] Notice of Pre-Trial Conference dated December 19, 2006, Docket, p. 39

hearing[11], the Pre-Trial Conference was finally reset on February 23, 2007.[12] Thus, petitioner filed its Pre-Trial Brief [13] on February 21, 2007 while respondent's Pre-trial Brief[14] was filed on February 22, 2007.

On May 31, 2007, the parties filed their Joint Stipulation of Facts and Issues[15] which was later approved in a Resolution[16] dated June 13, 2007. In the same Resolution, the Pre-Trial Conference was considered terminated.[17]

During trial, petitioner filed, on August 13, 2008,its Motion to Declare the Alleged Deficiency Income Tax and Value-Added Tax Assessments Extinguished under Republic Act No. 9480[18] alleging that it has availed of the tax amnesty pursuant to the provisions of RA No. 9480 and thus, it is now immune from the payment of the alleged deficiency tax assessments. In resolving the same, the Court treated the said Motion as a Motion to Withdraw Petition for Review and the instant Petition for Review was deemed partially withdrawn and correspondingly treated as closed and terminated but only insofar as the assessments covered by the tax amnesty are concerned.[19]

Consequently, the trial of the case continued giving both parties the opportunity to present their documentary and testimonial evidence. Petitioner formally offered in evidence Exhibits "MMM to MMMMMM-1"[20] which were

[11] Docket, pp. 41-45
[12] Docket, p. 48
[13] Docket, pp. 50-57
[14] Docket, pp. 58-62
[15] Docket, pp. 68-71
[16] Docket, pp. 73-74
[17] Ibid
[18] Docket, pp. 169-172
[19] Resolutions dated October 9, 2008 and January 26, 2009; Docket, pp. 190-191 and 200-203
[20] Formal Offer of Evidence, Docket, pp. 299-301

admitted in a Resolution[21] dated March 17, 2010 except Exhibits "MMM" to "PPP-3". For her part, respondent formally offered in evidence Exhibits "1" to "9"[22] which were later admitted in a Resolution[23] dated November 2, 2010.

Also, the Court admitted petitioner's rebuttal evidence, specifically Exhibits "AAAAA", "BBBBB", "CCCCCC", "DDDDDD", "NNNNNN" to "BBBBBBB-1", in a Resolution[24] dated November 25, 2011.

Subsequently, petitioner submitted its Memorandum[25] on February 13, 2012 while no memorandum has been filed by the respondent as per report of the Records Division dated February 20, 2012.[26] Accordingly, the case was considered submitted for decision per Resolution[27] promulgated on February 21, 2012.

The parties submitted the following issues[28] for this Court's disposition:

> "1. Whether or not the sale of amusement tickets by cinema and/or theater owners and/or operators, is subject to the VAT, so as to be collected by Respondent, or is subject to amusement tax, failing within the exclusive jurisdiction of the LGU having jurisdiction over the owner and/or operator of cinemas and/or theaters.
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> 2. Whether or not per Petitioner's books of account, as supported by its Monthly Remittance Returns of Creditable Taxes Withheld (BIR Form No. 1601) and other accounting records and books of account for the taxable year 2000, Petitioner had timely and properly withheld and remitted the necessary withholding taxes due on its payments to various service providers, and suppliers of goods, in accordance with the provisions of Revenue Regulations (RR) No. 2-98, as amended;

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[21] Docket,
[22] Docket, pp. 348-349
[23] Docket, pp. 377-378
[24] Docket, pp. 554-555
[25] Docket, pp.561-579
[26] Docket, p. 581
[27] Docket, p. 582
[28] Joint Stipulation of Facts and Issues (JSFI), Issues, Docket, pp. 70-71

3. Whether or not per Petitioner's books of account, as supported by its Monthly Remittance Returns of Taxes Withheld and other accounting records and books of account for the taxable year 2000, Petitioner was not required to withhold and remit any taxes on payments to certain contractors, considering that said contractors are exempt from withholding taxes in accordance with the provisions of Revenue Regulations (RR) No. 2-98, as amended, and the NIRC, as amended.

4. Whether or not Petitioner has undeclared income for the taxable year 2000

5. Whether or not the Petition is properly and validly filed.

6. Whether or not BIR Rulings cannot be given retroactive application if such retroactive application shall result in prejudice to taxpayers, in accordance with Section 246 of the NIRC, as amended."

Considering that the instant Petition for Review was deemed partially withdrawn with respect to the assessments covered by the tax amnesty, the remaining issues for the resolution of this Court are the following: (a) whether or not the Petition is properly and validly filed; and (b) whether or not respondent is correct in issuing the assessment against petitioner for deficiency expanded withholding and final withholding taxes for the taxable year 2000.

At the outset, it must be emphasized that jurisdiction over the subject matter is fundamental for a court to act on a given controversy. It is conferred by law, not by the consent of the parties. It can be challenged at any stage of the proceedings and for lack of it, a court can dismiss a case *ex mero motu*.[29] Likewise, the Court of Tax Appeals is a court of special jurisdiction and as

[29] Commissioner of Internal Revenue vs. Leonardo S. Villa and the Court of Tax Appeals, G.R. No. L-23988, January 2, 1968, 22 SCRA 3

such it can take cognizance only of such matters as are clearly within its jurisdiction.[30] Bearing this in mind, the Court deems it imperative to first resolve the issue on whether or not the Petition is properly and validly filed.

Section 7(a)(2) of the 2005 Revised Rules of the Court of Tax Appeals (RR CTA), as amended, provides:

> "SEC. 7. *Jurisdiction.* – The CTA shall exercise:
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> (a) Exclusive appellate jurisdiction to review by appeal, as herein provided:
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> XXX
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> (2) **Inaction by the Commissioner of Internal Revenue in cases involving disputed assessments,** refunds of internal revenue taxes, fees or other charges, penalties in relation thereto, or other matters arising under the National Internal Revenue Code or other laws administered by the Bureau of Internal Revenue, **where the National Internal Revenue Code provides a specific period for action in which case the inaction shall be deemed a denial**

Relevantly, Rule 8, Section 3(a) of the same RR CTA, as amended, provides for the specific period within which an appeal from the ruling or inaction of the Commissioner of Internal Revenue may be filed, to wit:

> "**Section 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 assessment**." *(Emphasis supplied)*

[30] Ibid.

The 30 day period to appeal was not only prescribed by the 2005 RR CTA, as amended, but also by statute, particularly Section 228 of the National Internal Revenue Code of 1997, as amended, the pertinent portion of which reads:

> "Sec. 228. **Protesting of Assessment.** — . . .
>
> xxx
>
> 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 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**." *(Emphasis supplied)*

Applying the foregoing to the facts of this case, petitioner received on January 3, 2006 the Formal Assessment Notices (FANs) dated December 23, 2005 for deficiency expanded and final withholding taxes (WE-4800-00-05-0452[31] and WF-4800-00-05-0452[32]).[33] Thereafter, on January 23, 2006, petitioner filed with respondent its written protest against the abovementioned assessments.[34] Since there is no proof of submission of supporting documents on the written protest, the 180-day period shall be counted from

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[31] Exhibit "5"
[32] Exhibit "6"
[33] JSFI, Facts Admitted, Par. 4, Docket, p. 69; Exhibit "7"
[34] Ibid, Par. 5, Docket, p. 69

date when the written protest was filed. Thus, counting from January 23, 2006, respondent had 180 days, or until July 22, 2006, to act on the said protest.

After the lapse of the 180-day period without respondent's action on the protest, petitioner should have filed the instant Petition for Review within 30 days from the lapse of the 180-day period or until August 21, 2006. However, in this case, the Petition for Review was filed only on October 2, 2006. Thus, the assessment has already become final, executory and demandable.

Consequently, petitioner had already lost its right to appeal the subject assessment before this Court.

At this juncture, it must be stressed that while the right to appeal a decision of the Commissioner of Internal Revenue to the Court of Tax Appeals is merely a statutory remedy, nevertheless, the requirement that it must be brought within 30 days is jurisdictional. [35]

Moreover, the right to appeal is not a natural right or a part of due process, it is merely a statutory privilege, and may be exercised only in the manner and in accordance with the provisions of the law. The party who seeks to avail of the same must comply with the requirements of the rules. Failing to do so, the right to appeal is lost.[36]

Accordingly, petitioner's failure to comply with the 30 day period provided under Section 228 of the National Internal Revenue Code of 1997,

[35] Rizal Commercial Banking Corporation vs. Commissioner of Internal Revenue, G.R. No. 168498, April 24, 2007, 522 SCRA 144 citing Ker & Company, Ltd. v. Court of Tax Appeals, G.R. No. L-12396, January 31, 1962, 4 SCRA 160, 163

[36] Producers Bank of the Philippines vs. Court of Appeals, G.R. No. 126620, April 17, 2002, 381 SCRA 185

as amended, as well as the 2005 Revised Rules of the Court of Tax Appeals, would indeed bar the appeal and, thus, had effectively removed the instant case from the ambit of this Court's jurisdiction.

WHEREFORE, premises considered, the instant Petition for Review is hereby **DISMISSED** for lack of jurisdiction.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

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

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

ATTESTATION

I attest 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's Division.

Juanito C. Castañeda, Jr.
JUANITO C. CASTAÑEDA, JR.
Associate Justice
Chairperson, Second Division

CERTIFICATION

Pursuant to Article VIII, Section 13 of the Constitution, and the Division Chairperson's Attestation, 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.

ERNESTO D. ACOSTA
Presiding Justice