REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

SECOND DIVISION

PEOPLE OF THE PHILIPPINES,
Plaintiff,

- versus -

LUCKY FORT FOOD VENTURES, INC., **ROBERTO V. GARCIA** and **VALERIE ANNE G. MALIG**,
Accused.

CTA CRIM. CASE NO. **O-815**

For: Violation of Section 255 of the NIRC of 1997, as amended

Members:

UY, *Chairperson*,
BACORRO-VILLENA, *and*
CUI-DAVID, *JJ.*

Promulgated: JAN 19 2023
4:30 p.m.

x - x

RESOLUTION

For the Court's resolution is the accused's Demurrer to Evidence[1] (**Demurrer**) filed on 07 October 2022, without plaintiff's comment or opposition thereto.[2]

Records show that on 26 February 2020, an Information[3] was filed against the accused accusing the latter with violation of Section 255[4] of the National Internal Revenue Code (**NIRC**) of 1997, as amended. The Information alleges:

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1 Division Docket, Volume II, pp. 564-591.

2 *Per* Records Verification dated 02 November 2022; Id., p. 597.

3 Id., Volume I, pp. 5-6.

4 **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 and 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.

> . . .
>
> That on 28 June 2012 and thereafter, in Taguig City and within the jurisdiction of this Honorable Court, accused LUCKY FORT FOOD VENTURES, INC., a registered taxpayer of BIR RDO No. 44 under Tax Identification No. 249-569-127-000, with obligation under the law to file and pay the corresponding Value Added Tax Return for taxable year /period 01 January to 31 December 2008, and accused ROBERTO V. GARCIA and VALERIE ANNE G. MALIG, its president and treasurer, respectively, and corporate responsible officers, did then and there, willfully and knowingly fail to pay the correct value[-]added tax based on Letter of Authority (LoA) No. LOA-00027482, in the amount of P1,810,724.35, exclusive of surcharges and interest, despite final assessment notice including prior and post notices and formal demand to pay, the last being in the nature of final notice for them to pay the said tax, to the damage and prejudice of the Government.
>
> CONTRARY LAW.
>
> . . .

In a Resolution dated 18 March 2021[5], warrants of arrest were issued against accused Roberto V. Garcia (**Garcia**) and Valerie Anne G. Malig (**Malig**).

Per the Court's Resolution dated 07 July 2021, the above accused have both surrendered voluntarily and later on granted bail on 07 July 2021. Subsequently, both accused were arraigned and entered their separate plea of "Not Guilty" to the criminal charge against them.[6]

Thereafter, trial ensued, and plaintiff proceeded with the presentation of its evidence. During trial, it offered the testimonies of the following witnesses: (**1**) Revenue Officer (**RO**) Dominador O. Agustin, Jr.[7] (**Agustin**); and, (**2**) RO Maria Consuelo G. Degollado[8] (**Degollado**) who both testified through their respective judicial affidavits.

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.

[5] Division Docket, Volume I, pp. 154-158.

[6] Order dated 18 October 2021; id., pp. 356-357.

[7] Exhibit "P-19"; id., pp. 214-230.

[8] Exhibit "P-20"; id., pp. 265-280.

RO Agustin testified to examining and auditing the accused's books of accounts which eventually led to the issuance of a Letter of Authority[9] (**LOA**) and all subsequent notices including the Formal Assessment Notice[10] (**FAN**) against the latter on 11 April 2012. The witness further attested to personally serving the accused of the FAN, and that despite receipt thereof, the accused still failed to pay its alleged tax deficiencies which resulted in the filing of the present criminal action.

Thereafter, RO Degollado testified to being tasked with the enforcement of the Preliminary Collection Letter[11] (**PCL**) issued on 07 January 2015 and Final Notice Before Seizure[12] (**FNBS**) issued on 13 February 2015 against the accused. The witness also testified to the fact of filing a criminal complaint[13] against the accused with the Department of Justice (**DOJ**) on 17 May 2019.

With the presentation of the testimonies of their witnesses, plaintiff proceeded to file a Formal Offer of Evidence[14] (**FOE**) on 24 May 2022, with the accused's Comments and Objections[15] filed on 29 June 2022.

In a Resolution dated 15 August 2022[16], the Court admitted all of plaintiff's exhibits save for Exhibits **"P-14-b"** and **"P-16-c"** which were no longer formally offered by plaintiff.

Subsequently, the accused filed a Motion for Leave of Court (**Motion for Leave**) to File Demurrer to Evidence[17] on the following grounds: (**a**) the period to file the criminal action had already prescribed; (**b**) plaintiff's alleged failure to prove service of the Bureau of Internal Revenue's (**BIR**'s) notices on the accused; and, (**c**) plaintiff's alleged failure to prove all the elements of the offense charged.

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9 Exhibit "P-4"; id., Volume II, p. 406.
10 Exhibits "P-11" to "P-11-f"; id., pp. 423-428.
11 Exhibit "P-14"; id., p. 431.
12 Exhibit "P-15"; id., p. 432.
13 Exhibit "P-1"; id., Volume I, pp. 20-24.
14 Id., Volume II, pp. 398-405.
15 Id., pp. 452-467.
16 Id., pp. 534-535.
17 Id., pp. 539-543.

With plaintiff's failure to file a timely opposition to the above motion, the Motion for Leave was granted in a Resolution dated 27 September 2022.[18]

Thereafter, the accused filed their Demurrer[19] wherein they argued that the criminal action had already prescribed considering that five (5) years had lapsed from their alleged commission of the crime to the filing of a criminal complaint with the DOJ. They further contended that plaintiff failed to prove the element of "willfulness" to warrant a conviction for the crime charged more so, that there was no proof that the BIR actually served its notices on the accused's authorized representatives.

In a Resolution dated 29 November 2022, the Court submitted the Demurrer for resolution, without plaintiff's opposition due to the latter's failure to timely file a comment to the said Demurrer.

We resolve.

After a careful review of the records, We find the instant Demurrer is impressed with merit.

Section 23 of Rule 119 of the Rules of Court (**ROC**) states:

> . . .
> **Sec. 23.** *Demurrer to evidence.* — After the prosecution rests its case, the court may dismiss the action on the ground of insufficiency of evidence (1) on its own initiative after giving the prosecution the opportunity to be heard or (2) upon demurrer to evidence filed by the accused with or without leave of court.
>
> If the court denies the demurrer to evidence filed with leave of court, the accused may adduce evidence in his defense. When the demurrer to evidence is filed without leave of court, the accused waives the right to present evidence and submits the case for judgment on the basis of the evidence for the prosecution.
>
> The motion for leave of court to file demurrer to evidence shall specifically state its grounds and shall be filed within a non-extendible period of five (5) days after the prosecution rests its case. The prosecution may oppose the motion within a non-extendible period of five (5) days from its receipt.

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18 Id., pp. 562-563.
19 Supra at note 1.

> If leave of court is granted, the accused shall file the demurrer to evidence within a non-extendible period of ten (10) days from notice. The prosecution may oppose the demurrer to evidence within a similar period from its receipt.
>
> The order denying the motion for leave of court to file demurrer to evidence or the demurrer itself shall not be reviewable by appeal or by *certiorari* before judgment.
>
> . . .

A review of the criminal Information and the evidence presented would reveal that the accused corporation allegedly committed the crime of tax evasion on 28 June 2012, *i.e.*, when it allegedly failed to pay its tax deficiencies despite demands from the BIR. As a result, the BIR filed the criminal complaint against all herein accused on 17 May 2019.

Section 281 of the NIRC of 1997, as amended, provides:

> . . .
> **SEC. 281.** *Prescription for Violations of any Provision of this Code.* - <u>All violations of any provision of this Code shall prescribe after five (5) years.</u>
>
> <u>Prescription shall begin to run from the day of the commission of the violation of the law</u>, and if the same be not known at the time, from the discovery thereof and the institution of judicial proceedings for its investigation and punishment.
>
> The prescription shall be interrupted when proceedings are instituted against the guilty persons and shall begin to run again if the proceedings are dismissed for reasons not constituting jeopardy.
>
> The term of prescription shall not run when the offender is absent from the Philippines.[20]
>
> . . .

The aforementioned provision is an almost *verbatim* recreation of Section 354 of the old Tax Code, which state thusly:

> . . .
> **Sec. 354**. Prescription for Violations of Any Provisions of this Code. — All violations of any provisions of this Code shall prescribe after five years.

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[20] Underscoring supplied.

> Prescription shall begin to run from the day of the commission of the violation of the law, and if the same be not known at the time, from the discovery thereof and the institution of judicial proceedings for its investigation and punishment.
>
> The prescription shall be interrupted when proceedings are instituted against the guilty persons and shall begin to run again if the proceedings are dismissed for reasons not constituting jeopardy.
>
> The term of prescription shall not run when the offender is absent from the Philippines.
>
> . . .

In the case of *Emilio E. Lim, Sr., et al. v. Court of Appeals, et al.*[21] (**Lim**) the Supreme Court had occasion to make clarification on the prescription of violations of the Tax Code. Therein the Supreme Court explained:

> . . .
>
> Inasmuch as the final notice and demand for payment of the deficiency taxes was served on petitioners on July 3, 1968, it was only then that the cause of action on the part of the BIR accrued. This is so because prior to the receipt of the letter-assessment, no violation has yet been committed by the taxpayers. The offense was committed only after receipt was coupled with the wilful refusal to pay the taxes due within the alloted period. The two criminal informations, having been filed on June 23, 1970, are well-within the five-year prescriptive period and are not time-barred.
>
> With regard to Criminal Cases Nos. 1790 and 1791 which dealt with petitioners' filing of fraudulent consolidated income tax returns with intent to evade the assessment decreed by law, petitioners contend that the said crimes have likewise prescribed. They advance the view that the five-year period should be counted from the date of *discovery* of the alleged fraud which, at the latest, should have been October 15, 1964, the date stated by the Appellate Court in its resolution of April 4, 1978 as the date the fraudulent nature of the returns was unearthed.
>
> On behalf of the Government, the Solicitor General counters that the crime of filing false returns can be considered "discovered" only after the manner of commission, and the nature and extent of the fraud have been definitely ascertained. It was only on October 10, 1967 when the BIR rendered its final decision holding that there was no ground for the reversal of the assessment and therefore required the petitioners to pay P1,237,190.55 in deficiency taxes that the tax infractions were discovered.

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[21] G.R. Nos. L-48134-37, 18 October 1990.

Not only that. The Solicitor General stresses that Section 354 speaks not only of discovery of the fraud but also institution of judicial proceedings. Note the conjunctive word "and" between the phrases "the discovery thereof" and "the institution of judicial proceedings for its investigation and proceedings." In other words, in addition to the fact of discovery, there must be a judicial proceeding for the investigation and punishment of the tax offense before the five-year limiting period begins to run. It was on September 1, 1969 that the offenses subject of Criminal Cases Nos. 1790 and 1791 were indorsed to the Fiscal's Office for preliminary investigation. Inasmuch as a preliminary investigation is a proceeding for investigation and punishment of a crime, it was only on September 1, 1969 that the prescriptive period commenced.

But according to the Lim spouses, that argument had precisely been raised, considered and found without merit in the case of *People vs. Ching Lak* which had perfunctorily dismissed the Government's position in this wise:

> Anent the theory that in the present case the period of prescription should commence from the time the case was referred to the Fiscal's Office, *suffice it to state that the theory is not supported by any provision of law and we need not elucidate thereon.*

The Court is inclined to adopt the view of the Solicitor General. For while that particular point might have been raised in the Ching Lak case, the Court, at that time, did not give a definitive ruling which would have settled the question once and for all. As Section 354 stands in the statute book (and to this day it has remained unchanged) it would indeed seem that tax cases, such as the present ones, are practically imprescriptible for as long as the period from the discovery *and* institution of judicial proceedings for its investigation and punishment, *up to* the filing of the information in court does not exceed five (5) years.

In the case of *People vs. Tierra*, the same argument came up before the Court but its conclusions on the issue of prescription did not bring us any closer to a categorical ruling. It opined:

> Evidence was adduced to show, and the trial court so found, that the falsity of the returns filed by the appellant and his failure to preserve his books of accounts for at least five years from the date of the last entry in each book were all discovered only on December 16, 1950. Since the informations were filed on December 12, 1955, the trial court correctly ruled that the actions were all within the five-year period of limitation.
>
> Appellant argues, however, that since the informations make no allegation that the offenses were not known

> at the time of the commission as to bring them within the exception to the statute of limitations, then the informations were necessarily defective for that reason, and this fatal defect cannot be cured by the introduction of evidence. Prescription is a matter of defense and the information does not need to anticipate and meet it. The defendant could, at most, object to the introduction of evidence to defeat his claim of prescription; but he did not. *Anyway, the law says that prescription begins to run from ... "the institution of judicial proceedings for its ... punishment."*
>
> Unless amended by the legislature, Section 354 stays in the Tax Code as it was written during the days of the Commonwealth. And as it is, must be applied regardless of its apparent one-sidedness in favor of the Government. In criminal cases, statutes of limitations are acts of grace, a surrendering by the sovereign of its right to prosecute. They receive a strict construction in favor of the Government and limitations in such cases will not be presumed in the absence of clear legislation.[22]
>
> ...

According to *Lim*, it appears that there is a difference in application of the 5-year prescription period depending on the offense charged. *First*, in cases of willful failure to pay, the period begins to run from the offense's commission or when no payment has been made on the date the assessed tax deficiencies fall due. *Second,* in cases of fraud, the period begins to run from the discovery thereof coupled with the filing of criminal complaint.

The present action is based on the first circumstance as the Information filed alleges that the accused failed to pay their tax deficiencies despite demands from the BIR.

Evidence shows that a final demand for payment was made on the accused through a FAN issued on 11 April 2012 demanding settlement of unpaid taxes by 11 May 2012. Thereafter, a PCL was issued on 07 January 2015 and an FNBS on 13 February 2015.

Following *Lim*, prior to demand, no violation has yet been committed by the accused; therefore, it was only upon failure to pay that the crime of willful non-payment is committed. In the case at bar, the FAN demanded payment of the alleged tax deficiency taxes by 11 May 2012. Hence, it was on <u>12 May 2012</u> that the offense charged

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22 Citations omitted and italics in the original text.

could be deemed to have been committed and the 5-year prescription period would begin to run. Counting therefrom, the BIR would have had until 12 May 2017 to file a criminal complaint against the accused.

However, a criminal complaint was only instituted against the accused on 17 May 2019, more than seven (7) years after the offense's alleged commission and more than two (2) years after the same had already prescribed. Although, it would be gleaned from the evidence that the accused supposedly filed a motion for reinvestigation against the FAN on 12 October 2012, a copy of such protest was not offered as evidence. Instead, in a letter dated 24 October 2014[23], it is shown that the BIR denied the supposed protest on the ground that the same was filed out of time making the assessment final and executory as of 13 May 2012.

Considering the apparent prescription of the offense charged against the accused, the Court finds no reason to further belabor itself in resolving the other arguments raised by the accused as the same would have no more bearing on the outcome of the case.

It is well-established doctrine that "the [p]rosecution must rely on the strength of its evidence, not on the weakness of his defense".[24] Since, plaintiff has fallen short of proving that the instant action was filed within the limits provided by law, the criminal action against the accused must necessarily fail.

WHEREFORE, the foregoing premises considered, the accused's Demurrer to Evidence filed on 07 October 2022 is hereby **GRANTED.** Accordingly, the present criminal action subject of Crim. Case. No. O-815 is **DISMISSED** on the basis of prescription.

No pronouncement as regards civil liability *ex-delicto*.

SO ORDERED.

(On Leave)
ERLINDA P. UY
Associate Justice

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23 Exhibit "P-13"; Division Docket, Volume II, p.430.
24 *People of the Philippines v. Pacifico Sangcajo, Jr.*, G.R. No. 229204, 05 September 2018.

JEAN MARIE A. BACORRO-VILLENA
Associate Justice

LANEE S. CUI-DAVID
Associate Justice