REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

EN BANC

CITY OF MANILA and LIBERTY M. TOLEDO, as City Treasurer of Manila,
Petitioners,

-versus-

COLUMBIA PICTURES INDUSTRIES, INC.,
Respondent.

C.T.A. EB No. 337
(C.T.A. AC No. 29)

Present:

Acosta, ***P.J.***,
Castañeda, Jr.,
Bautista,
Uy,
Casanova, and
Palanca-Enriquez, ***JJ.:***

Promulgated:
AUG 0 5 2008 Apolinario 2:15 p.m.

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DECISION

CASTAÑEDA, JR., J.:

THE CASE

On appeal are the Decision dated August 30, 2007 issued by the Court in Division ordering the City of Manila a) to desist from further collecting business taxes under Section 21 of the Manila Revenue Code, as amended, and b) to refund Columbia Pictures Industries, Inc., the amount of Two Million Eight Hundred Ninety Three Thousand Four Hundred Twenty Three Pesos and 28/100 (P2,893,423.28) representing business taxes under the same provision for the years 2000 to 2001, and the Resolution dated November 13, 2007 denying the Motion for Reconsideration, due to lack of merit, in CTA AC No. 29.

THE FACTS

The City of Manila is a local government unit vested by law to assess and collect business taxes, fees and other charges, represented by City Treasurer Liberty M. Toledo ("petitioners"); while Columbia Pictures Industries, Inc. ("respondent"), a local branch of a foreign corporation duly organized and existing under the laws of Delaware, United States of America, is engaged in the distribution of cinematographic and television films.[1]

For the taxable years 1999, 2000 and 2001, the petitioners assessed business taxes in the amount of P7,636,657.30 against the respondent which paid the corresponding amount due[2] under Section 18 of the Manila Revenue Code ("MRC"), or also known as Ordinance No. 7794, as amended by Ordinance No. 7807[3]. In compliance with petitioners' assessment of business taxes under Section 21 of the MRC, as amended,

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[1] Records of CTA AC No. 29, p. 39.
[2] Records of CTA AC No. 29, pp. 6, 10, 23 and 40.
[3] Ordinance 7807 took effect on October 1, 1993.

covering the same period, the respondent also paid the additional amount of P4,722,672.68.[4]

On January 2, 2002, the respondent requested the petitioners to refund or credit the amount of additional business taxes paid in the amount of P4,722,672.68 for the years 1999 to 2001 allegedly erroneously collected by the latter.[5]

In a letter dated January 12, 2002, petitioner Toledo denied respondent's claim for tax refund or credit, and reasoned that the business taxes imposed pursuant to Section 21 of the MRC, as amended, is an indirect tax payable by the person paying for the services rendered by the respondent. As a collecting agent, the respondent is tasked to remit the tax to petitioner City of Manila within twenty (20) days after the end of each quarter. Thus, the business taxes under Section 21 of the MRC, as amended, must be enforced against the respondent.[6]

Feeling aggrieved, on January 18, 2002, the respondent, as plaintiff, commenced an action for the refund and/or tax credit of business taxes collected by the petitioners impleaded as defendants with the Regional Trial Court ("RTC") of the City of Manila, Branch 21, entitled, "Columbia Pictures Industries, Inc. vs. City of Manila, Liberty M. Toledo-City

[4] Records of CTA AC No. 29, pp. 6, 10, 23 and 40.
[5] Records of CTA AC No. 29, pp. 27-28.
[6] Records of CTA AC No. 29, p. 29.

Treasurer, and Joseph Santiago - Chief, License Division", and docketed as Civil Case No. 02102663.[7]

During the pendency of the proceedings in the trial court, the Supreme Court promulgated the case of *Coca-Cola Bottlers Philippines, Inc. vs. City of Manila*[8] and declared the nullity of Ordinance Nos. 7988[9] and 8011[10] which was supposed to amend Ordinance No. 7794 on the basis of petitioner City of Manila's failure to follow the publication requirement prescribed in Section 188 of the 1991 Local Government Code.

In ruling for the respondent, the RTC issued a Decision dated November 8, 2006 which ordered the petitioners to refund or credit the additional business taxes collected in the amount of P4,722,672.68 for the years 1999, 2000 and 2001.[11]

Petitioners sought a reconsideration of the Decision dated November 8, 2006 which the RTC denied for lack of merit in the Order dated March 7, 2007. In the same Order, the trial court reiterated the grant of the refund of the claimed amount in favor of the respondent.[12]

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[7] Records of CTA AC No. 29, p. 21.
[8] G.R. No. 156252, June 27, 2006, 493 SCRA 279.
[9] Approved on February 25, 2000.
[10] Approved on February 22, 2001.
[11] Records of CTA AC No. 29, pp. 39-42.
[12] Records of CTA AC No. 29, pp. 43-46.

Dissatisfied, on April 12, 2007, the petitioners elevated the case docketed as CTA AC No. 29 for review, before the Court in Division.[13]

In the Decision dated August 30, 2007, the Court in Division affirmed with modification the RTC's Order dated March 7, 2007. Out of the original claim of P4,722,672.68, the Court in Division ordered the refund in the reduced amount of P2,893,423.28 representing additional business taxes under Section 21 of the MRC, as amended, for the years 2000 to 2001, and denied the remaining amount for the year 1999, due to prescription.[14]

Unfazed, the petitioners filed a Motion for Reconsideration of the Decision dated August 30, 2007. However, in the Resolution dated November 13, 2007, the Court in Division denied their Motion for lack of merit.[15] Thus, the petitioners appealed by way of a Petition for Review to the Court *En Banc,* pursuant to Section 11 of Republic Act ("R.A.") No. 9282.

[13] Records of CTA AC No. 29, p. 1.
[14] Penned by Presiding Ernesto D. Acosta, with Justices Lovell R. Bautista and Caesar A. Casanova concurring. See records of CTA AC No. 29, pp. 60-75.
[15] Records of CTA AC No. 29, pp. 93-97.

ISSUES

The petitioners interpose the following assignment of errors committed by the Court in Division:

> I. The 1st Division of this Court erred in holding that the City of Manila cannot validly impose taxes under Section 21 on businesses already paying taxes under Section 18 of the Manila Revenue Code;
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> II. The 1st Division gravely erred in holding that respondent could question the assessment against it;
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> III. The 1st Division erred in holding that petitioner were already estopped from questioning the respondent's capacity to sue; and
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> IV. The 1st Division erred in holding that the amendment made by the RTC of its ruling was correct without explaining the reason therefore.[16]

COURT'S RULING

EXISTENCE OF DIRECT DUPLICATE TAXATION

Petitioners allege that although the respondent already paid business taxes under Section 18 of the MRC, as amended, the business taxes imposed in Section 21(A) of the same code, are valid, and do not result to direct duplicate taxation. Section 18 is a tax on contractors; while Section 21 (A) specifically is a tax on persons who sell goods and Jc

[16] Rollo, p. 8.

services in the course of trade or business subject to excise, value-added and other percentage taxes under the National Internal Revenue Code ("NIRC"), as amended. Moreover, in Section 21(A), the respondent acts as withholding agent to its customers availing its services who bear the burden of business taxes. Thus, the taxes imposed in Section 21(A) are in the nature of indirect taxes.

The respondent counters that since both Sections 18 and 21(A) of the MRC, as amended, impose the same direct taxes on its business based on gross receipts involving the same taxing period for the same purpose of raising revenues enforced within the City of Manila, validate the existence of direct duplicate taxation.

Contrary to petitioners' assertion, Section 21(A) of the MRC, as amended, clearly refers to business taxes on persons who sell goods and services in the course of trade or business, and not on their customers, thus, this provision does not pertain to an indirect tax.

The Court disagrees with petitioners' argument.

Double taxation means taxing the same property twice when it should be taxed only once. This means that the same person is taxed twice by the same jurisdiction for the same thing. The law prohibits direct duplicate taxation which takes place when two taxes are imposed on the same subject matter, for the same purpose, by the same taxing authority, within the same jurisdiction, during the same taxing period involving the same kind or character.[17]

To ascertain if the business taxes imposed under Sections 18 and 21 of the MRC, as amended, constitute direct duplicate taxation, it is imperative to look into the provisions of the 1991 Local Government Code, or also known as R.A. No. 7160.

Sections 151 and 143 of R.A. No. 7160 authorize a city to impose taxes, fees and charges similarly levied by a province or municipality, reading:

> SEC. 151. Scope of Taxing Powers. – Except as otherwise provided in this Code, the city may levy taxes, fees, and charges which the province or municipality may impose: x x x
>
> xxx xxx xxx
>
> SECTION 143. Tax on Business. – The municipality may impose taxes on the following businesses:
>
> (a) On manufacturers, assemblers, repackers, processors, brewers, distillers, rectifiers, and compounders of liquors, distilled spirits, and wines or manufacturers of any article of commerce of whatever kind or nature, in accordance with the following schedule: xxx
> (b) On wholesalers, distributers, or dealers in any article of commerce or whatever kind or nature in accordance with the following schedule: xxx
> (c) On exporters, and on manufacturers, millers, producers, wholesalers, distributors, dealers or retailers of essential commodities enumerated hereunder xxx
> (d) On retailers xxx

[17] *Commissioner of Internal Revenue vs. Bank of the Philippine Islands*, G.R. No. 147375, June 26, 2006, 492 SCRA 551 citing *Commissioner of Internal Revenue vs. Solidbank*, G.R. No. 148191, 25 November 2003, 416 SCRA 436.

> **(e) On contractors and other independent contractors, in accordance with the following schedule: xxx with gross sales or receipts for the preceding calendar year in the amount of xxx**
> (f) On banks and other financial institutions, at a rate x x x
> (g) On peddlers engaged in the sale of any merchandise or article of commerce, at a rate xxx
> **(h) On any business, not otherwise specified in the preceding paragraphs, which the sanggunian concerned may deem proper to tax: Provided, That on any business subject to the excise, value-added or percentage tax under the National Internal Revenue Code, as amended, the rate xxx** (Emphasis Supplied.)

The clause "on any business, not otherwise specified in the preceding paragraphs" pertaining to subsection (h) of Section 143 of R.A. No. 7160 means that a city is allowed to impose new business taxes as long as they are not among those enumerated in subsections (a) to (g) of Section 143 of the same code.

While Sections 18 and 21 of the MRC, as amended, provide:

> Section 18. – Tax on Contractors – A percentage is hereby imposed on contractors and other independent contractors, in accordance with the following schedule: With gross receipts for the preceding calendar year xxx
>
> xxx xxx xxx
>
> Section 21.- Tax on Businesses subject to the Excise, Value-Added or Percentage Taxes Under the NIRC – On any of the following businesses and articles of commerce subject to the excise, value-added or percentage taxes under the National Internal Revenue Code hereinafter referred to as NIRC, as amended, a tax of xxx xxx xxx on the gross sales or receipts of the preceding calendar year is hereby imposed:
>
> (A) On persons who sell goods and services in the course of trade or business; and those who import goods whether for business or otherwise, as provided for in sections 100 to 103 of the NIRC as

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> administered and determined by the Bureau of Internal Revenue pursuant to the pertinent provisions of the said code.
>
> xxx xxx xxx
>
> The tax shall be payable by the person paying for the services rendered and shall be paid to the person rendering the services who is required to collect and pay the tax within twenty (20) days after the end of each quarter.

Correlating the provisions of the MRC, as amended, and R.A. 7160, Section 18 is derived from Section 143 (e); and Section 21(A) is a variation of Section 143(h).

In essence, Section 18 of the MRC, as amended, imposes taxes on contractors based on their gross sales or receipts. Section 21 of the MRC, as amended, on the other hand, levies taxes on persons engaged in the sale of goods and services in the course of trade or business, including those who import goods, subject to excise, value-added or percentage taxes under the National Internal Revenue Code ("NIRC"), as amended, based on their gross sales or receipts.

This Court concurs with respondent's posture that the business taxes in Section 21 are the same business taxes referred to in Section 18 of the MRC, as amended. Section 131 (h) of R.A. No. 7160 defines a contractor as persons, natural or juridical, not subject to professional tax under Section 139 of this code, whose activity consists essentially of the sale of all kinds of services for a fee, regardless of whether or not the performance of the service calls for the exercise or use of the physical or mental faculties of such contractor or his employees. It can be deduced from the foregoing definition that a contractor is a person or entity engaged in the sale of services for a fee in the course of trade or business. Since the business taxes imposed in Section 21 similarly pertains to the business taxes levied in Section 18 of the MRC, as amended, there is a clear violation of Section 143 (h) of R.A. No. 7160.

We do not subscribe to petitioners' view that Section 18 of the MRC, as amended, is a tax on the respondent; while Section 21 of the same code is a tax on the end-users. As previously discussed, it is established that Section 21 is a tax on the business subject to excise, VAT and percentage taxes. The purchase of goods or services cannot be regarded as business activity within the scope of Section 21.

Simply stated, the business taxes based on respondent's gross receipts collected by petitioner City of Manila for the purpose of raising revenues pursuant to Sections 18 and 21 of the MRC, as amended, covering the years 1999, 2000 and 2001 result to direct duplicate taxation because the situation here involves taxing (a) twice, (b) by the same taxing authority, (c) within the same jurisdiction or taxing district, (d) for the same purpose, (e) same taxing period, and (f) the same object in the territory.

SECTION 187 OF R.A. 7160 APPLIES TO CASES INVOLVING QUESTIONS ON THE CONSTITUTIONALITY OF AN ORDINANCE OR REVENUE MEASURE, AND NOT IF THE CASE INVOLVES A TAX REFUND

Petitioners contend that direct duplicate taxation as a constitutional defense should have been earlier raised by the respondent with the Secretary of Justice before seeking judicial redress with this Court in accordance with Section 187 of R.A. No. 7160. The failure of the respondent to observe the provision of Section 187 is fatal to its cause.

Respondent maintains that it is not assailing the constitutionality or validity of Section 21 of the MRC, as amended, but merely insists that this provision and Section 18 of the same code constitute direct double taxation entitling it to recover what was illegally or erroneously collected by petitioner City of Manila.

We are not persuaded with the position taken by the petitioners.

The cause of action contesting the constitutionality or legality of the MRC is a different cause of action from the instant case involving a claim of refund of the additional taxes paid by the respondent under Section 21 of the same code. Logically, the provision of Section 187 of R.A. 7160 on questions involving the constitutionality or legality of a local tax ordinance and revenue measure is inapplicable to the instant case.

THE DEFENSE OF LACK OF LEGAL CAPACITY TO SUE BY MR. SALAMERA IN RESPONDENT'S BEHALF SHOULD HAVE BEEN TIMELY RAISED IN THE MOTION TO DISMISS OR ANSWER

According to petitioners, the Court in Division erroneously ruled that they are estopped from questioning Mr. Gener Salamera's capacity to sue for the respondent. At the onset, respondent's complaint filed with the RTC should have been dismissed outright for lack of capacity to sue because the authority of Mr. Salamera to appear in its behalf is not shown in a board resolution duly executed prior to the filing of this initiatory pleading.

Respondent asserts that the petitioners waived their defense of Mr. Salamera's lack of capacity to sue because they did not raise the same either in a Motion to Dismiss, or in the Answer pursuant to the 1997 Rules of Civil Procedure. Petitioners belatedly interpose the issue of the lack of capacity to sue in their Memorandum filed with the trial court.

Respondent's contention is meritorious.

Lack of legal capacity to sue means that the complainant is not in the exercise of his civil rights, or does not have the necessary qualification to appear in the case, or does not have the character or representation claimed. It refers to a complainant's general disability to sue, such as on account of minority, insanity, incompetence, lack of juridical personality, or any other disqualifications of a party.[18] The defense of lack of legal capacity to sue is among the grounds in dismissing an initiatory pleading or an incipient application of a party asserting a claim for relief[19], and may be raised in the Motion to Dismiss[20], or Answer as provided in Section 1 (d) and Section 6, Rule 16 and Section 1, Rule 9 of the 1997 Rules of Civil Procedure, stating:

Rule 16

MOTION TO DISMISS

> **SECTION 1.** Grounds. – Within the time for but before filing the answer to the complaint or pleading asserting a claim, a motion to dismiss may be made on any of the following grounds:
>
> **(d) That the plaintiff has no legal capacity to sue;** x x x (Emphasis Supplied.)
>
> xxx xxx xxx
>
> SEC. 6. Pleading grounds as affirmative defenses. – If no motion to dismiss has been filed, any of the grounds for dismissal provided in this Rule may be pleaded as an affirmative defense in the answer and, in

[18] *Lorenzo Shipping Corporation vs. Chubb & Sons,* G.R. 147724, June 8, 2004, 431 SCRA 266.
[19] *Carpio vs. Rural Bank of Sto. Tomas (Batangas), Inc.* G.R. No. 153171, May 4, 2006, 489 SCRA 492 citing *Sto. Tomas University Hospital v. Surla*, G.R. No. 129718, August 17, 1998, 294 SCRA 382.
[20] *Evangelista vs. Santiago*, G.R. No. 157447, April 29, 2005, 457 SCRA 744 citing *Columbia Pictures, Inc. vs. Court of Appeals,* G.R. No. 110318, August 28, 1996, 261 SCRA 144.

> the discretion of the court, a preliminary hearing may be had thereon as if a motion to dismiss had been filed. xxx

The effect of the failure to raise the affirmative defense of lack of legal capacity to sue in either a Motion to Dismiss, or in the Answer is a waiver of such defense pursuant to Section 1, Rule 9 of the 1997 Rules of Civil Procedure which provides:

> **Rule 9**
>
> **EFFECT OF FAILURE TO PLEAD**
>
> **SECTION 1. Defenses and objections not pleaded. – Defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived.** However, when it appears from the pleadings or the evidence on record that the court has no jurisdiction over the subject matter, that there is another action pending between the same parties for the same cause, or that the action is barred by a prior judgment or by statute of limitations, the court shall dismiss the claim (Emphasis supplied.)

A corporation such as the respondent cannot act on its own but through its board of directors. All corporate powers are exercised and all business conducted, and all properties controlled by the board of directors. A corporation has a separate and distinct personality from its directors and officers and can only exercise its corporate powers through the board of directors. Thus, an individual corporate officer cannot solely exercise any corporate power pertaining to the corporation without authority from the board of directors.[21]

In the case at bar, Mr. Salamera filed the complaint for tax refund, in behalf of the respondent before the RTC, without the requisite board of directors' approval. Mr. Salamera's absence of corporate representation is tantamount to his lack of legal capacity to sue for the respondent. Pursuant to Section 1, Rule 9 of the 1997 Rules of Civil Procedure, the petitioners should have brought to the RTC's attention of their defense of Mr. Salamera's lack of legal capacity to sue for the respondent in a Motion to Dismiss, or at the very least in the Answer filed before the trial court. For failure of the petitioners to timely interpose the defense of lack of legal capacity to sue against the respondent, they are barred in questioning the same before this Court.

THE TRIAL COURT CORRECTLY AMENDED THE DISPOSITIVE PORTION OF ITS DECISION DATED NOVEMBER 8, 2006

Records show that on November 25, 2006, the respondent filed with the RTC a Motion for Clarification and/or Amendment alleging among

[21] *Cagayan Valley Drug Corporation vs. Commissioner of Internal Revenue,* G.R. No. 151413, February 13, 2008.

others that the first sentence of the dispositive portion of the trial court's Decision dated November 8, 2006 contradicts the second sentence[22], reading:

> **WHEREFORE premises considered, the Court hereby orders the DISMISSAL of the petition. The respondent is hereby directed to refund or credit the amount of P4,722,672.68 representing the business tax paid under Section 21 of the Revenue Code for the period 1999, 2000 and 2001.xxx**[23] (Emphasis supplied.)

Acting on respondent's Motion for Clarification and/or Amendment of the Decision, the trial court issued an Order dated March 7, 2007 granting the same and amended accordingly the dispositive portion as follows:

> **WHEREFORE, premises considered, the petition is hereby GRANTED.** Defendants are restrained from collecting taxes under Section 21 of the City's Revenue Code. The defendants are directed to refund or credit the amount of P4,722,672.68 representing the business taxes by plaintiff for the years 1999, 2000 and 2001 under Section 21 of the City's Revenue Code. Without pronouncement as to costs.[24] (Emphasis Supplied.)

Petitioners allege that in concurring with the RTC's Order dated March 7, 2007, the Court in Division, in its Decision dated August 30, 2007, should have explained the reason why the trial court correctly amended the dispositive portion of its original Decision dated November 8, 2006. *ge*

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[22] Records of CTA AC Case No. 29, p. 43.
[23] Records of CTA AC Case No. 29, p. 42.
[24] Records of CTA AC Case No. 29, p. 46.

Respondent asseverates that the amendment undertaken by the trial court was to rectify its error, and for the body of the decision to be in consonance with the dispositive portion thereof.

The Court disagrees with petitioners' stance.

As correctly pointed by the respondent that while the first sentence of the dispositive portion of the RTC's Decision dated November 8, 2006 refers to the dismissal of its action for tax refund, the second sentence thereof, directs the petitioners to refund or credit the amount of business taxes of P4,722,672.68 paid under Section 21 of the MRC, as amended, for the years 1999, 2000 and 2001. The clear disparity between the first and second sentences of the dispositive portion of the RTC's Decision dated November 8, 2006 requires an examination of the body of the trial court's ruling as held in the case of *Jacinto Galang vs. Court of Appeals*[25], where the Supreme Court made the following pronouncements:

> [W]here there is ambiguity caused by an omission or mistake in the dispositive portion of a decision the court may clarify such ambiguity by an amendment even after judgment had become final, and for this purpose it may resort to the pleadings filed by the parties, the court's findings of facts and conclusions of law as expressed in the body of the decision.[26]

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[25] G.R. 139448, October 11, 2005, 472 SCRA 259 citing *Filipino Legion Corporation vs. Court of Appeals,* G.R. L-22364 and No. L-28330, April 30, 1974, 56 SCRA 674.
[26] Id.

In the body of the Decision dated November 8, 2006, the RTC agreed with the findings of the Department of Finance that the additional business taxes imposed by the petitioners result to double taxation. Thus, on the basis of the body of the decision, the RTC correctly ruled on the existence of direct duplicate taxation and aptly made the necessary modification to harmonize both the dispositive portion and the body of the trial court's ruling dated November 8, 2006 as affirmed by the Court in Division which ordered the refund and credit of the business taxes in favor of the respondent.

In the event there exists an ambiguity in the dispositive portion of a decision, or the body of the decision contradicts with the dispositive portion, the Supreme Court's ruling in the case of *Rosales vs. Court of Appeals*[27] is instructive, *viz*:

> The general rule is that where there is a conflict between the dispositive portion or the fallo and the body of the decision, the fallo controls. This rule rests on the theory that the fallo is the final order while the opinion in the body is merely a statement ordering nothing. **However, where the inevitable conclusion from the body of the decision is so clear as to show that there was a mistake in the dispositive portion, the body of the decision will prevail.** [28] (Emphasis supplied.)

As to the amount of refund, the Court in Division correctly reduced the amount of business taxes from P4,722,672.68 to P2,893,423.28 on the

[27] G.R. 137566, February 28, 2001, 353 SCRA 179.
[28] Id.

ground that the claimed business tax payments amounting to P1,829,249.40 for the year 1999 had prescribed beyond the two (2) year reglementary period counted from payment.[29]

WHEREFORE PREMISES CONSIDERED, the Petition for Review is hereby **DISMISSED.** The assailed Decision dated August 30, 2007 and Resolution dated November 13, 2007 are **SUSTAINED**.

SO ORDERED.

JUANITO C. CASTAÑEDA, JR.
Associate Justice

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Justice

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

See attached Concurring & Dissenting Opinion

OLGA PALANCA-ENRIQUEZ
Associate Justice

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[29] Rollo, pp. 35-36. See Section 196 of R.A. 7160.

CERTIFICATION

Pursuant to Article VIII, Section 13 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.

ERNESTO D. ACOSTA
Presiding Justice

REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

CITY OF MANILA and LIBERTY M. TOLEDO, as City Treasurer of Manila, *Petitioners,*	**C.T.A. EB NO. 337** **(C.T.A. AC NO. 29)**
	Present:
-versus-	ACOSTA, Presiding Justice, CASTAÑEDA, JR., BAUTISTA, UY, CASANOVA, and PALANCA-ENRIQUEZ, JJ.
COLUMBIA PICTURES INDUSTRIES, INC., *Respondent.*	**Promulgated:** AUG 0 5 2008 C. Apolinario 2:15 p.m.

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CONCURRING AND DISSENTING OPINION

PALANCA-ENRIQUEZ, J.:

Concurring

I concur with the *Ponente*, in so far as he ruled that:

a) The cause of action contesting the constitutionality or legality of the Manila Revenue Code ("MRC") is a different cause of action from the instant case involving a claim of refund of the additional

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taxes paid by respondent Columbia Pictures Industries, Inc. *under Section 21 of the same Code*; that the provision of *Section 187 of RA 7160* prescribing the procedure on how to assail the constitutionality or legality of tax ordinances or revenue measures is inapplicable to the instant case;

b) The effect of failure to raise the affirmative defense of lack of legal capacity to sue either in a motion to dismiss, or in the answer is a waiver of such defense, pursuant to *Section 1, Rule 9 of the 1997 Rules of Civil Procedure*; that for petitioners' failure to timely interpose the defense of lack of legal capacity to sue of Mr. Salamera for the respondent, petitioners are, now barred from questioning the same before this Court; and

c) When there exists an ambiguity in the dispositive portion of a decision, or when the body of the decision contradicts with the dispositive portion, the Court may properly amend its decision to rectify its error and for the body of the decision to be in consonance with the dispositive portion thereof.

Dissenting

However, with due respect to the Majority, after taking a second hard look at the pertinent facts of the case, in relation to applicable laws and jurisprudence, and consistent with my Dissenting Opinions in the cases of *Liberty M. Toledo, in her Capacity as The Treasurer of the City of Manila vs. Unilever Philippines, Inc., C.T.A. AC No. 21,* promulgated on May 10, 2007; *Unilever Philippines, Inc. vs. The Treasurer of the City of Manila, C.T.A. AC No. 25,* promulgated on June 18, 2007; *Treasurer of the City of Manila vs. Alcan Packaging Corporation (formerly Starpack Philippines Corporation), C.T.A. EB No. 261* promulgated on July 30, 2007, I find it difficult to agree with the Majority that there exists a direct duplicate taxation between *Sections 18 and 21 of the MRC*, for the following ratiocinations:

The Taxes Imposed By *Sections 18 and 21 of the Revenue Code of Manila* are Two Different and Distinct Taxes, as they Embrace Two Different Subject Matters

Section 18 of Ordinance No. 7794 provides:

> "SEC. 18. *Tax on Contractors.* – A percentage tax is hereby imposed on contractors and other independent contractors, in accordance with the following schedule:
>
> xxx xxx."

The above provision imposes a percentage tax on contractors with the gross sales or receipts for the preceding calendar year in the schedule provided therein. In other words, in *Section 18* the tax is imposed on the construction business.

On the other hand, *Section 21 of Ordinance No. 7794*, as amended by *Ordinance No. 7807,* provides:

> "SEC. 21. – Tax on Businesses Subject to the Excise, Value Added or Percentage Taxes under the NIRC – On any of the following businesses and articles of commerce subject to the excise, value added or percentage taxes under the National Internal Revenue Code hereinafter referred to as the NIRC, as amended, a tax of fifty percent (50%) of one percent (1%) per annum on the gross sales or receipts of the preceding calendar year is hereby imposed:
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> A) On persons who sell goods and services in the course of trade or business; and those who import goods whether for business or otherwise, as provided for in Sections 100 to 103 of the NIRC as administered and determined by the Bureau of Internal Revenue pursuant to the pertinent provisions of the said code.
>
> B) On the gross receipts of keepers of garages, cars for rent or hire driven by the lessee, transportation

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contractors, persons who transport passengers or freight for hire, and common carriers by land, air or water, except owners of bancas and owners of animal-drawn two-wheel vehicle.

C) On the amount paid on every overseas dispatch, message or conversation transmitted from the Philippines by telephone, telegraph, telewriter exchange, wireless and other communication equipment services, except amounts paid by the government, its political subdivisions or instrumentalities; diplomatic services; public international organizations or any of their agencies based in the Philippines; and news services.

The tax shall be payable by the person paying for the services rendered and shall be paid to the person rendering the services who is required to collect and pay the tax within twenty (20) days after the end of each quarter.

D) Excisable goods subject to VAT

(1) Distilled spirits
(2) Wines
(3) Tobacco products (other than cigarettes, cigars and chewing tobacco)
(4) Tobacco specially prepared for chewing
(5) Fireworks
(6) Cinematographic films
(7) Saccharine
(8) Coal and coke
(9) Fermented liquor, brewers' wholesale price, excluding the ad valorem tax
(10) Automobiles, manufacturers or importers selling price
(11) Non-essential goods based on wholesale price, net of excise tax and VAT

(a) Jewelry, whether real and imitation, pearls, precious and semi-precious stones and imitations thereof; goods made of, or ornamented, mounted or fitted with precious metals or imitations thereof or ivory (not including surgical and dental instruments, silver-plated wares, frames or mountings for spectacles or eyeglasses and dental gold or gold alloys and other precious metals used in filling, mounting or fitting of the teeth.)

(b) Perfumes and toilet waters.

(c) Yachts and other vessels intended for pleasure sports.

(12) Mineral products, based on actual market value of the annual gross output at the time of removal.

E) Excisable goods not subject to VAT.

(1) Naptha when used as raw materials for production of petro-chemical products.

(2) Asphalt

xxx xxx."

Pursuant to the above provision, the tax under *Section 21(A)* is imposed on businesses subject to excise, value-added or percentage taxes under the NIRC. Therefore, a contractor whose business is not subject to value added tax is beyond the contemplation of *Section 21*. To illustrate, a contractor whose gross receipts do not exceed P550,000.00 under the *NIRC of 1997, as amended,* or P1,500,000.00 under *RA 9337* is VAT exempt. Applying *Section 21*, it is not subject to local business tax thereunder. However, such contractor may be liable to pay the local business tax under *Section 18*.

Further, *Section 21* is not a direct tax on persons who sell goods and services in the course of trade or business, and those who import goods whether for business or otherwise, but a tax payable by the persons paying for the services rendered by the respondent, in view of the modifying paragraph of *Section 21,* which states that "the tax shall be payable by the person paying for the services rendered and shall be paid to the person rendering the services who is required to collect and pay the tax, within twenty (20) days after the end of each quarter". Respondent merely acts as the withholding or collecting agent of the tax paid by the persons paying for or availing of the construction services of the respondent.

A careful examination and scrutiny of *Section 21 of Ordinance No. 7794, as amended by Ordinance No. 7807,* clearly shows that the

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qualifying provision on who is required to pay the tax applies to *subsections A, B and C,* as shown by the fact that *subsections A, B and C* enumerate business establishments that are subject to tax. The succeeding *subsections D and E* already classify the goods that are subject and not subject to Value Added Tax.

The fact that said qualifying provision applies to *subsections A, B, and C of Section 21* is clear from *Section 21* itself considering that said qualifying provision was embodied and incorporated in *Section 21,* as a separate and concluding paragraph for business establishments enumerated in *subsections A, B and C of Section 21.* It is bolstered by the fact that said modifying provision provides a period when to pay the tax, to wit, "within twenty (20) days after the end of each quarter", which is applicable to all consumers/end-users of business establishments enumerated in *subsections A, B and C of Section 21,* including those who sell services, like respondent.

It is clear, categorical, and needs no further interpretation or construction. Settled is the rule in statutory construction that "when the

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law is clear, the function of the courts is simple application" *(Woodridge School, Inc. vs. ARB Construction Co., Inc., 516 SCRA 185).*

Considering that *Section 21* was not declared invalid, the above-quoted modifying provision is also presumed valid. After all, such proviso transgresses no inherent and constitutional provisions. Neither is it antithetical to any of the fundamental principles of local taxation under *Section 130 of the LCG*. A *fortiori*, the local business tax is a tax on end users, thereby negating the presence of direct double taxation.

<u>Elements of
Double Taxation</u>

Double taxation is sometimes known as "duplicate" taxation. Duplicate taxation may be direct or indirect. Direct duplicate taxation or double taxation in the objectionable or prohibited sense (also known as obnoxious) means that the same property is taxed twice when it should be taxed only once; and that both taxes are imposed on the same property or subject matter for the same purpose, by the same State, Government, or taxing authority within the same jurisdiction or taxing district during the same taxing period and covering the same kind or character of tax (*Villanueva vs. City of Iloilo, 26 SCRA 594*).

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On the other hand, indirect duplicate taxation is permissible double taxation. This is allowed if the taxes are of different nature or character, imposed by different taxing authorities (*Tax Principles and Remedies by Japar B. Dimaampao, 2nd ed., p. 122*).

The elements of direct double taxation are as follows:

1) taxing twice;
2) same person/property or subject matter;
3) by the same taxing authority;
4) within the same jurisdiction or taxing district;
5) for the same purpose; and
6) in the same year or taxing period.

<u>No Double Taxation</u>

These elements do not obtain in the case of *Sections 18 and 21(A) of Ordinance No. 7794,* as amended by *Ordinance No. 7807*.

First, these two (2) taxes are of two (2) different kinds or characters. The tax imposed upon respondent under *Section 18* is a tax on contractors. It is classified as a direct tax, which is demanded from the petitioner primarily burdened to pay the same, in contrast to *Section 21,*

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which is payable not by the respondent itself, but by the persons availing of the construction services of the respondent, akin to an indirect tax. Respondent only acts as the withholding or collecting agent of the City of Manila of the tax imposed on its customers.

Second, the taxes in *Sections 18 and 21* are payable by two entirely different and distinct entities. *Section 18* is payable by the respondent, as a construction business. On the other hand, *Section 21* is payable by respondent's customers, or the persons availing of respondent's services.

Third, although the two taxes deal on one activity, the construction activity, *Sections 18 and 21* are imposed on different subject matters. The subject matter of *Section 18* is the privilege on engaging in the construction business. The tax is imposed for the business of operating a construction establishment. On the other hand, *Section 21* is imposed on establishments subject to excise, value-added or percentage taxes under the NIRC, which may not be subject to *Section 21*, if said business establishment is exempt from excise, value-added or percentage taxes under the NIRC, as previously illustrated. It is payable by the persons availing of the services of such business establishments.

Evidently, a tax on respondent, as a contractor, is different from the tax imposed on businesses subject to excise, value added or percentage tax, payable by their customers. Under *Section 21*, respondent merely acts as the withholding or collecting agent of the City of Manila, while the ones actually paying the tax are its customers/end-users.

In sum, there is no double taxation, because there is no taxing twice, on the same person *(Procter & Gamble Philippines Manufacturing Corp., vs. Municipality of Jagna, 94 SCRA 903)*, or the same subject matter, by the same taxing authority, within the same jurisdiction, in different taxing periods, some of the property in the territory.

Considering that the taxes sought to be refunded herein were imposed under *Section 21 of Ordinance No. 7794,* the original ordinance, *as amended* by the first amendatory *Ordinance No. 7807*, which still both subsist, and considering further that the ruling in the *Coca-Cola Bottlers Phils., Inc. vs. City of Manila, et al., 493 SCRA 291*, declared null and void *Ordinance Nos. 7988 and 8011* only, I reiterate that respondent is covered by *Section 21.* Respondent cannot, therefore, be exempted from the imposition of *Section 21*.

It has always been the rule that those seeking tax refunds or credits bear the burden of proving the factual bases of their claims and of showing, by words too plain to be mistaken, that the legislature intended to entitle them to such claims [*Commissioner of Internal Revenue vs. Seagate Technology (Philippines), 451 SCRA 152; Atlas Consolidated Mining and Development Corporation, 518 SCRA 428*].

OLGA PALANCA-ENRIQUEZ
Associate Justice

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