REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

EN BANC

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

- versus -

FSM CINEMAS, INC.,
Respondent.

CTA EB No. 977
(CTA CASE NO. 7074)

Present:

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

Promulgated:

JUL 22 2014

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DECISION

DEL ROSARIO, PJ.:

This is a Petition for Review filed by the Commissioner of Internal Revenue on January 17, 2013 seeking the reversal of the Decision dated September 26, 2012 and the Resolution dated December 11, 2012 rendered by the former Third Division[1] of this Court in CTA Case No. 7074, entitled *FSM Cinemas Inc., vs. Commissioner of Internal Revenue*, which partially granted FSM Cinemas Inc.'s prayer for the cancellation of the Formal Letter of Demand and Formal Assessment Notices dated December 15, 2003.

The dispositive portions of the assailed Decision and Resolution are quoted hereunder:

[1] Composed of Associate Justice Lovell R. Bautista as Chairperson, Associate Justice Olga Palanca-Enriquez and Associate Justice Amelia R. Cotangco-Manalastas, as members.

Decision dated September 26, 2012:

"**WHEREFORE**, premises considered, the present Petition for Review is hereby **PARTLY GRANTED**. Accordingly, the Formal Letter of Demand, with Formal Assessment Notices:

1) No. IT-3362-99-03-507, for deficiency Income Tax, in the amount of P5,404,829.89; and

2) No. VT-3362-99-03-507, for deficiency Value-Added Tax, in the amount of P17,000,253.28.

are hereby ordered **CANCELLED** and **SET ASIDE**, solely in view of petitioner's availment of Tax Amnesty *under RA 9480*;

3) No. WE-3362-99-03-507, for deficiency Expanded Withholding Tax, in the amount of P633,228.61 is hereby ordered **CANCELLED** and **SET ASIDE**, for having been issued beyond the three (3)-year prescriptive period to assess; and

4) No. WC-3362-99-03-507, for basic deficiency Withholding Tax on Compensation, in the amount of P7,450.27 is hereby **UPHELD**. In addition, petitioner is ordered to pay the following:

a) 25% surcharge of the basic deficiency Withholding Tax on Compensation of P7,450.27, pursuant *to Section 248 (A) (3) of the NIRC of 1997, as amended*;

b) Deficiency interest at the rate of twenty percent (20%) per annum on the basic deficiency Withholding Tax on Compensation of P7,450.27, computed from January 25, 2000, until full payment thereof, pursuant to *Section 249 (B) of the NIRC of 1997, as amended*; and

c) Delinquency interest at the rate of twenty percent (20%) per annum on the total amount of P9,312.84, representing the basic deficiency Withholding Tax on Compensation of P7,450.27, 25% surcharge of P1,862.57 and on the 20% deficiency interest which have accrued as afore-stated in (b), computed from January 19, 2004, until full payment thereof, pursuant to *Section 249 (C) of the NIRC of 1997, as amended.*

SO ORDERED."

Resolution dated December 11, 2012

> "**WHEREFORE**, premises considered, respondent CIR's "Motion for Reconsideration" is hereby **DENIED** for lack of merit."

THE FACTS

Petitioner FSM Cinema, Inc. (FSM), a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines, is primarily engaged in the servicing, booking, and arranging of films, programs, shows, plays and movies of all kinds, types, makes and colors for movie houses, theaters or cinemas and to exhibit, lease, run or operate movie houses, theaters, cinemas[2], as well as supply equipment, machines and accessories needed in cinemas, theaters or movie houses. Its principal place of business is located at 4th level, Festival Supermall, Inc., Filinvest Corporate City, Alabang, City of Muntinlupa, Metro Manila.[3]

Respondent is the duly appointed Commissioner of Internal Revenue (CIR), vested under the appropriate laws with 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 of 1997, as amended* (1997 NIRC). She may be served with summons and other court processes at the 5th Floor, BIR National Office Building, BIR Road, Diliman, Quezon City, Metro Manila.[4]

On November 22, 2000, the Bureau of Internal Revenue (BIR) issued Letter of Authority (LOA) No. 00013797, for the examination of FSM's books of accounts and other accounting records for all internal revenue taxes for calendar year 1999.[5]

On December 19, 2003, FSM received Final Assessment Notice (FAN) No. IT-3362-99-03-507, for deficiency income tax, in the amount of P5,404,829.89; FAN No. VT-3362-99-03-507, for deficiency value-added tax (VAT), in the amount of P17,000,253.28; FAN No. WC-3362-99-03-507, for deficiency withholding tax on compensation (WTC), in the amount of P13,353.33; and FAN No. WE-3362-99-03-507, for deficiency expanded

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[2] Par. 2, Joint Stipulation of Facts and Issues (JSFI), *Division Docket*, p. 60.
[3] Par. 1, *Id.*
[4] Par. 3, *Id., Division Docket*, p. 61.
[5] Par. 4, *Id.*

withholding tax (EWT), in the amount of P633,228.61, all of which are dated December 15, 2003.[6]

On January 16, 2004, FSM filed its formal protest[7] against the afore-said FANs, pursuant to Section 228 of the 1997 NIRC.[8]

The CIR failed to act on FSM's protest within the 180-day period from March 16, 2004, the date when FSM submitted documents in support of its protest,[9] which is also the last day of the 60-day period for FSM to submit supporting documents, reckoned from the filing of its formal protest on January 16, 2004.

On October 12, 2004, FSM filed a Petition for Review[10] before the Court in Division.

CIR filed her Answer[11] on January 12, 2005 and raised special and affirmative defenses which are summarized hereunder:

> a) It was not shown that Josephine Gotianum Yap was authorized by the Board of Directors of FSM to institute a suit on its behalf;
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> b) FSM failed to withhold the tax due on income payments/expenditures to its projectionist;
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> c) Based on FSM's return, its sales/receipts is only P15,100,152.00 but investigation disclosed that it has taxable sales/receipt from its cinema house, snack bar and other income in the total amount of P89,261,650.00;
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> d) The withholding tax due from compensations paid by FSM is P92,443.91 but the tax withheld based on its return is only P84,993.64;
>
> e) FSM failed to withhold the tax due on its income payments to projectionist, electrician/plumber, film rental, cashiering labor and rental which made it liable for deficiency tax in the total amount of P633,228.61, inclusive of interest; and,
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> f) All presumptions are in favor of tax assessments.

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[6] Par. 6, JSFI, *Division Docket*, p. 61.
[7] Exhibit "13", *BIR Records*, p. 565 to 571.
[8] Par. 7, *Division Docket*, p. 62.
[9] Exhibit "UUU", Division Docket, pp. 479 to 482.
[10] Petition for Review dated October 11, 2004 docketed as CTA Case No. 7074, *Division Docket*, pp. 1 to 11.
[11] Answer dated January 4, 2005, *Division Docket*, pp. 34 to 37.

On February 10, 2010, FSM filed a *"Motion to Declare the Alleged Deficiency Income Tax and Value-Added Tax Assessments Extinguished under Republic Act No. 9480."*[12]

On March 16, 2010, FSM filed a Manifestation[13] stating that it filed a "Motion to Declare Alleged Deficiency Income Tax and VAT Assessments Extinguished under Republic Act (RA) No. 9480" and submitted the following documents:

1) BIR Form No. 2116 — Tax Amnesty Return;

2) BIR Form No. 0617 — Tax Amnesty Payment Form;

3) Notice of Availment of Tax Amnesty;

4) Statement of Assets, Liabilities and Networth as of 31 December 2005;

5) Balance Sheet as of 31 December 2005; and,

6) Bank Official Receipt issued by an authorized agent bank covering the payment of amnesty tax on 04 March 2008.

On November 19, 2010, the Court ordered FSM to submit the original or certified true copies of the following documents:

1) BIR Form No. 2116 — Tax Amnesty Return;

2) BIR Form No. 0617 — Tax Amnesty Payment Form;

3) Notice of Availment of Tax Amnesty; and,

4) Statement of Assets, Liabilities and Networth as of 31 December 2005;

On March 4, 2011, FSM filed a "Compliance/Submission"[14] submitting the original of its Balance Sheet as of 31 December 2005 and the faithful reproduction of the original copies of BIR Form No. 2116 — Tax Amnesty Return, BIR Form No. 0617 — Tax Amnesty Payment Form, Notice of Availment of Tax Amnesty, Statement of Assets, Liabilities and Networth as of 31 December 2005 and Bank Official Receipt issued by an authorized agent bank covering the payment of amnesty tax on 04 March 2008. ꟽ

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[12] *Division Docket*, pp. 579 to 581.
[13] *Division Docket*, pp. 587 to 588.
[14] *Division Docket*, pp. 706 to 707.

On April 4, 2011, in view of FSM's availment of Tax Amnesty under RA No. 9480, the Court issued a Resolution[15] declaring the Petition for Review as partially withdrawn and correspondingly treating the assessment as closed and terminated insofar as the alleged deficiency income tax and VAT assessments were concerned, subject to the provisions of RA No. 9480.

On February 10, 2012, the Court in Division submitted the case for decision.[16]

As afore-stated, the Court issued the assailed Decision on September 6, 2012 partially granting FSM's Petition for Review. Aggrieved, CIR filed a Motion for Reconsideration on October 16, 2012 which was denied by the Court in Division in the assailed Resolution.

Hence, CIR filed this Petition for Review on January 17, 2013 praying that the Court *En Banc* set aside the assailed Decision and Resolution. CIR prays that the Court *En Banc* render judgment declaring that the Court in Division has no jurisdiction to take cognizance of FSM's Petition for Review as the FANs have attained finality.

FSM failed to comment on CIR's Petition for Review despite due notice.[17] On December 18, 2013, the Court *En Banc* gave due course to the present Petition for Review and required the parties to submit their respective memoranda within thirty (30) days from notice.[18]

The subject Petition for Review was submitted for decision after the filing of FSM' s Memorandum on February 7, 2014 and after noting CIR's failure to file her memorandum within the prescribed period.[19]

ISSUES

Petitioner raised the following issues for the Court *En Banc*'s resolution:

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[15] *Division Docket*, pp. 732 to 734.
[16] *Division Docket*, pp. 776 to 777.
[17] *Rollo,* p. 111.
[18] *Rollo*, pp. 113 to 114.
[19] *Rollo, unpaginated.*

(1) Whether or not [the] filing of FSM's Petition for Review on October 12, 2004 with the Court in Division is already time-barred.

(2) Whether or not FSM and the Court have the power and authority to question the validity of the subject assessments that had already attained finality.[20]

RULING OF THE COURT *EN BANC*

FANs have not attained finality

CIR claims that FSM's Protest dated January 15, 2004 (Exhibit "H") has been denied admission by the Court in Division; it is as if no protest was filed by FSM against the FANs, which thereby became final, executory and demandable. Hence, the Court in Division has no jurisdiction to rule on the validity of the FANs as well as the validity of FSM's availment of the tax amnesty under RA No. 9480.

Records reveal that the Court in Division indeed denied the admission of FSM's Exhibit "H" (FSM's Protest Letter dated January 15, 2004). This denial is not, however, sufficient to conclude that FSM did not file a valid protest to the FANs.

A more careful scrutiny of the records shows the following:

a) The CIR also formally offered the FSM's Protest Letter dated January 15, 2014 as Exhibit "13"[21] which was admitted by the Court in Division in its Resolution dated August 3, 2009;[22]

b) In CIR's Answer[23] to FSM's Petition for Review, CIR admitted FSM's material allegations in its Petition for Review, viz.:

> "1) He ADMITS the material allegation in paragraphs 1, 2, 3, 4, **5**, and 12 of the Petition; xxx" (*Emphasis and underlining supplied*)

Paragraph 5 of FSM's Petition for Review[24] alleges that:

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[20] Petition for Review dated January 9, 2013, *Rollo*, p. 10.
[21] *Division Docket*, p. 548.
[22] *Division Docket*, pp. 553.
[23] Par. 1, Answer dated January 4, 2005, *Division Docket*, p. 34.
[24] Par. 5, Petition for Review, *Division Docket*, p. 4.

> "5. **On January 16, 2014, Petitioner, through counsel, filed its formal protest against the subject FANs**, pursuant to Section 228 of the NIRC, as amended. Said protest letter, attached hereto and made an integral part hereof as Annex "B", identified, objected to, and contested each alleged deficiency tax assessment as per the FANs issued by Respondent, providing factual and legal bases against said alleged deficiency tax assessments, and further requested for [a] reconsideration and reinvestigation of the subject alleged deficiency tax assessments." (*Emphasis supplied*)

c) In the Joint Stipulation of Facts and Issues[25] submitted by FSM and CIR to the Court in Division, they stipulated that FSM filed a protest letter, *viz*.:

> "7. On January 16, 2004, Petitioner, through a counsel, filed its formal written protest against the subject FANs, pursuant to Section 228 of the NIRC, as amended."

Section 4 of Rule 129 of the Rules of Court provides:

> **Section 4.** *Judicial admissions.* — **An admission, verbal or written, made by the party in the course of the proceedings in the same case, does not require proof.** The admission may be contradicted only by showing that it was made through palpable mistake or that no such admission was made.

As afore-stated, while FSM's Exhibit "H" was denied admission, petitioner nonetheless admitted in its Answer and in the Joint Stipulation of Facts and Issues that FSM filed a protest letter. The parties' judicial admission is even supported by the admission of CIR's Exhibit "13" (FSM's Protest Letter dated January 15, 2014) as evidence.

In other words, CIR's contention that the FANs have become final and executory as no valid protest was deemed filed by FSM in view of the denial of the admission of FSM's Exhibit "H" must necessarily fail. Since the FANs have not become final and executory, the Court in Division correctly assumed jurisdiction over FSM's Petition for Review pursuant to Section 7(a) of RA No. 1125, as amended, and as implemented by Section 3(a) of Rule 4 of the 2005 Revised Rules of the Court of Tax Appeals (CTA), as amended. om

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[25] Par. 7, JSFI, *Division* Docket, p. 62

FSM timely filed its Petition for Review with the Court in Division on October 12, 2004

CIR postulates that in view of FSM's failure to submit supporting documents in support of the protest within the 60-day period, which is reckoned from the filing of its protest on January 16, 2004, the 180-day period for the BIR to act on the protest should be counted from January 16, 2004. CIR insists that the 180-day period expired on July 14, 2014 and FSM had only until August 13, 2004 within which to file a Petition for Review before the Court in Division.

The Court *En Banc* notes that FSM offered as evidence Exhibit "UUU" (previously marked as Exhibit "YYYY"),[26] a Letter dated March 15, 2004, which was **received by the BIR on March 16, 2004,** wherein FSM raised additional arguments and submitted a photocopy of its "Annual Information Return of Income Tax Withheld on Compensation, Expanded and Final Withholding Taxes for the year 1999 (BIR Form No. 1604)" and a photocopy of its "Alpha List of Payees subject to Expanded Withholding Tax for the year 1999", in support of its protest.

In view of FSM's submission of relevant documents to the BIR within the 60-day period from the filing of its protest on January 16, 2004, **the 180-day period within which the BIR should act on the protest commenced on March 16, 2004** and not on January 16, 2004. The BIR had until September 12, 2004 within which to act on the protest. Since there was no action on the part of the BIR, FSM had thirty (30) days from September 12, 2004 or until **October 12, 2004** within which to file a Petition for Review before the Court in Division to appeal the BIR's inaction. Undeniably, FSM filed its Petition for Review before the Court in Division on October 12, 2004.

In fine, since the FANs issued by the BIR have not become final and executory, and considering that FSM timely filed its Petition for Review before the Court in Division, the Court in Division correctly assumed jurisdiction over the case.

WHEREFORE, in light of the foregoing principles, the *Petition for Review* filed by the Commissioner of Internal Revenue is hereby **DENIED** for lack of merit. Accordingly, the Decision dated September 26, 2012 and the Resolution dated December 11, 2012 rendered by the former Third

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[26] *Division Docket,* pp. 479 to 482.

Division of this Court in CTA Case No. 7074, entitled *FSM Cinemas Inc., vs. Commissioner of Internal Revenue* are hereby **AFFIRMED**.

SO ORDERED.

ROMAN G. DEL ROSARIO
Presiding Justice

WE CONCUR:

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

LOVELL R. BAUTISTA
Associate Justice

ERLINDA P. UY
Associate Justice

CAESAR A. CASANOVA
Associate Justice

ESPERANZA R. FABON-VICTORINO
Associate Justice

Cielito N. Mindaro-Grulla
CIELITO N. MINDARO-GRULLA
Associate Justice

AMELIA R. COTANGCO-MANALASTAS
Associate Justice

MA. BELEN M. RINGPIS-LIBAN
Associate Justice

CERTIFICATION

Pursuant to Section 13 of Article VIII 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 *En Banc*.

ROMAN G. DEL ROSARIO
Presiding Justice