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REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

ATLAS CEMENT CORPORATION,
Petitioner,

- versus -

C.T.A. CASE NO. 5011

LIWAYWAY VINZONS-CHATO, in her capacity as the Commissioner Of Internal Revenue,
Respondent.

Promulgated:

NOV 14 1997

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DECISION

This is a petition for review filed by the petitioner, ATLAS CEMENT CORPORATION, against the respondent COMMISSIONER OF INTERNAL REVENUE, for the latter's decision to assess the former the total amount of P5,329,064.67 allegedly representing the deficiency income tax on the disallowed interest expense or payments (back-to-back loan transaction), of the petitioner for the fiscal year ended June 30, 1989.

The antecedent facts of the case are as follows:

Petitioner is a domestic corporation duly organized and existing under the laws of the Republic of the Philippines and is engaged in the cement business.

On October 20, 1992, respondent issued against the petitioner a deficiency income tax assessment for 1989 in the total amount of ₱5,329,064.67, inclusive of surcharge, interest and compromise penalty. The deficiency assessment was the result of the disallowance by the respondent of the petitioner's claimed deduction from its gross income, particularly its interest expenses or payments arising from back to back loan transactions.

In a letter, dated November 23, 1992 (Exhibit "D"), petitioner protested the aforecited deficiency income tax assessment and prayed for the reconsideration, reinvestigation and recall of the said assessment for lack of legal basis.

The petitioner's protest was denied by the respondent thru its letter to the petitioner, dated June 2, 1993 (Exhibit "E"), and received by the latter on the 23rd day of the said month and year. Hence, on July 21, 1993, petitioner filed with this Court this instant petition for review.

During the initial stage of the trial, the sole issue that came to fore for our consideration was: WHETHER OR NOT INTEREST EXPENSES INCURRED BY THE PETITIONER IN ITS BACK-TO-BACK LOAN TRANSACTIONS ARE DEDUCTIBLE FROM ITS GROSS INCOME.

Upon presentation of the petitioner of its rebuttal/additional evidence, a prejudicial issue cropped up and that was: WHETHER OR NOT THE RIGHT OF THE

RESPONDENT TO ASSESS THE PETITIONER'S DEFICIENCY INCOME TAXES FOR 1989 HAS PRESCRIBED.

Petitioner, in its rebuttal, stressed that after a perusal of the records of the BIR, it was discovered that the assessment notice FAS 1-89-92-004149 which was issued by the respondent for alleged deficiency income tax for the taxable year 1989 was dated October 20, 1992. Since its fiscal year ended June 30, 1989, the deadline for the filing of petitioner's income tax return for the taxable period of 1989 should be on October 15, 1989, and since this date fell on a Sunday, it was eventually filed only on the 16th of October, 1989. Thus, petitioner concluded that the assessment notice FAS 1-89-92-004149 was without any legal effect for having been issued beyond the prescribed period for assessment as provided for in Section 203 of the NIRC in relation to Section 70(b) also of the Tax Code, which provides, to wit:

> **SEC. 203.** ***Period of limitation upon assessment and collection.*** - Except as provided in the succeeding section, internal revenue taxes shall be assessed within three years after the last day prescribed by law for the filing of the return, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period: Provided, That in a case where a return is filed beyond the period prescribed by law, the three-year period shall be counted from the day the return was filed. For the purposes of this section, a return filed before the last day prescribed by law for the filing

> thereof shall be considered as filed on such last day. (As amended by B.P. Blg. 700)
>
> **SEC. 70.** (a) x x x
>
> (b) *Time of filing the income tax return.* - The corporate quarterly declaration shall be filed within sixty (60) days following the close of each of the first three quarters of the taxable year. The final adjustment return shall be filed on or before the 15th day of April or on or before the 15th day of the 4th month following the close of the fiscal year, as the case may be.

Further, petitioner expounded that the waivers of the defense of prescription which were executed in its behalf, one undated and the other dated February 12, 1993, found on pages 179 and 202 of the BIR records (Exhibits "N" and "O") are invalid and without binding effect, since these were not signed by the Commissioner of Internal Revenue as required by Section 223(b) of the Tax Code, hence, the three (3) year assessment period could not have been tolled or suspended by reason thereof. Said provision of law states:

> SEC. 223. ***Exceptions as to period of limitation of assessment and collection of taxes.*** - (a) x x x
>
> (b) If before the expiration of the time prescribed in the preceding section for the assessment of the tax, both the Commissioner and the taxpayer have agreed in writing to its assessment after such time, the tax may be assessed within the period agreed upon. The period so agreed upon may be extended by subsequent written agreement made before the

expiration of the period previously agreed upon.

All the above-mentioned allegations of the petitioner were supported by evidence, specifically exhibits N, N-1, O, P, P-1 to P-23 and P-a, all found in the BIR records. When the exhibits were formally offered in Court as petitioner's rebuttal evidence, respondent failed to file her comment thereon within the time given by the Court, thus, all the aforecited exhibits were admitted. Concededly, it is within the competence of the respondent to verify the authenticity of the contents of these documents, nonetheless, neither did she do the same nor file any sur-rebuttal evidence, thus giving strength to the petitioner's rebuttal evidence.

After a careful scrutiny of the petitioner's ratiocination and the evidence presented, the Court finds that indeed the right of the respondent to assess the petitioner's deficiency income tax for 1989 has already prescribed.

It was established by the petitioner that it filed its 1989 income tax return on October 16, 1989 (see Exhibits "P" and "P-a", p. 178, BIR records). It is therefore from this date that the prescriptive period of three (3) years shall commence to run. The issuance of the notice of assessment FAS 1-89-92-004149 on October

20, 1992 (Exhibit "C") is way beyond the prescribed period for assessment, thus, the assessment is deemed null and void.

The execution by the petitioner of the waivers of the defense of prescription under the statute of limitations of the Tax Code could not be considered as exceptions to the prescribed three (3) year period for assessment. Section 223 of the Tax Code clearly provides that to be exempt from the period of limitation of assessment, the taxpayer and the Commissioner of Internal Revenue shall agree in writing with regard to such extension. Since the petitioner's rebuttal exhibits N, N-1 and O, which were not denied by the respondent, did not contain the signature of the Commissioner of Internal Revenue, the same should have no binding effect, thus, the defense of prescription will lie against the respondent.

The Court of Appeals in the case of **Commissioner of Internal Revenue v. Carnation Phils., Inc. CA-G.R. SP No. 30220, May 31, 1994,** has rendered a decision on a similar issue to the case at bar, and we quote:

> "We cannot go along with petitioner's theory. Section 319 of the Tax Code earlier quoted is clear and explicit that the waiver of the five-year prescriptive period must be in writing and signed by both the BIR Commissioner and the taxpayer.

> Here, the three waivers signed by Carnation do not bear the written consent of the BIR Commissioner as required by law.
>
> We agree with the CTA in holding "these waivers" to be invalid and without any binding effect on petitioner (Carnation) for the reason that there was no consent by the respondent (Commissioner of Internal Revenue)."

In the above-mentioned decision of the Court of Appeals it quoted a ruling of the Supreme Court in the case of **Collector of Internal Revenue v. Solano, L-11475, July 31, 1958, cited in Collector of Internal Revenue v. Pineda, 2 SCRA 401, and Cordero v. Gonda, 18 SCRA 331,** thus:

> "xxx The only agreement that could have suspended the running of the prescriptive period for the collection of the tax in question is, as correctly pointed out by the Court of Tax Appeals, a written agreement between Solano and the Collector, entered into before the expiration of the five-year prescriptive period, extending the limitation prescribed by law."

Hence, we are left with no recourse but to conclude that this is a simple case of negligence on the part of the respondent. Having found that the right of the respondent to assess the petitioner's deficiency income tax liability for 1989 has already prescribed, the Court will no longer delve on the issue as to whether or not interest expenses incurred by the petitioner in its back-to-back loan transaction are deductible from gross income, because said issue has become moot and academic.

WHEREFORE, premises considered, judgment is hereby rendered **GRANTING** the herein petition. Respondent is hereby **ORDERED** to **CANCEL** the assessment notice FAS 1-89-92-004149, on grounds of prescription.

SO ORDERED.

RAMON O. DE VEYRA
Associate Judge

WE CONCUR:

ERNESTO D. ACOSTA
Presiding Judge

AMANCIO Q. SAGA
Associate Judge

CERTIFICATION

I hereby certify that the above decision was reached after due consultation with the members of the Court of Tax Appeals in accordance with Section 13, Article VIII of the Constitution.

ERNESTO D. ACOSTA
Presiding Judge
Court of Tax Appeals