REPUBLIC OF THE PHILIPPINES
Court of Tax Appeals
QUEZON CITY

SPECIAL SECOND DIVISION

FSM CINEMAS, INC.,
Petitioner,

- versus -

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CTA CASE NO. 7525

Members:

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

Promulgated:
JUL 04 2013
10:55 a.m.

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AMENDED DECISION

CASANOVA, *J.*

On June 13, 2012, petitioner filed its "*Partial Motion for Reconsideration*"[1] seeking reconsideration of the Decision[2] (Assailed Decision) promulgated on May 25, 2012, the dispositive portion of which reads:

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

Petitioner prays that the Assailed Decision be set aside and a decision be rendered terminating the Formal Assessment Notice[3] dated December 23, 2005, for deficiency expanded and final withholding tax.

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[1] Docket (Vol II), pp. 599-607
[2] Ibid, pp. 585-596
[3] Annex A to Petition for Review, Docket (Vol. I), pp. 16-17

In a Resolution[4] dated August 16, 2012, the resolution of petitioner's *Partial Motion for Reconsideration* was held in abeyance pending the presentation, submission and formal offer of the documents attached to the *Motion* as Annexes "A" and "B", together with the supporting documents allegedly submitted by petitioner on March 3, 2006, and "C".

Thereafter, petitioner filed its "Supplemental Formal Offer of Evidence"[5] on December 13, 2012. In a Resolution[6] dated January 23, 2013, this Court admitted Exhibits "CCCCCCC" to "CCCCCCC-6", "CCCCCCC-8" to "CCCCCCC-21" and "DDDDDDD" to "GGGGGGG-1", as part of petitioner's documentary evidence, with the exception of Exhibit "CCCCCCC-7", which was denied admission for not being found in the records of the case.

Considering petitioner's "Supplemental Memorandum"[7] filed on March 13, 2013 and respondent's "Manifestation and Motion"[8] filed on March 22, 2013, stating that she is adopting all legal arguments and affirmative defenses found in her "Comment/Opposition (Petitioner's Supplemental Formal Offer of Evidence)" and all other documents formally offered as evidence and those found in the BIR Records and the testimonies of respondent's witness, as part of her Memorandum, petitioner's *Partial Motion for Reconsideration* was submitted for this Court's resolution.[9]

Petitioner alleges that the instant Petition for Review was timely filed on October 2, 2006, pursuant to Section 228 of the National Internal Revenue Code (NIRC) of 1997, as amended. Petitioner contends that it submitted its supporting documents to its protest on March 3, 2006. The one hundred eighty (180)-day period ends on August 30, 2006; thus, it has until September 29, 2006 to file the present Petition for Review with this Court. However, all government offices in the National Capital Region (NCR) were closed on September 29, 2006 due to the aftermath of super typhoon "*Milenyo*", per Memorandum Circular No. 119, Series of 2006, so petitioner posits that it had until the next working day to file the Petition for Review.

This Court finds merit in petitioner's arguments.

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[4] Docket (Vol. II), pp. 650-655
[5] Ibid, pp. 703-705
[6] Id., pp. 771-772
[7] Id., pp. 776-783
[8] Id., pp. 784-785
[9] Resolution dated April 5, 2013, Id., p. 786

In the instant case, petitioner received the Formal Assessment Notice No. WE-4800-00-05-0452[10] on January 2, 2006 and within thirty (30) days from receipt thereof, it filed its administrative protest on January 23, 2006.[11] Petitioner had sixty (60) days, or until March 24, 2006 to submit all relevant supporting documents.

Based on the petitioner's Transmittal Letter[12] dated March 1, 2006, with its attachments, petitioner submitted additional documents in support of its administrative protest on March 3, 2006 , to wit:

1. Letter from Securities and Exchange Commission, dated April 14, 2000;
2. Certification dated May 4, 2000, executed by Ana Venus A. Mejia;
3. Certificate of Filing of Certificate of Increase of Capital Stock;
4. Certificate of Amendment of the Articles of Incorporation of FSM, Cinemas, Inc.;
5. Treasurer's Affidavit;
6. Certificate of Filing of Amended Articles of Incorporation;
7. Amended Articles of Incorporation of FSM Cinemas, Inc.; and
8. Directors' Certificate executed by the directors of Festival Supermall, Inc.

In accordance with Section 228 of the NIRC of 1997, as amended, the one hundred eighty (180)-day period shall be counted from the submission of all relevant supporting documents. Thus, counting the 180-day period from March 3, 2006, the said period lapsed on August 30, 2006. Being so, petitioner had thirty (30) days from August 30, 2006, or until September 29, 2006 to file the Petition for Review with this Court. Petitioner filed the present Petition for Review on October 2, 2006. But this Court takes notice that in the case of *Surigao del Norte Electric Cooperative, et al. v. NLRC, et al.*[13]("Surigao case"), the High Court upheld the National Labor Relations Commission's (NLRC's) Order taking cognizance of an appeal filed one day late since the delay in filing was caused by the onslaught of typhoon Besing, resulting in the closure of the Surigao Post Office on the last day for the appellant to file her appeal.

Also, in the case of *Gana vs. National Labor Relations Commission, et. al,.*[14] the High Court reiterated its ruling in the Surigao case and upheld

[10] Exhibits "5" and "7"
[11] Par. 5, Facts Admitted, Joint Stipulation of Facts and Issues (JSFI), Docket (Vol. I), p. 69
[12] Exhibits "CCCCCCC" to "CCCCCCC-6" and "CCCCCCC-8" to "CCCCCCC-21"
[13] G.R. 125212, June 28, 1999
[14] G.R. No. 164640, June 13, 2008

the Court of Appeals' (CA) ruling that the one-day delay in the filing of therein private respondents' appeal was justified.

Parallel to the above-mentioned jurisprudence, the delay in the filing of the Petition for Review on October 2, 2006 is justified when all government offices in the NCR were closed on September 29, 2006 pursuant to Memorandum Circular No. 119 issued by the Office of the President of the Philippines on September 28, 2006, the last day for the filing of the appeal to this Court, and that the succeeding days, September 30 and October 1, 2006, fell on a Saturday and Sunday, respectively. All told, the instant Petition for Review is deemed to have been timely filed.

This Court shall now determine the merits of each assessment. In this petition, petitioner seeks the cancellation and termination of the assessments against it 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.

However, during trial, petitioner filed its *"Motion to Declare the Alleged Deficiency Income Tax and Value-Added Tax Assessments Extinguished under Republic Act No. 9480*[15]*"* on August 13, 2008, alleging that it had availed of the tax amnesty under RA No. 9480. As such, petitioner contended that it was 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 insofar as the assessments covered by the tax amnesty are concerned.[16]

Therefore, what remains to be resolved is the issue on whether or not respondent was correct in issuing the assessment against petitioner for deficiency expanded withholding and final withholding taxes for the taxable year 2000.

Section 203 of the NIRC of 1997, as amended, provides for the period upon which assessment can be validly made, to wit:

> "SEC. 203. *Period of Limitation Upon Assessment and Collection.* — Except as provided in Section 222, internal revenue taxes **shall be assessed within three (3) years after the last day prescribed by law for the filing of the return**, and no proceeding in court without assessment for the

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[15] Docket (Vol. I), pp. 169-172

[16] Resolutions dated October 9, 2008 and January 26, 2009, Ibid, pp. 190-191 and 200-203

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 (3)-year period shall be counted from the day the return was filed**. For 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." (*Emphasis supplied.*)

The above law leaves no room for argument, the three-year period to assess commences from the date of the actual filing of the return or from the last date prescribed by law, whichever comes later. Better stated, if the return was filed earlier than the last day allowed by law, the period to assess shall still be counted from the last day prescribed for the filing of the return. However, if the return was filed beyond the period prescribed by law, the three-year period shall be counted from the day the return was filed.

Corollary to said Section 203, Section 2.58(A)(2)(a) of Revenue Regulations (RR) No. 2-98 requires that "*the withholding tax return, whether creditable or final, shall be filed and payments should be made within ten (10) days after the end of each month except for taxes withheld for December which shall be filed on or before January 25 of the following year.*"

Applying the foregoing to petitioner's expanded withholding tax, the return is required to be filed and the payment is to be made within ten (10) days after the end of each month, except for taxes withheld for the month of December of each year, which shall be filed on or before January 25 of the following year. Thus, the last day of the statutes of limitation for each month covering the period from January to December 2000 are summarized as follows:

Period	Date filed	Reckoning date of the 3 year period to assess	Last Day to Assess
January 2000	February 8, 2000 (Exh. "NNNNNN")	February 10, 2000	February 10, 2003
February 2000	March 9, 2000 (Exh." OOOOOO")	March 10, 2000	March 10, 2003
March 2000	April 10, 2000 (Exh. "PPPPPP")	April 10, 2000	April 10, 2003
April 2000	May 10, 2000 (Exh. "QQQQQQ")	May 10, 2000	May 10, 2003
May 2000	June 8, 2000 (Exh. "RRRRRR")	June 10, 2000	June 10, 2003
June 2000	July 7, 2000 (Exh. "SSSSSS")	July 10, 2000	July 10, 2003
July 2000	August 10, 2000 (Exh. "TTTTTT")	August 10, 2000	August 10, 2003

August 2000	September 8, 2000 (Exh. "UUUUUU")	September 10, 2000	September 10, 2003
September 2000	October 9, 2000 (Exh. "VVVVVV")	October 10, 2000	October 10, 2003
October 2000	November 10, 2000 (Exh. "WWWWWW")	November 10, 2000	November 10, 2003
November 2000	December 11, 2000 (Exh. "XXXXXX")	December 11, 2000	December 11, 2003
December 2000	January 10, 2001 (Exh. "YYYYYY")	January 25, 2001	January 25, 2004

Petitioner received the Formal Assessment Notice No. WE-4800-00-05-0452 dated December 23, 2005 on January 2, 2006.[17] Clearly, the assessment for deficiency expanded withholding tax was made beyond the 3 year prescriptive period provided by law; thus, it is void.

Anent respondent's assessment against petitioner for deficiency final withholding tax, there was no allegation that petitioner filed a return on the final withholding tax assessed. In fact, petitioner itself avers that it did not pay the final withholding tax assessed considering that the dividends paid by petitioner, a domestic corporation, to its corporate stockholders, which allegedly are also domestic corporations, are exempt from income tax in accordance with Section 27(D) of the NIRC of 1997, as amended.

Clearly, petitioner failed to file the corresponding returns thus the applicable prescriptive period to assess is the ten-year period provided in Section 222 of the NIRC of 1997, as amended, which provides that:

> "SEC. 222. *Exceptions as to Period of Limitation of Assessment and Collection of Taxes.* —
>
> (a) In the case of a false or fraudulent return with intent to evade tax **or of failure to file return, the tax may be assessed**, or a proceeding in court for the collection of such tax may be filed without assessment, **at any time within ten (10) years after the discovery of the** falsity, fraud or **omission**: Provided, That in a fraud assessment which has become final and executory, the fact of fraud shall be judicially taken cognizance of in the civil or criminal action for the collection thereof." (*Emphasis supplied.*)

Since no return for final withholding tax was filed in this case, the said tax may be assessed anytime within ten years after the discovery of the

[17] Exhibits "5" and "7"

omission. Nevertheless, in counting the ten-year prescriptive period, records reveal that the actual date of discovery of the omission was not established. Be that as it may, in view of the presumption of regularity in the performance of official duties, respondent is presumed to have issued the subject deficiency final withholding tax assessment on time.

Going now to the issue of whether or not petitioner is liable for the deficiency final withholding tax assessed, records show that petitioner was assessed of basic deficiency final withholding tax in the amount of P1,181,154.50, with interest in the amount of P1,178,943.40, or a total of P2,360,097.90[18], for its alleged failure to withhold final withhold tax on its cash dividend in the amount of P11,811,545.00 for taxable year 2000, as reflected in its Audited Financial Statement for the taxable year 2000[19].

Petitioner maintains that no tax was withheld for the dividends declared and paid in 2000 considering that two (2) of petitioner's corporate stockholders, which collectively owns 99.99% of its capital stock of petitioner, are domestic corporations. Accordingly, the dividends paid by petitioner in 2000 to the said stockholders are exempt from withholding tax as provided for under Section 27 (D) of the NIRC of 1997, as amended.

To support its allegation, petitioner presented the Affidavit executed by Ms. Elvira Bernadette C. Garcia, the Assistant Corporate Secretary of Festival Supermall, Inc.; [20] Certificate of Registration issued by the Securities and Exchange Commission to Festival Supermall, Inc. on March 21,1997;[21] Articles of Incorporation of Festival Supermall, Inc.;[22] Affidavit executed by Ms. Jacqueline Chua, the Corporate Secretary of Cinema Services Chain Corp.;[23] Certificate of Registration issued by the Securities and Exchange Commission to Cinema Services Chain Corp. on February 12, 1997;[24] Articles of Incorporation of Cinema Services Chain Corp.;[25] Audited Financial Statements of FSM Cinemas, Inc. for the taxable year 2000;[26] Statements of Income and Retained Earnings of FSM Cinemas, Inc. for the year 2000;[27] and petitioner's Amended Articles of Incorporation.[28]

Relevant thereto is Section 27(D)(4) of the NIRC of 1997, as amended, which provides that dividends received by a domestic corporation from another domestic corporation **shall not be subject to tax.**

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[18] Exhibit "6"
[19] Exhibits "MMMMMM" and "MMMMMM-1"
[20] Exhibit "HHHHHH"
[21] Exhibit "IIIIII"
[22] Exhibit "IIIIII-1"
[23] Exhibit "JJJJJJ"
[24] Exhibit "KKKKKK"
[25] Exhibit "LLLLLL"
[26] Exhibit "MMMMMM"
[27] Exhibit "MMMMMM-1"
[28] Exhibits "CCCCCCC-11" to "CCCCCCC-16"

A verification of the evidence presented by the parties and the records of this case show that petitioner's total cash dividend amounted to P11,811,545.00 for taxable year 2000, as per Audited Financial Statements of FSM Cinemas, Inc. for the taxable year 2000[29]. Respondent imposed a 10% final withholding tax thereon as per Formal Assessment Notice dated December 23, 2005. Likewise, it was found that petitioner FSM Cinemas is a domestic corporation duly organized and existing under and by virtue of the laws of the Republic of the Philippines;[30] that two (2) of petitioner's corporate stockholders, Festival Supermall, Inc., and Cinema Services Chain Corporation, are domestic corporations created and organized under the laws of the Philippines;[31] and that the said corporate stockholders collectively owns 249,9991 shares out of the 250,000 shares representing petitioner's authorized capital stock subscribed,[32] or 99.99% of the capital stock of petitioner.

Considering that the above-mentioned corporate stockholders are found to be domestic corporations, exempt from final withholding tax on dividends declared by another domestic corporation and that the said corporate stockholders, which collectively owns 99.99% of the capital stock of petitioner, appear to have been paid the majority of the subject cash dividends, it can be concluded that the assessment for 10% final withholding tax on the whole amount of P11,811,545.00, representing petitioner's total cash dividend for taxable year 2000, was erroneous.

It is worth emphasizing that, indeed, tax assessments by tax examiners are presumed correct and made in good faith. The taxpayer has the duty to prove otherwise. In the absence of proof of any irregularities in the performance of duties, an assessment duly made by a Bureau of Internal Revenue examiner and approved by his superior officers will not be disturbed. All presumptions are in favor of the correctness of tax assessments.[33] However, in this case, petitioner was able to overturn the presumption of the correctness of the assessment for deficiency final withholding tax issued by respondent while respondent failed to controvert the evidence presented by petitioner. Thus, the Court is left with no alternative but to cancel the assessment against petitioner for deficiency final withholding tax for the taxable year 2000.

In view of this Court's findings that the assessment for deficiency expanded withholding tax is now deemed null and void for being issued beyond the prescriptive period and that the assessment for deficiency final

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[29] Exhibits "MMMMMM" and "MMMMMM-1"
[30] Par 1, Facts Admitted, JSFI , Docket (Vol I.), p. 68; Exhibits "CCCCCCC-11" to "CCCCCCC-16"
[31] Exhibits "IIIIII", "IIIIII-1", "KKKKKK" and "LLLLLL"
[32] Exhibits "CCCCCCC-11" to "CCCCCCC-16"
[33] Commissioner of Internal Revenue vs. Bank of Philippine Islands, G.R. No. 134062, April 17, 2007

withholding tax was erroneous, petitioner's *Partial Motion for Reconsideration* is **GRANTED**.

WHEREFORE, the assailed Decision promulgated on May 25, 2012 is **SET ASIDE** and the instant Petition for Review filed on October 2, 2006 is hereby **GRANTED**. Accordingly, Assessment Notice No. WE-4800-00-05-0452 for deficiency expanded withholding tax in the amount of P2,299,339.35 and Assessment Notice No. WF-4800-00-05-0452 for deficiency final withholding tax in the amount of P2,360,097.90, both for taxable year 2000, are hereby **CANCELLED** and **SET ASIDE**.

SO ORDERED.

CAESAR A. CASANOVA
Associate Justice

WE CONCUR:

JUANITO C. CASTAÑEDA, JR.
Associate Justice

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.
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.

ROMAN G. DEL ROSARIO
Presiding Justice