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REPUBLIC OF THE PHILIPPINES
COURT OF APPEALS
MANILA

SEVENTEENTH DIVISION

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

- versus -

COURT OF TAX APPEALS AND HI-CEMENT CORPORATION,
Respondents.

CA-G.R. SP No. 36587

Members:

MARTIN, JR.,
REYES, R.T., and
AMIN, JJ.:

Promulgated:

JUL 31 1997

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DECISION

MARTIN, JR., J.:

Assailed in this petition for certiorari, prohibition and mandamus under Rule 65 of the Revised Rules of Court are two (2) Resolutions of the Court of Tax Appeals in CTA Case No. 5055 entitled "Hi-Cement Corporation, petitioner, versus Liwayway Vinsons-Chato, in her capacity as Commissioner of Internal Revenue, respondent," issued allegedly in grave abuse of discretion amounting to lack or excess of jurisdiction, to wit:

> (1) Resolution dated August 16, 1994 denying herein petitioner's motion to dismiss (Annex "A", Petition; pp. 32-41, Rollo); and

(2) Resolution dated December 7, 1994 denying herein petitioner's motion for reconsideration of the court's earlier resolution for lack of merit (Annex "B"; pp. 42-47, ibid.).

The underlying facts, as gathered from the record, are as follows:

On September 28, 1992, petitioner Commissioner of Internal Revenue (CIR), through her Assistant Commission for Special Operations Service, sent to private respondent Hi-Cement Corporation a Pre-assessment Notice informing the latter of its deficiency income tax in the aggregate sum of ₱28,624,237.84 for income earned during the fiscal year 1988 (Annex "C", p. 48, ibid.).

In a reply letter dated October 28, 1992, private respondent, through its comptroller Mario B. Casupanan, initially responded to the above pre-assessment claiming that the company had not understated its income. He reasoned that the Bureau of Internal Revenue (BIR), in computing private respondent's tax, considered the additional income from clinker sales to affiliates which should be exempt since it has already been taken up in the company's books as credit or reduction to cost of sales. (Annex "D", p. 49, ibid.)

On October 29, 1992, private respondent, through its counsels, sent to petitioner a protest seeking the reconsideration, reinvestigation and recall of the pre-assessment notice for lack of legal basis. (Annex "E", pp. 50-51, ibid.)

In an Assessment Notice No. FAS-1-88-92-004130 dated October 15, 1992 which private respondent received on October 28, 1992, petitioner, through her Assistant Commissioner for Collection, assessed the latter deficiency income tax in the sum of ₱28,624,981.03 with the notation to pay the same on or before November 15, 1992. (Annex "F", p. 52, ibid.)

In protest thereto, private respondent sent to petitioner a letter dated November 12, 1992 seeking the recall and reconsideration of the assessment notice. (Annex "G", pp. 53-54, ibid.)

On December 1, 1993, petitioner, through her Assistant Chief, Accounts Receivable/Billing Division, sent to private respondent a Final Notice which the latter received on December 10, 1993, the tenor of which reads:

> "Sir/Madam:
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> "Your revenue tax liability for the year/s 1988 amounting to ₱28,763,981.13 including increments under Ass./Demand No/s. FAS-1-88 92-004130 dated 11-19-92 which is still outstanding inspite of several notices will be referred for issuance of warrant and/or judicial action.
>
> "Before doing so, and to avoid inconvenience, you are requested to settle the said tax liability on or before 12-15-93 to the Accounts Receivable/Billing Division, Room 203, BIR Building, Diliman, Quezon City in order that the case can be closed and terminated.
>
> "Please give this your preferential attention."
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> (Annex "H", p. 55, ibid.)

Interpreting said "Final Notice" as petitioner's final decision on its protest, private respondent filed with the Court of Tax Appeals (CTA) on January 2, 1994 a Petition for Review which was docketed as CTA Case No. 5055 (Annex "I", pp. 56-62, ibid.), praying that the court set aside the assessment issued by the BIR.

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After several motions for extension of time to file pleading, petitioner filed below a motion to dismiss on the ground of lack of jurisdiction since the said "Final Notice" does not constitute a final decision on the assessment protest or reconsideration thereof which is appealable to the CTA (Annex "J", pp. 63-71, ibid.).

In a Resolution dated August 16, 1994, the CTA denied petitioner's motion to dismiss with a dissenting vote from Associate Judge Ramon O. De Veyra (Annex "A", pp. 32-41, ibid.). The CTA likewise denied petitioner's motion for reconsideration in a Resolution dated December 7, 1994 (Annex "B", pp. 42-47, ibid.).

Hence, this petition filed by the CIR alleging grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the CTA in denying both her motion to dismiss and motion for reconsideration.

This petition is impressed with merit.

The jurisdiction of the CTA is conferred by Republic Act No. 1125, as amended, otherwise known as An Act Creating the Court of Tax Appeals. The pertinent provision of the law states:

> "Section 7. *Jurisdiction.* - The Court of Tax Appeals shall exercise exclusive appellate jurisdiction to review by appeal, as herein provided -
>
> "(1) **Decisions of the Commissioner of Internal Revenue in cases involving disputed assessments**, refunds of internal revenue taxes, fees or other charges, penalties imposed in relation thereto, or other matters arising under the National Internal Revenue Code or other law or part of law administered by the Bureau of Internal Revenue; x x x x x" (Emphasis supplied)

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In the case of *Commissioner of Internal Revenue vs. Villa* (22 SCRA 3, 6) the word "decisions" in paragraph 1, Section 7 of Republic Act No. 1125, has been interpreted to mean the decisions of the Commissioner of Internal Revenue on the protest of the taxpayer against assessments. Definitely, said word does not signify the assessment itself.

On the other hand, a "disputed assessment" under the same provision of the law has been interpreted by the Supreme Court in the same case, citing *St. Stephen's Association and St. Stephen's Chinese Girl's School vs. Collector of Internal Revenue* (104 Phil. 314, 317), as follows:

> "x x x Where a taxpayer questions an assessment and asks the collector to reconsider or cancel the same because he (the taxpayer) believes he is not liable therefor, the assessment becomes a 'disputed assessment' that the Collector must decide, and the taxpayer can appeal to the Court of Tax Appeals only upon receipt of the decision of the Collector on the disputed assessment, x x x" (at pp. 6-7)

The Court in *Commissioner of Internal Revenue vs. Villa (supra)* continued:

> "Note that the law used the word 'decisions', not 'assessments', thus further indicating the legislative intention to subject to judicial review the *decision* of the Commissioner on the protest against an assessment but not the assessment itself." (at p. 7)

Based on the foregoing, the Final Notice dated December 1, 1993 (Annex "H", p. 55, ibid.) of the deficiency tax assessment issued by petitioner against private respondent cannot be interpreted as the final decision of the

Commissioner of Internal Revenue on a disputed assessment which the Court of Tax Appeals may take cognizance of under Section 7(1) of RA 1125. Said final notice, as petitioner argues, is merely "a simple reminder to the private respondent of its tax liability admonishing the latter to pay the same before December 15, 1993, otherwise it will be referred for issuance of warrant and/or judicial action." It is not the decision appealable to the CTA as it did not decide the protest earlier filed by private respondent nor did it refer thereto.

Neither the threat that the assessment shall be referred for issuance of warrant and/or judicial action will make the Final Notice a final decision of the BIR on the protest. In *Commissioner of Internal Revenue vs. Union Shipping Corporation* (185 SCRA 547, 552), notwithstanding that a warrant of distraint and levy has been issued, the Supreme Court did not consider the same as the BIR's final decision on a disputed assessment. The Court categorically ruled that the Commissioner of Internal Revenue must state whether his action on a questioned assessment is final. All the more in the case at bar, the threatening statement in the final notice cannot be considered a final decision on private respondent's disputed assessment when said notice did not even make mention of the protest.

We do not subscribe to private respondent's contention that the case of *Surigao Electric Co., Inc. vs. Court of Tax Appeals* (57 SCRA 523) applies to the present suit. Private respondent has taken out of context the statement of the Court therein, *viz*:

> "x x x The tenor of the letter, specifically the statement regarding the resort to legal remedies, unmistakably indicates the final nature of the determination made by the Commissioner of the petitioner's deficiency franchise tax liability." (at p. 526)

A reading of the facts of the case would reveal that the protest of petitioner therein, Surigao Electric Co., Inc., on its deficiency franchise tax was initially responded to by the Commissioner of Internal Revenue who referred the same to the General Auditing Office (now Commission on Audit). Thereafter, there was an exchange of correspondence between Surigao, on the one hand, and the CIR and the Auditor General (now Commissioner of Audit), on the other. It was only after the exchange of correspondence that the CIR issued a revised assessment containing the warning that in the event petitioner failed to pay the deficiency tax assessed, the CIR would be constrained to enforce the collection of the tax by means of the remedies provided by law, which the Supreme Court considered the final decision appealable to the CTA.

The present case is different. The CIR's Final Notice on the assessment although denominated as "Final" cannot be considered a final decision of the BIR on private respondent's protest since, as earlier stated, it did not decide the protest nor even mentioned or referred to it.

We recall the Supreme Court's conclusion in the case of *Commissioner of Internal Revenue vs. Villa (supra)*, thus:

> "x x x the jurisdiction of the Tax Court is to review by appeal *decisions* of the Commissioner of Internal Revenue on disputed assessments. The Tax Court is a court of special jurisdiction. As such, it can take cognizance only of such matters as are clearly within its jurisdiction." (at p. 7)

WHEREFORE, PREMISES CONSIDERED, this petition is hereby ***GRANTED.*** The Resolutions of respondent Court of Tax Appeals dated August

16, 1994 and December 7, 1994 are ***SET ASIDE*** and declared ***NULL*** and ***VOID.*** Accordingly, CTA Case No. 5055 is ***DISMISSED.***

SO ORDERED.

FERMIN A. MARTIN, JR.
Associate Justice

WE CONCUR:

RUBEN T. REYES
Associate Justice

OMAR U. AMIN
Associate Justice

ATTESTATION

I hereby attest that this decision was reached after due consultation among the members of this Division, in accordance with the provisions of Section 13, Article VIII of the Constitution.

FERMIN A. MARTIN, JR.
Associate Justice
Chairman, Seventeenth Division