CTA Form No. 8 (For DCC)

22-000227-0060

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

CTA CRIM CASE NO. O-913

PEOPLE OF THE PHILIPPINES,
Plaintiff,

- versus -

NOTICE OF RESOLUTION

CESAR VACUNAWA LEBITE,
(At-Large: Address: Sitio-3 Kabilugan St., Gulod, Novaliches, Quezon City),
Accused.

To:

PROSECUTOR GENERAL BENEDICTO A. MALCONTENTO
SENIOR ASST. STATE PROS. MA. CRISTINA A. MONTERA-BAROT
Department of Justice
Padre Faura Street, Ermita, Manila 1000

ATTY. RAMON B. LORENZO
ATTY. ROWELL B. VICENTE
Bureau of Internal Revenue
Legal Division, BIR Revenue Region No. 6-Manila
Solana St., Intramuros, Manila

ATTY. MARK OLIVER C. ASIS
ATTY. MICHAELSON D. ROÑO
ATTY. MAY ANNE S. COMETA
PUBLIC ATTORNEY'S OFFICE
6th Floor, Justice Cecilia Muñoz Palma Hall,
DOJ Building, Quezon City Hall Complex, Quezon City

CESAR VACUNAWA LEBITE
26 Kabilugan St., Gulod, Novaliches
Quezon City

DIRECTOR
National Bureau of Investigation
Taft Avenue, Ermita, Manila

PNP CHIEF
Thru: CIDG
Philippine National Police
National Headquarters
Camp General Rafael Tagle Crame
EDSA, Quezon City

CHIEF, WARRANT & SUBPOENA SECTION
Quezon City Police District
Camp BGen Tomas Karingal, Sikatuna Village
Diliman, Quezon City

GREETINGS:

You are hereby notified by these presents that on **March 26, 2024,** a Resolution was rendered in the above-entitled case, copy of which is attached hereto.

Quezon City, Philippines, **March 27, 2024.**

Atty. Margarette Y. Guzman
Executive Clerk of Court III

REPUBLIC OF THE PHILIPPINES
COURT OF TAX APPEALS
QUEZON CITY

FIRST DIVISION

PEOPLE OF THE PHILIPPINES,
Plaintiff,

-versus-

CESAR VACUNAWA LEBITE,
(At-Large: Address: Sitio-3 Kabilugan St., Gulod, Novaliches, Quezon City),
Accused.

CTA Crim Case No. O-913

For: Violation of Section 255 (Failure to Pay Tax) of the NIRC of 1997, as amended

Members:
DEL ROSARIO, *P.J., Chairperson,*
BACORRO-VILLENA, *and*
CUI-DAVID, *JJ.*

Promulgated:

MAR 2 6 2024 4:05PM

x- -x

RESOLUTION

This resolves the ***Demurrer to Evidence (With Prior Leave of Court)*** filed by the accused on October 12, 2023, against which plaintiff filed its ***Opposition (Re: Accused's Demurrer to Evidence)*** on October 20, 2023.

Accused Cesar Vacunawa Lebite is indicted for violation of Section 255 of the National Internal Revenue Code (**NIRC**) of 1997, as amended, allegedly committed as follows:

> "That on or about May 15, 2013 and thereafter, in Manila, Philippines, and within the jurisdiction of this Honorable Court, accused Cesar Vacunawa Lebite, a Filipino citizen, owner and proprietor of a business under the name and style 'Blue Alcindor Enterprise" in which he is engaged in the business of selling merchandise with Tax Identification Number (TIN) 913-477-128-000, and therefore subject and liable to file Value-Added Tax (VAT) returns and to pay the corresponding tax due, pursuant to Sections 105 and 106 of the National Internal Revenue Code (NIRC) of 1997, as amended, did then and there knowingly, unlawfully and willfully fails and refuses to pay his basic VAT liability for taxable year 2010

in the total amount of Eight Million One Hundred Sixty Nine Thousand and Eight Hundred Ten Pesos and 43/100 (Php8,169,810.43), exclusive of surcharge and interest, despite receipt of several notices and demands as specified under the law and regulations, the last of which are the Preliminary Assessment Notice (PAN) and Formal Letter of Demands, including the final notice before seizure issued by the BIR on May 15, 2013, to the damage and prejudice of the government.

CONTRARY TO LAW."

On October 27, 2022, the accused was arraigned and entered a plea of **NOT GUILTY**. Thereafter, the Pre-Trial Conference ensued.[1]

On February 8, 2023, the Court issued the *Pre-Trial Order*.[2]

On February 9, 2023, the prosecution moved to amend the *Pre-Trial Order* to include Ms. Alden T. Bruno as an additional witness and Exhibits P-6-a, P-7-b, P-24, and P-25 as additional documentary exhibits. The accused and his counsel interposed no objection, and the Motion was granted.[3]

On March 6, 2023, the accused filed a *Motion to Amend Pre-Trial Order* praying for (1) the removal of the stipulation that the accused, Cesar Vacunawa Lebite, is the same person named and charged in the Information; (2) the removal of the reserved documentary evidence – Memorandum dated May 29, 2015, signed by Leo S. Castillo; and (3) the allowance of the reservation of certain documentary evidence.[4] On March 30, 2023, the Motion was granted.[5]

The presentation of prosecution's evidence followed. The prosecution presented Revenue Officers Rosario Villaflor and Leo S. Castillo on March 9, 2023, Mr. Benhur C. Nacorda on April 12, 2023, and Ms. Alden T. Bruno on September 6, 2023.

On September 12, 2023, the prosecution filed plaintiff's *Formal Offer of Evidence* (**FOE**) dated September 7, 2023, offering the following exhibits:[6]

[1] Order dated October 27, 2022, Division Docket, pp. 226-227.
[2] Pre-trial Order, *id.*, pp. 259-264.
[3] *Id.*, pp. 293-294.
[4] *Id.*, pp. 295-300.
[5] *Id.*, pp. 316-319.
[6] *Id.*, pp. 344-356.

Exhibits	Nature
P-1	Information dated 23 June 2017
P-2	BIR Referral Letter to the Secretary of Justice dated 10 December 2015
P-3	Joint Complaint-Affidavit dated 10 December 2015 with annexes
P-4	Formal Letter of Demand dated 24 October 2012
P-4-a	Assessment Notice dated 24 October 2012 (Income Tax)
P-4-b	Assessment Notice dated 24 October 2012 (Value-Added Tax)
P-4-c	Registry Receipt No. 912500
P-5	Letter of Authority (LOA) 030-2012-00000048/ SN eLA201100004361 dated 12 January 2012
P-6	Letter Notice LN 030-TRS-10-00-00048
P-6-a	Details of Withholding Agents/ Payors and Payees/Income Recipients Records Attached to the Letter Notice (LN)
P-7	Letter Notice LN 030-RLF-10-00-00083
P-7-a	Details of Taxpayer's Customers Records Attached to the Letter Notice (LN)
P-8	Checklist of Requirements
P-9	First Notice dated 08 February 2012
P-9-a	Registry Receipt No. 907096
P-10	Second and Final Notice dated 23 February 2012
P-10-a	Registry Receipt No. 905594
P-11	Certification of NO RECORD
P-12	Post Reporting Notice dated 29 May 2012
P-13	Memorandum dated 18 June 2012 Recommending issuance of Assessment Notices
P-14	Preliminary Assessment Notice (PAN) dated 13 August 2012 with Details of Discrepancies
P-14-a	Letter Transmittal Registry Receipt No. 903138
P-15	1st Notice Before Seizure dated 08 February 2013
P-16	Final Notice Before Seizure dated 15 May 2013
P-16-a	Progress Report of Revenue Officer Angeles R. Mores
P-17	Warrant of Garnishment Phil Trust Bank
P-18	Warrant of Garnishment Landbank of the Philippines
P-19	Warrant of Garnishment Banco De Oro
P-20	Warrant of Garnishment Bank of the Philippine Islands
P-21	Warrant of Garnishment Metrobank
P-22	Warrant of Distraint and/or Levy
P-23	Memorandum Report dated 29 May 2015
P-24	Certification dated 22 November 2022 of non-filing of Value-Added Tax (VAT) Returns for taxable year 2010
P-25	Business Summary Details of accused (computer printout) from the Internal Revenue Integrated System (IRIS) of the Bureau of Internal Revenue
P-26	Judicial Affidavit of Revenue Officer Rosario L. Villaflor
P-26-a	Signature above the printed name "Rosario L. Villaflor"
P-27	Judicial Affidavit of Revenue Officer Leo S. Castillo
P-27-a	Signature above the printed name "Leo S. Castillo"
P-28	Judicial Affidavit of Mr. Benhur C. Nacorda
P-28-a	Signature above the printed name "Benhur C. Nacorda"
P-29	Judicial Affidavit of Ms. Alden T. Bruno
P-29-a	Signature above the printed name "Alden T. Bruno"

On September 19, 2023, the accused filed his *Comment and/or Objection* to plaintiff's FOE.[7]

[7] *Id.*, pp. 357-363.

On October 12, 2023, the accused filed a *Demurrer to Evidence (with prior leave of court)*, to which the prosecution filed an *Opposition (Re: Accused's Demurrer to Evidence)* on October 20, 2023.[8]

On December 1, 2023, the Court admitted plaintiff's documentary exhibits, subject to its final evaluation and/or appreciation of their probative value, except Exhibit P-16-a, for failure to submit the duly marked exhibit.[9]

On December 19, 2023, the accused filed a *Manifestation and Motion* stating that on December 7, 2023, he received the Court's Resolution dated December 1, 2023 on plaintiff's FOE; on October 12, 2023, he filed a Demurrer to Evidence (with prior leave of court), a copy of the Demurrer to Evidence was attached; and moved that the Court consider for resolution his Demurrer to Evidence.[10]

On January 5, 2024, the prosecution filed an *Omnibus Motion a. For Reconsideration Re: Resolution dated December 1, 2023; b. Admit Attached Duly Marked Exhibit (Omnibus Motion).*

On January 16, 2024, the Court issued a Minute Resolution noting the accused's *Manifestation and Motion* and plaintiff's *Omnibus Motion*; granting the accused five (5) days from receipt to file comment to plaintiff's *Omnibus Motion*; and cancelling the accused's presentation of evidence on January 17, 2024 at 8:30 a.m.

On January 18, 2024, the Court issued another Minute Resolution noting the accused's *Demurrer to Evidence (with prior leave of court)* and plaintiff's *Opposition (Re: Accused's Demurrer to Evidence)* and submitting for resolution the accused's *Demurrer to Evidence.*

On February 6, 2024, records verification shows that the accused failed to file a comment to plaintiff's *Omnibus Motion.* Thus, on February 23, 2024, the Court resolved to submit plaintiff's *Omnibus Motion* for resolution.

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[8] *Id.*, pp. 393-403.
[9] *Id.*, pp. 388-389.
[10] *Id.*, pp. 390-392.

THE COURT'S RULING

On the plaintiff's Omnibus Motion

Finding merit, plaintiff's *Omnibus Motion a. For Reconsideration Re: Resolution dated December 1, 2023 b. Admit Attached Duly Marked Exhibit,* without the accused comment, is granted. Accordingly, the Court admits plaintiff's Exhibit P-16-a, subject to the Court's final evaluation and/or appreciation of its probative value to the issues involved in the instant case.

On the accused's Demurrer to Evidence

In his *Demurrer to Evidence*, the accused contends that the prosecution failed to establish the accused's actual receipt of the Letter of Authority (**LOA**), which rendered the assessment void.[11] In relation to the Preliminary Assessment Notice (**PAN**) and Final Assessment Notice (**FAN**)/Formal Letter of Demand (**FLD**), the accused argues that the presentation of the transmittal letter and registry receipt is insufficient to prove service to him of the assessment notices by registered mail. The accused contends that a signed registry return card or Certification from the Philippine Post Office should have been presented.[12] The accused suggests that the invalidity of the assessment negates the element that the failure to pay taxes was *willful*.[13]

In its *Opposition*, plaintiff initially points out that the filing of the *Demurrer to Evidence* on October 12, 2023, is premature, considering that the Court has not yet ruled on the prosecution's Formal Offer of Evidence.[14] Plaintiff further states that it successfully established the guilt of the accused.[15] Anent the service of the LOA to the accused, plaintiff states that the building administration office always directs the prosecution's witness, Revenue Officer (**RO**) Villaflor, to Room 330 of Regina Building in Escolta St., Binondo, Manila. Plaintiff also points to the admission of the accused in his *Judicial Affidavit* that "Jade Bros. Freight Int'l., Inc.," the occupant of Room 330 of Regina Building, initially provided the accused with legal counsel.[16]

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[11] Demurrer to Evidence, par. 10.
[12] *Id.*, pars. 15 and 16.
[13] *Id.*, par. 18.
[14] Opposition, par. 4.
[15] *Id.*, par. 10.
[16] *Id.*, par. 13.

As to the propriety of the filing of the *Demurrer to Evidence*, suffice it to say that while the *Demurrer to Evidence* was filed before the Court issued a resolution on plaintiff's FOE on December 1, 2023, the Court did not act on it until the accused filed a *Manifestation and Motion* on December 19, 2023, praying that his *Demurrer to Evidence* be considered for resolution by the Court.[17] It bears to note that it was only on January 18, 2024 that the Court noted the filing of the accused's *Demurrer to Evidence* on October 12, 2023, and plaintiff's *Opposition* on October 20, 2023, and submitted for resolution the said *Demurrer to Evidence.*

The Court now proceeds to resolve the merit of the accused's *Demurrer to Evidence.*

The prosecution failed to adduce sufficient evidence to convict accused Cesar Vacunawa Lebite.

A demurrer to evidence is "an objection by one of the parties in an action, to the effect that the evidence which his adversary produced, is insufficient in point of law, whether true or not, to make out a case or sustain the issue."[18] The party demurring challenges the sufficiency of the whole evidence to sustain a verdict. On the other hand, the court, in passing upon the sufficiency of the evidence raised in a demurrer, is merely required to ascertain whether there is competent or sufficient evidence to sustain the indictment or to support a verdict of guilt.[19]

In criminal cases, a demurrer to evidence partakes of the nature of a motion to dismiss the case for failure of the prosecution to prove the guilt of the accused beyond reasonable doubt.[20] Under Section 23, Rule 119 of the Revised Rules of Criminal Procedure, as amended, the trial court may dismiss the action on the ground of insufficiency of evidence upon a demurrer to evidence filed by the accused with or without leave of court,[21] *viz.*:

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[17] *Id.*, pp. 390-392.
[18] *Republic v. Sandiganbayan, 5th Division et al.*, G.R. Nos. 195837, 198221, 198974 & 203592, October 3, 2023.
[19] *Go-Yu v. Yu*, G.R. No. 230443, April 3, 2019; *Gutib v. CA*, G.R. No. 131209, August 13, 1999.
[20] *Salazar v. People*, G.R. No. 151931, September 23, 2003.
[21] *People v. Sandiganbayan*, G.R. No. 140633, February 4, 2002.

> "Section 23. *Demurrer to evidence.* – **After the prosecution rests its case**, the court may dismiss the action on the ground of insufficiency of evidence (1) **on its own initiative** after giving the prosecution the opportunity to be heard or (2) **upon demurrer to evidence** filed by the accused with or without leave of court.
>
> If the court denies the demurrer to evidence filed with leave of court, the accused may adduce evidence in his defense. When the demurrer to evidence is filed without leave of court, the accused waives the right to present evidence and submits the case for judgment on the basis of the evidence for the prosecution.
>
> The motion for leave of court to file demurrer to evidence shall specifically state its grounds and shall be filed within a non-extendible period of five (5) days after the prosecution rests its case. The prosecution may oppose the motion within a non-extendible period of five (5) days from its receipt.
>
> The order denying the motion for leave of court to file demurrer to evidence or the demurrer itself shall not be reviewable by appeal or by *certiorari* before judgment."

The rule allows the accused to move for the dismissal of the case against him after the prosecution has presented its evidence on the ground of insufficiency of evidence. It authorizes a judgment on the merits of the case without the accused having to submit evidence on his part[22] as he would ordinarily have to do if it is shown by the prosecution's evidence that the latter is not entitled to the relief sought.

In fine, when the accused files a Demurrer to Evidence, the court's role is to "ascertain whether there is competent or sufficient evidence to sustain the indictment or support a verdict of guilt"[23] against the accused and to dismiss the case if it finds none.

In the instant case, the accused is charged with violation of Section 255 (Failure to Pay Tax) of the NIRC of 1997, as amended, quoted as follows:

> SEC. 255. *Failure to File Return, Supply Correct and Accurate Information, Pay Tax, Withhold and Remit Tax and Refund Excess Taxes Withheld on Compensation.* — Any person required under this Code or by rules and regulations promulgated thereunder to pay any tax, make a return, keep

[22] *Nepomuceno v. Comelec*, G.R. No. L-60601, December 29, 1983.
[23] *Jalandoni v. The Office of the Ombudsman, et al.*, G.R. Nos. 211751, 217212-80, 244467-535 & 245546-614, 10 May 2021.

> any record, or supply correct and accurate information, who willfully fails to pay such tax, make such return, keep such record, or supply such correct and accurate information, or withhold or remit taxes withheld, or refund excess taxes withheld on compensation, at the time or times required by law or rules and regulations shall, in addition to other penalties provided by law, upon conviction thereof, be punished by a fine of not less than Ten thousand pesos (P10,000) and suffer imprisonment of not less than one (1) year but not more than ten (10) years. xxx

To sustain a conviction for failure to pay tax under Section 255 above, the following elements must be established by the prosecution:

1. The accused was **required under the NIRC of 1997 to pay any tax**, make a return, keep any record, or supply correct and accurate information, or withhold or remit taxes withheld, or refund excess taxes withheld on compensation at the time or times required by law or rules and regulations; and

2. The accused **failed to pay the required tax**, make a return or keep the required record, or supply the correct and accurate information; and

3. The accused ***willfully*** **failed to pay such tax**, make such return, keep such record, or supply such correct and accurate information, or withhold or remit taxes withheld or refund excess taxes withheld on compensation at the time or times required by law or rules and regulations.

Section 2, Rule 133 of the Revised Rules of Court provides the degree of proof necessary to convict an accused for the offense charged. We quote:

> **"Rule 133**
>
> Sec. 2. *Proof beyond reasonable doubt.* – In a criminal case, the accused is entitled to an acquittal unless his guilt is shown beyond reasonable doubt. **Proof beyond reasonable doubt does not mean such a degree of proof as, excluding possibility of error, produces absolute certainty.** Moral certainty only is required or that degree of proof which produces conviction in an unprejudiced mind." (*Emphasis supplied)*

It is well-settled that the burden of proof is on the prosecution, and unless it discharges this burden, the accused need not even offer evidence in his behalf and he would be entitled to an acquittal.

After a judicious review of the prosecution's documentary and testimonial evidence, the Court finds the evidence offered by the prosecution to be insufficient to sustain the indictment or support a conviction for failure to pay tax under Section 255 of the NIRC of 1997, as amended.

Section 6 of the NIRC of 1997, as amended, requires the taxpayer to pay the assessed deficiency tax upon notice and demand of the CIR or his duly authorized representative, to wit:

> SEC. 6. *Power of the Commissioner to Make Assessments and Prescribe Additional Requirements for Tax Administration and Enforcement.* —
>
> (A) Examination of Return and Determination of Tax Due. After a return has been filed as required under the provisions of this Code, the **Commissioner or his duly authorized representative may authorize the examination of any taxpayer and the assessment of the correct amount of tax, Provided, however, That failure to file a return shall not prevent the Commissioner from authorizing the examination of any taxpayer**.
>
> **<u>The *tax or* any deficiency tax *so* assessed shall be paid upon notice *and* demand from the Commissioner or from his duly authorized representative</u>**. ... . *[Emphasis and underscoring supplied]*

Accused Lebite was charged with failure to pay the assessed deficiency taxes despite the BIR's notice and demand. Hence, the prosecution must establish, through competent evidence, a valid assessment, notice, and demand from the BIR to pay deficiency taxes.

Section 228 of the NIRC of 1997, as amended, provides for the procedure for the issuance of an assessment and the manner through which it can be protested by the taxpayer, *viz.*:

> SEC. 228. Protesting of Assessment. — **<u>When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings</u>**: ...
>
> ... ...

> **The taxpayers shall be informed in writing of the law and the facts on which the assessment is made; otherwise, the assessment shall be void**.
>
> Within a period to be prescribed by implementing rules and regulations, **the taxpayer shall be required to respond to said notice**.
>
> If the **taxpayer fails to respond, the Commissioner or his duly authorized representative shall issue an assessment based on his findings**.
>
> Such assessment may be **protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations**.
>
> Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, the assessment shall become final.
>
> **If the protest is denied in whole or in part, or is not acted upon within one hundred eighty (180) days from submission of documents, the taxpayer adversely affected by the decision or inaction may appeal to the Court of Tax Appeals within thirty (30) days from receipt of the said decision, or from the lapse of one hundred eighty (180)-day period; otherwise, the decision shall become final, executory and demandable**. *(Emphasis and underscoring supplied)*

Sec. 228 is implemented by Revenue Regulations (**RR**) No. 12-99, as amended by RR No. 18-2013.

To determine whether the requirement for a valid assessment is duly complied with, it is important to ascertain the governing law, i.e., the NIRC, the rules and regulations of the BIR, and the jurisprudence when the assessment was issued.

Here, the LOA was issued on January 12, 2012, the PAN on August 13, 2012, and the FLD/FANs on October 24, 2012; hence, in this case, the provisions of RR No. 12-99, issued on September 14, 1999,[24] and effective until 17 December 2013,[25] apply. RR No. 12-99 provides:

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[24] SUBJECT: Implementing the Provisions of the National Internal Revenue Code of 1997 Governing the Rules on Assessment of National Internal Revenue Taxes, Civil Penalties and Interest and the Extra-Judicial Settlement of a Taxpayer's Criminal Violation of the Code Through Payment of a Suggested Compromise Penalty.

[25] Revenue Regulations No. 18-13, Amending Certain Sections of Revenue Regulations No. 12-99, Relative to the due process requirement in the issuance of a Deficiency Tax Assessment, 28 November 2013.

SECTION 3. Due Process Requirement in the Issuance of a Deficiency Tax Assessment. —

3.1 Mode of procedures in the issuance of a deficiency tax assessment:

3.1.1 Notice for informal conference. — The Revenue Officer who audited the taxpayer's records shall, among others, state in his report whether or not the taxpayer agrees with his findings that the taxpayer is liable for deficiency tax or taxes. If the taxpayer is not amenable, ..., the taxpayer shall be informed, in writing, by the Revenue District Office or by the Special Investigation Division, as the case may be (in the case Revenue Regional Offices) or by the Chief of Division concerned (in the case of the BIR National Office) of the discrepancy or discrepancies in the taxpayer's payment of his internal revenue taxes, for the purpose of "Informal Conference," in order to afford the taxpayer with an opportunity to present his side of the case. If the taxpayer fails to respond within fifteen (15) days from date of receipt of the notice for informal conference, he shall be considered in default, ...

3.1.2 Preliminary Assessment Notice (PAN).— If after review and evaluation by the Assessment Division or by the Commissioner or his duly authorized representative, as the case may be, it is determined that there exists sufficient basis to assess the taxpayer for any deficiency tax or taxes, the said Office shall issue to the taxpayer, at least by registered mail, a Preliminary Assessment Notice (PAN) for the proposed assessment, showing in detail, the facts and the law, rules and regulations, or jurisprudence on which the proposed assessment is based (see illustration in ANNEX A hereof). If the taxpayer fails to respond within fifteen (15) days **<u>from date of receipt of the PAN</u>, he shall be considered in default,** in which case, a formal letter of demand and assessment notice shall be caused to be issued by the said Office, calling for payment of the taxpayer's deficiency tax liability, inclusive of the applicable penalties.

... ...

3.1.4 Formal Letter of Demand and Assessment Notice. — The formal letter of demand and assessment notice shall be issued by the Commissioner or his duly authorized representative. The letter of demand calling for payment of the taxpayer's deficiency tax or taxes shall state the facts, the law, rules and regulations, or jurisprudence on which the assessment is based, otherwise, the formal letter of demand and assessment notice shall be void (see illustration in ANNEX B hereof).**The same shall be sent to the taxpayer only by registered mail or by**

> **personal delivery.** If sent by personal delivery, the taxpayer or his duly authorized representative shall acknowledge receipt thereof in the duplicate copy of the letter of demand, showing the following: (a) His name; (b) signature; (c) designation and authority to act for and in behalf of the taxpayer, if acknowledged received by a person other than the taxpayer himself; and (d) date of receipt thereof.
>
> ... ...
>
> 3.1.7 Constructive Service. — **If the notice to the taxpayer herein required is served by registered mail**, and no response is received from the taxpayer within the prescribed period from date of the posting thereof in the mail, **the same shall be considered actually or constructively received by the taxpayer.** If the same is personally served on the taxpayer or his duly authorized representative who, however, refused to acknowledge receipt thereof, the same shall be constructively served on the taxpayer. Constructive service thereof shall be considered effected by leaving the same in the premises of the taxpayer and this fact of constructive service is attested to, witnessed and signed by at least two (2) revenue officers other than the revenue officer who constructively served the same. The revenue officer who constructively served the same shall make a written report of this matter which shall form part of the docket of this case. *(Emphasis and underscoring supplied)*

Based on the foregoing, the BIR is required to issue the Notice of Informal Conference (**NIC**), the PAN, and the FLD/FAN.

A review of the case records reveals that no NIC was issued to and received by the accused, and the BIR did not hold an informal conference.

Moreover, the prosecution failed to prove receipt of the LOA. This is evident in the testimony of Revenue Officer (RO) Rosario L. Villaflor during the hearing dated March 9, 2023, *viz.:*

> ATTY. COMETA:
> And Ms. Witness, it is not you who served the aforesaid Letter of Authority together with the Checklist of Requirements to the accused taxpayer?
>
> WITNESS:
> I myself served this Letter of Authority.
>
> ... ...

ATTY. COMETA:
And the accused taxpayer himself should be the one to receive the Letter of Authority and the Checklist of Requirements, correct?

WITNESS:
Because that time.... (interrupted)

ATTY. COMETA:
Ms. Witness, it is answerable by yes or no.

WITNESS:
Yes.

ATTY. COMETA:
Ms. Witness, you did not submit as part of your evidence any proof that this was the duly authorized representative of the accused taxpayer, correct?

WITNESS:
Yes.

ATTY. COMETA:
So, Ms. Witness, you merely assumed that this was the accused taxpayer's authorized representative, correct?

WITNESS:
Yes.

... ...

REDIRECT-EXAMINATION
X-------------------X

ATTY. VICENTE:
Ma'am Villaflor, you mentioned that you personally served the letter of authority?

WITNESS:
Yes.

ATTY. VICENTE:
And can you tell the Honorable Court where did you serve the letter of authority as well as the other documents you identified in your Judicial Affidavit?

WITNESS:
First, I attempted to serve the letter of authority on the same address of Cesar Lebite Vacunawa at Room 326 Regina Building, but that room was closed and I went to the admin division of the building, and they informed me that I can deliver the letter to Room 330, whom Marilou is employed.

... ...

ATTY. VICENTE:
Did you inform those present therein that you are serving notices to the taxpayer Cesar Vacunawa Lebite?

WITNESS:
Yes, Attorney.

... ...

ATTY. VICENTE:
Then what was the answer of Ms. Marilou Comon when you represented that you are serving certain notices?

WITNESS:
She said that she personally knows Cesar Lebite, and she was employed with their company that time and she was the one who handled the papers for the accounting record. They're the one who handle the accounting record of Mr. Cesar Lebite.

ATTY. VICENTE:
So during the course of your service of these notices, the personnel, Ms. Marilou Comon, informed you that they are authorized to receive the documents in behalf of Mr. Lebite?

WITNESS:
Yes, Attorney.

... ...

RECROSS-EXAMINATION
X------------------X

ATTY. COMETA:
Ms. Witness, other than the mere representation of Ms. Marilou Comon, what is your proof that they are authorized to receive, or is authorized to receive the letter of authority on behalf of Mr. Cesar Lebite?

WITNESS:
First, I asked the admin. division of Regina Building. I would like to ask for a certification or any proof that Mr. Lebite was not present or any can I just leave or any forwarding address, and the admin division told me that I have to go to Room 330 because Cesar Lebite is connected with the company located .... (interrupted)

ATTY. COMETA:
Sorry to cut you, Ms. Witness, but what is your proof?

WITNESS:
I have no in writing.

An LOA is the authority given to the appropriate revenue officer assigned to perform assessment functions. It empowers or enables said revenue officer to examine the books of account and other accounting records of a taxpayer for the purpose of collecting the correct amount of tax or to recommend the assessment of any deficiency tax due. The issuance of an LOA is premised on the fact that the examination of a taxpayer who has already filed his tax returns is a power that statutorily belongs only to the CIR himself or his duly authorized representative. The issuance of an LOA prior to examination and assessment is a requirement of due process. It is not a mere formality or technicality. Additionally, Revenue Audit Memorandum Order (RAMO) No. 1-2000 requires that an LOA must be served or presented to the taxpayer within thirty (30) days from the date of issuance; otherwise, it becomes null and void unless revalidated.

The records are clear that RO Villaflor, upon the alleged instruction of the building administration, personally served the LOA to another room, i.e., Room 330, within the same building as the registered address of the accused, i.e., Room 326, Regina Building. Without proof that the person who received the LOA in Room 330 is a duly authorized representative of the accused, We rule that the LOA was improperly served.

The improper service of the LOA renders the assessment void and negates the presence of *willfulness* as an element of the crime of failure to pay any tax under Section 255 of the NIRC of 1997, as amended.

Apart from the LOA, the assessment notices, more importantly, the PAN and the FLD/FANs for taxable year 2010, were not duly served and received by the accused. The testimonies of RO Leo S. Castillo and Mr. Benhur C. Nacorda during the hearings on March 9, 2023, and April 12, 2023, respectively, fell short of showing that the assessment notices were actually or constructively served on the accused or his duly authorized representative, as required under Secs. 3.1.2, 3.1.4, and 3.1.7 of RR No. 12-99.

We quote the relevant portion of RO Leo S. Castillo's testimony during the hearing on March 9, 2023, *viz.*:

ATTY. COMETA:
In your answer to Question No. 8, you also mentioned that you were able to ascertain that a formal letter of demand and assessment notices were issued to accused on October 24, 2012, correct?

WITNESS:
Yes, Ma'am.

ATTY. COMETA:
But only the transmittal letter bearing the registered receipt was presented as proof of mailing, correct?

WITNESS:
Yes, Ma'am.

ATTY. COMETA:
Mr. Witness, there was no registry return receipt card nor any certification from the Philippine Post Office proving that the formal letter of demand and assessment notices mailed to the accused taxpayer were in fact received by him, correct?

WITNESS:
Yes, Ma'am.

ATTY. COMETA:
And even after the lapsed of several years, you were not able to secure any proof or evidence categorically showing that the accused taxpayer actually or personally received the letters and notices, correct?

WITNESS:
Yes, Ma'am.[26]

We likewise quote the relevant portion of Mr. Benhur C. Nacorda's testimony during the hearing on April 12, 2023, *viz.:*

ATTY. COMETA:
Mr. Nacorda, you did not personally mail the notices and letters to the accused taxpayer in this case, correct?

MR. NACORDA:
Yes, ma'am.

ATTY. COMETA:
As you mentioned in your answer to Question No. 7, your office caused the mailing of the PAN, as well as the Formal Letter of Demand, correct?

MR. NACORDA:
Yes, ma'am.

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[26] TSN during the hearing on March 9, 2023, pp. 34-35.

ATTY. COMETA:
And you did not know who made the actual mailing to the accused, correct?

MR. NACORDA:
Yes, ma'am.

ATTY. COMETA:
You mentioned in your answer to Question No. 12 that it is the protocol of your office to attach the registry return receipt as proof of mailing, correct?

MR. NACORDA:
Yes, ma'am.

ATTY. COMETA:
Mr. Witness, you did not attach the registry return receipt card or any certification from the Philippine Post Office proving that the PAN, as well as the Formal Letter of Demand mailed to the accused taxpayer, were in fact received by him, correct?

MR. NACORDA:
Yes, ma'am.

ATTY. COMETA:
Even after the lapse of years, you were not able to secure any proof or evidence categorically showing that the accused taxpayer actually or personally received the letters and notices, correct?

MR. NACORDA:
Yes, ma'am.

...

A perusal of the records and the testimonies of the prosecution witnesses shows that plaintiff was able to provide the registry receipt regarding the transmittal of the PAN[27] and FLD/FANs.[28] However, plaintiff failed to prove receipt of the accused of the PAN and FLD/FANs and merely relied on the disputable presumption established under the Rules of Court that "a letter duly directed and mailed" is presumed to have been received by the addressee thereof "in the regular course of the mail."[29] Plaintiff did not even lay the basis for the said presumption to apply in relation to the said assessment notices.

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[27] Exhibit "P-4-a", Docket, p. 45.
[28] Exhibit "P-4-c", Docket, p. 46.
[29] *Commissioner of Internal Revenue v. South Entertainment Gallery, Inc.*, G.R. No. 225809. March 17, 2021.

Notwithstanding the presentation of the registry receipt in relation to the sending of the PAN and FLD/FANs, the Supreme Court explained in *CIR v. South Entertainment Gallery, Inc.*[30] that the presumption that a letter duly directed and mailed was received in the regular course of the mail is merely a disputable presumption which may be controverted. According to the Supreme Court, direct denial *shifts* the burden to the party favored by the presumption to prove that the addressee received the mailed matter.

Considering that plaintiff failed to refute the accused's direct denial as stated in the Pre-trial Order,[31] the Court cannot apply the presumption. To repeat, the accused's direct denial that he received the LOA, the PAN, and FLD/FANs shifts the burden to the prosecution to prove that the accused actually received the same.

Hence, the prosecution did not sufficiently prove the essential element of the accused's ***willful failure to pay tax***.

The term "willful" is defined in the Ninth Edition of Black's Law Dictionary as voluntary and intentional, but not necessarily malicious, *viz.*:

> The word "Wilful" or "Wilfully" when used in the definition of a crime, it has been said time and again, means **only intentionally or purposely as distinguished from accidentally or negligently** and does not require any actual impropriety; while on the other hand it has been stated with equal repetition and insistence that the requirement added by such a word is not satisfied unless **there is a bad purpose or evil intent**. Rollin M. Perkins & Ronald N. Boyce, Criminal Law 875-76 (3d ed. 1982).
>
> Almost all of the cases under [Bankruptcy Code § 523(a)(6)] deal with the definition of the two words "willful" and "malicious." Initially one might think that willful and malicious mean the same thing. If they did, Congress should have used one word and not both. Most courts feel compelled to find some different meaning for each of them. David G.

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[30] G.R. No. 223767, April 24, 2023.
[31] Pre trial Order, Docket, pp.259-260.
A. Stipulation of Facts
... ...

A-2. For the Accused

1. That the Letter of Authority, Checklist of Requirements, Post Reporting Notice dated January 12, 2012, were all received by a certain Marilou Comon;

2. That the Preliminary Assessment Notice, Final Assessment Notice and Letter of Authority **were not received by the taxpayer.** [*Emphasis supplied*]

> Epstein, et al., Bankruptcy § 7-30, at 531 (1993). [*Emphasis supplied*]

Even if the LOA and assessment notices were duly served to and received by the accused, the instant case would still be dismissed because the offense charged had already prescribed.

Even if plaintiff's arguments - that the LOA, the PAN, and FLD/FANs were served to and received by the accused and that it had established the elements of the crime of willful failure to pay tax – were proven, the instant case would still be dismissed on the ground of prescription.

Section 281 of the NIRC of 1997, as amended, provides:

> *SEC. 281. Prescription for Violations of any Provision of this Code.* - **<u>All violations of any provision of this Code shall prescribe after five (5) years</u>**.
>
> Prescription shall begin to run from the day of the commission of the violation of the law, and if the same be not known at the time, **<u>from the discovery thereof and the institution of judicial proceedings for its investigation and punishment.</u>**
>
> The prescription shall be interrupted when proceedings are instituted against the guilty persons and shall begin to run again if the proceedings are dismissed for reasons not constituting jeopardy.
>
> The term of prescription shall not run when the offender is absent from the Philippines. [*Emphases and underscoring supplied.*]

The foregoing provision presents two (2) modes for the commencement of the period of prescription:

1. *First Mode*: From the *day of the commission* of the violation of the law; or

2. *Second Mode*: When the day of the commission is unknown, from the *discovery* of the commission and the institution of judicial proceedings for its investigation and punishment.

In the case of *Emilio E. Lim, Sr. and Antonia Sun Lim v. Court of Appeals* ("*Lim*"),[32] the crime of failure to pay tax is committed only after receipt of the final notice and demand for payment, coupled with the willful refusal to pay the taxes due within the allotted period. The Supreme Court ruled as follows:

> Inasmuch as the final notice and demand for payment of the deficiency taxes was served on petitioners on July 3, 1968, it was only then that the cause of action on the part of the BIR accrued. **This is so because prior to the receipt of the letter-assessment, no violation has yet been committed by the taxpayers. The offense was committed only after receipt was coupled with the willful refusal to pay the taxes due within the allotted period**. The two criminal informations, having been filed on June 23, 1970, are well-within the five-year prescriptive period and are not time-barred. [*Emphasis and underscoring supplied.*]

The BIR circularized the pronouncement in *Lim* through the issuance of Revenue Memorandum Circular (**RMC**) No. 101-90,[33] which states:

> For the information and guidance of all concerned, the following are the salient features of the decision promulgated by the Supreme Court on October 19, 1990, in the case entitled "*Emilio E. Lim, Sr. et al. v. Court of Appeals, et al.*," G.R. Nos. L-48134-37.
>
> 1. *When cause of action for willful failure to pay deficiency tax occurs.*
>
>   The cause of action for willful failure to pay deficiency tax occurs when the final notice and demand for the payment thereof is served on the taxpayer. Prior thereto, no violation is committed. The offense is ***committed*** only after receipt is coupled with refusal to pay the tax within the allotted period.
>
> 2. *Prescription under Section 280 of the Tax Code.*
>
>   (a) **The 5-year prescriptive period in** an offense or **willful failure to pay a deficiency tax assessment commences to *run* only after the receipt of the final notice and demand by the taxpayer, and he refuses to pay.** [*Emphasis supplied*]

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[32] G.R. Nos. 48134-37, October 18, 1990, 268 PHIL 680-692.

[33] SUBJECT: *Determination of When Cause of Action for Willful Failure to Pay Deficiency Tax Occurs; and Prescription under Section 280 of the Tax Code.*

This interpretation was further applied by the Supreme Court in *Petronila C. Tupaz v. Honorable Benedicto B. Ulep, Presiding Judge of RTC Quezon City, Branch 105, and People of the Philippines,*[34] where it was ruled that the crime of willful failure to pay tax, "by its nature[,] the violation could only be committed after service of notice and demand for payment of the deficiency taxes upon the taxpayer."

In a *Resolution* dated March 3, 2023, in CTA Crim Case No. O-966,[35] citing *Lim*, the Court declared the indispensability of actual receipt of final notice and demand, to wit:

> ... absent any proof that the final notice and demand for payment was received by the taxpayer, it cannot be said that the offense has been committed because prior to the receipt of the letter-assessment, no violation has yet been committed.

Upon perusal of the records, nothing in the Assessment Notices indicates when the accused received the notices. Thus, pursuant to *Lim*, the accused could not be charged with the willful failure to pay tax, absent a showing that the accused received the notice.

Be that as it may, even assuming that the date of issuance is likewise the date of service, under Section 228 of the NIRC of 1997, as amended, the FLD/FANs would have attained finality *upon the lapse* of thirty (30) days from receipt of said notices.[36]

In the *Joint Complaint-Affidavit*,[37] it was alleged that the FLD/FANs were served to the accused via registered mail on October 24, 2012.

Under prevailing regulations, service of the FAN may be made through registered mail, and there is created a disputable presumption that such assessment notice was received by the addressee in the regular course of the mail.[38]

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[34] G.R. No. 127777, October 1, 1999.
[35] *People of the Philippines v. Cliref Enterprises, Inc., Alfredo V. Pagarigan and Luz N. Pagarigan (Km. 326 Willarey Avenue, Urbano Velasco Extension, Pinagbuhatan, Pasig City).*
[36] SEC. 228. Protesting of Assessment. - When the Commissioner or his duly authorized representative finds that proper taxes should be assessed, he shall first notify the taxpayer of his findings: Provided, however, That a pre-assessment notice shall not be required in the following cases:
... ...
Such assessment may be protested administratively by filing a request for reconsideration or reinvestigation within thirty (30) days from receipt of the assessment in such form and manner as may be prescribed by implementing rules and regulations. Within sixty (60) days from filing of the protest, all relevant supporting documents shall have been submitted; otherwise, **the assessment shall become final**.
[37] Exhibit "P-3", Docket, p. 18.
[38] *Commissioner of Internal Revenue v. T Shuttle Services, Inc.*, G.R. No. 240729, August 24, 2020.

The estimated turnaround time for such registered mail to be delivered is seven (7) working days.[39] Even if the Court assumes that the accused received the FAN thirty (30) days from its mailing, or on November 23, 2012, and no protest was filed within thirty (30) days from such date, the assessment would have become final on **December 24, 2012**.

In counting the prescriptive period provided under Section 281 of the NIRC of 1997, as amended, *Lim,* as quoted above, is instructive that it is the filing of the criminal informations which must fall within the five-year prescriptive period.

The Supreme Court enunciated in *Lim* that tax criminal cases are basically imprescriptible. However, violations shall nevertheless prescribe if more than five (5) years have lapsed from the time of commission of the offense, if known, and as applicable in this case, *i.e.*, the date of finality of the FLD/FAN, up to the date of filing of the *Information* before the Court.

Thus, pursuant to *Lim* case and RMC No. 101-90, plaintiff had five (5) years counted from December 24, 2012, or until **December 24, 2017**, to file the *Information* in Court. The *Information* dated June 23, 2017 was filed with this Court only on **May 16, 2022**. Following plaintiff's own allegation that the FLD/FANs were received, the filing of the *Information* would have already been time-barred for more than four (4) years.

It must be stressed that prescription in criminal cases is a matter of substantive law.[40] Although prescription has not been raised as an issue, it is well-settled that if the pleadings or the evidence on record show that the claim is barred by prescription, the Court may *motu proprio* order its dismissal on said ground.[41]

WHEREFORE, premises considered, accused's *Demurrer to Evidence (with prior leave of Court)* is **GRANTED**.

Accordingly, CTA Crim Case No. O-913 is **DISMISSED,** and the accused **CESAR VACUNAWA LEBITE** is **ACQUITTED** on the grounds of insufficiency of evidence and prescription of the offense charged.

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[39] Philippine Postal Corporation. *Post Office Delivery Lead Time.* available at https://phlpost.gov.ph/postal-office-delivery-lead-time/.
[40] *Reodica v. Court of Appeals*, G.R. No. 125066, July 8, 1998, 354 PHIL 90-111.
[41] *Commissioner of Internal Revenue v. Nippon Express (Phils.) Corp.*, G.R. No. 212920, September 16, 2015, 769 PHIL 861-871

x---x

SO ORDERED.

ROMAN G. DEL ROSARIO
Associate Justice

ON LEAVE
JEAN MARIE A. BACORRO-VILLENA
Associate Justice

LANEE S. CUI-DAVID
Associate Justice